

RATTLING THE CAGE DEFENDED

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Abstract: In *Rattling the Cage: Toward Legal Rights for Animals*, the author advocated basic legal rights—specifically common law rights—for chimpanzees, bonobos, and other nonhuman animals. In this Article, the author responds to many of the major criticisms of *Rattling the Cage*. The author confronts critics of his historical arguments for legal rights for nonhuman animals, tracing those arguments through ancient philosophy and nineteenth century English statutes. The author also expands upon his legal arguments for animal rights, reexamining various theories of rights and justifications for treating animals as property. Finally, borrowing from his upcoming book *Drawing the Line: Science and The Case for Animal Rights*, the author defends his advocacy of legal rights for nonhuman animals based on the relative autonomy nonhuman animals possess.

INTRODUCTION

"The 'animal rights' movement is gathering steam and Steven Wise is one of the pistons."¹ Thus Judge Richard Posner began a *Yale Law Journal* review of my book, *Rattling the Cage: Toward Legal Rights for Animals*, published in 2000.² The animal rights movement—in its technical sense—is gathering steam. In the mid-1980s Pace University School of Law invited attorney Jolene Marion to teach the first animal law class offered at any American law school. In 1990, I began teaching "Animal Rights Law" at Vermont Law School. By 2002, nearly twenty-five American law schools had offered, were offering, or were about to offer a course or seminar in animal rights law, including those at Harvard, Yale, Georgetown, UCLA, Boston College, Duke,

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¹ Richard A. Posner, *Animal Rights*, 110 *YALE L.J.* 527, 527 (2000) (book review).

² *Id.* See generally STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000).

Hastings, Northwestern, and the University of Michigan. In Europe, animal law courses are being, or have been, taught at the University of Aberdeen, University of East Anglia, John Moore's University in Liverpool, Westminster University, the University of Utrecht, and the University of Vienna. In 2001, American television personality and animal rights activist, Bob Barker, established the Bob Barker Endowment Fund for the Study of Animal Rights at Harvard Law School. In 1995, the first legal journal devoted to animal law appeared. *Animal Law* is published by the students of the Northwestern School of Law of Lewis and Clark College in Oregon—the law school that published the first environmental law journal more than a quarter century ago. In 2002, a second journal, the *Journal of Animal Law and Policy*, is scheduled to be published jointly by students from Harvard, Yale, Boston College and New York University Law Schools.

If I am a piston, it is because *Rattling the Cage* is the first book to advocate basic legal—as opposed to moral—specifically common law rights for chimpanzees and bonobos, or for that matter, any nonhuman animal.³ It attracted attention from judges, lawyers, scientists, and environmentalists around the world. The critiques were not uniform. In the *Harvard Law Review*, philosopher Martha Nussbaum concluded the book “makes an important contribution to progress on one of the most urgent moral issues of our time.”⁴ Pharmacology and neuroscience professor Robert Speth declared, “No matter how many imaginary scenarios he devises, no matter how defamatory his characterization of biomedical research, no matter how provocative his analogies, no matter how intensely he attacks religion, he cannot reverse the simple, fundamental fact that apes are not humans.”⁵ In this Article I respond to the most important criticisms.

I. CRITICISMS OF MY HISTORY

Judge Posner found history “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.”⁶ For reasons set forth by Justice Holmes, I disagree:

³ I did not argue, as some critics imply, that any nonhuman animal is entitled to constitutional rights. See, e.g., Posner, *supra* note 1, at 531, 538–39.

⁴ Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 HARV. L. REV. 1506, 1548–49 (2001) (book review).

⁵ Robert C. Speth, *Review of Rattling the Cage: Toward Legal Rights for Animals*, in J. SOC’Y FOR VETERINARY MED. ETHICS, May 2000, at 6, 7.

⁶ Posner, *supra* note 1, at 529.

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those rules. . . . It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁷

The thrust of *Rattling the Cage's* intellectual and legal history is that the rule that every nonhuman animal is a legal thing is an anachronism. Its roots burrow deeply into Roman law and the ancient philosophies and religions from which that law sprung. That is why it is important to reply to Professor Nussbaum's criticisms of my history as "incomplete," "unilinear," and "failing to describe the complexity of ancient philosophical thinking," including the thinking of Pythagoreans and Neoplatonists.⁸ "[O]n Wise's account," Professor Nussbaum writes,

there is absolutely nothing in our ancient Greek and Roman heritage that might have informed ethical thought in a positive direction with regard to thought about animals. All ancient philosophers, and presumably the lay people influenced by them, were morally obtuse on this matter. Progress had to await our more enlightened era.⁹

According to Professor Nussbaum, the picture I paint of history is that

[w]e were all obtuse under the influence of bad Aristotle and the Stoics, and then, after a long time, things got much better under the influence of Charles Darwin. Now we are all Darwinians, ready to understand our commonality with animals when it is clearly shown to us by evidence. The most difficult question is how law, that very conservative and

⁷ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

⁸ Martha C. Nussbaum, *supra* note 4, at 1513-14, 1522, 1526.

⁹ *Id.* at 1514.

precedent-driven discipline, can be made to listen to the new knowledge we have acquired.¹⁰

But an *American Bar Association Journal* review noted that *Rattling the Cage* was

ambitious in its effort to summarize entire fields of human knowledge. They include: a historical view of man's concept of his position in the natural order, the worldwide legal history of animals dating from pre-biblical times, the genesis of civil liberties, and the evolution of common law. Wise also includes the modern legal history of . . . the slave, the definition of consciousness, the genetic composition of humans and chimpanzees, and the intricacies of primate behavior.¹¹

The key word in that review is "summarize." *Rattling the Cage*, limited to about 250 pages, could not provide a thick, rich, unbroken history of how the West has viewed nonhuman animals from ancient times. That would have taken an entire book, or three. Richard Sorabji, a professor of ancient philosophy, upon whom I relied, took nearly an entire book just to illuminate the competing Greek philosophical theories about nonhuman animal minds and how this affected their moral status in ancient times.¹²

Rattling the Cage was intended to accomplish something else: follow the main intellectual thread that leads from today's legal thinghood of nonhuman animals through the maze of legal history to its origins in Greek and Roman philosophy and in Hebrew and Roman law. The stories are complex, with casts of hundreds, and sweep across four thousand years. I could devote only about forty pages to it. In the story of Theseus and the minotaur, the hero makes his way through Daedalus' maze, from which no one ever escaped, seeking the monster to slay, while playing out the thread necessary to find his way out. If Theseus had been asked how he did it, his questioners would have been most interested in knowing where the thread led and not every blind alley he encountered. Similarly, *Rattling the Cage* tells the reader

¹⁰ *Id.* at 1526.

¹¹ Lisa Stansky, *Personhood for Bonzo? Animal Rights Lawyer Argues for Protections for Higher Primates*, A.B.A.J., Mar. 2000, at 94.

¹² See generally RICHARD SORABJI, *ANIMAL MINDS AND HUMAN MORALS* (1993); WISE, *supra* note 2, at 272-75.

where the thread of the legal thinghood of nonhuman animals began and has led.¹³

Professor Sorabji notes that "the Stoic view of animals, with its stress on their irrationality, became embedded in Western, Latin-speaking Christianity above all through Augustine. Western Christianity concentrated on one-half, the anti-animal half, of the much more evenly balanced ancient debate."¹⁴ Professor Nussbaum concedes that much of ancient philosophical thinking about nonhuman animals was based upon the belief that souls migrated between human and nonhuman animals, but this idea "had little impact on the thinking of philosophers" and no impact on modern law.¹⁵ A respected Aristotelian scholar, she is exercised by my allegedly crediting Aristotle "with all the evils of two thousand years of moral obtuseness."¹⁶ She finds, for example, "no evidence that he believed in a universal teleology of nature, such as the 'Great Chain of Being.'"¹⁷ I respectfully disagree.

The Great Chain of Being was, in the words of its foremost scholar, Professor Arthur O. Lovejoy, the "conception of the plan and structure of the world which, through the Middle Ages and down to the late eighteenth century, many philosophers, most men of science, and, indeed, most educated men, were to accept without question."¹⁸ It was "one of the half-dozen most potent and persistent presuppositions in Western thought. It was, in fact, until not much more than a century ago, probably the most widely familiar conception of the general *scheme* of things, of the constitutive pattern of the universe."¹⁹ Professor Lovejoy said it was Aristotle "who chiefly suggested to naturalists and philosophers of later times the idea of arranging (at least) all animals in a single graded *scala naturae* according to their degree of 'perfection.'"²⁰

Those who fought for the first anti-cruelty statutes in England in the early nineteenth century accepted the Great Chain of Being. To

¹³ Even Professor Nussbaum understands how limitations of space can force an author to condense and omit. See Nussbaum, *supra* note 4, at 1523 n.80 (Bentham "was, however, preceded by Montaigne and Mandeville, whose contributions I have simply omitted here; less systematic than Bentham's, they were, nonetheless important."). *Id.* at 1526 ("a real look at history (toward which I have made only a few gestures)").

¹⁴ SORABJI, *supra* note 12, at 2.

¹⁵ Nussbaum, *supra* note 4, at 1526-27.

¹⁶ *Id.* at 1516.

¹⁷ *Id.* at 1517.

¹⁸ ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING* 59 (1960).

¹⁹ *Id.*

²⁰ *Id.* at 58.

what else was Chief Justice Taney referring in the infamous *Dred Scott* case when he wrote that, at the time of the ratification of the United States Constitution, blacks were seen as "beings of an inferior order" and "so far inferior [to whites], that they had no rights which the white man was bound to respect."²¹

What Nussbaum calls "universal teleology," others, such as the evolutionary biologist, Ernst Mayr, call "cosmic teleology"; both convey the idea that everything in nature has a purpose. Six years ago I wrote:

Some modern students of Aristotle claim that he has long been mischaracterized as a universal or cosmic teleologist. . . . Even those who contend that Aristotle has been traditionally, but badly, misunderstood as a cosmic teleologist . . . concede that, if the traditionalists were led astray, it was Aristotle's hand that pointed the wrong way. These untraditional interpretations do not detract from the truth that, misunderstood or no, Aristotle was, until recently, nearly uniformly understood to be a cosmic teleologist and that it was these traditional understandings that affected the formation of the law of nonhuman animals.²²

Not every Greek thought alike, but they did think in ways that failed to respect nonhuman animals, or so we believe.

Professor Nussbaum concedes that Aristotle, in his *Politics* (as I reported), said that all nonhuman animals were created for the sake of humans, but insists this is "counterbalanced by hundreds of statements in his biological writings suggesting that each animal's goal is its own life and flourishing."²³ I do not know whether Aristotle was actually a cosmic or universal teleologist, or a builder of the Great Chain of Being, or an advocate of the natural inferiority of nonhuman animals (and women and slaves, as he says in his *Politics*). But until recently, few doubted he was all these things and it was these ideas, combined with the allied ideas of Stoics and the Old Testament, and not the ideas of the Pythagoreans or the Neoplatonists or other

²¹ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856).

²² Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 22 n.33 (1995) (citing D.M. BALME, ARISTOTLE'S DE PARTIBUS ANIMALIUM I AND DE GENERATIONE ANIMALIUM I 93-98 (1972); ERNST MAYR, TOWARD A NEW PHILOSOPHY OF BIOLOGY 60-61 (1988); MARTHA C. NUSSBAUM, ARISTOTLE'S DE MOTU ANIMALIUM 60 (1978)).

²³ Nussbaum, *supra* note 4, at 1517, 1519.

comparatively dead-end philosophers, that were incorporated into early Christian thinking about nonhuman animals, aggressively advocated by St. Augustine, absorbed wholesale into Roman law, most notably Gaius' *Institutes*, Justinian's *Institutes*, Justinian's *Digest*, and finally pressed into the common law.²⁴

The classics scholar, Peter Birks, wrote:

Honoré has shown that Gaius brought to his law a mind formed by Aristotelian thought and methods. Aristotle, discussing the acquisition of property, also creates a hierarchy of natural provision which, not very differently from Genesis, comes to an apex in man. Furthermore, his discussion includes one sentence which is almost exactly Gaius' assertion that, . . . "[i]f then nature makes nothing without a purpose, nothing with no end to serve, it follows by necessity that nature has made all things for man."²⁵

If Gaius attended an appellate argument in an animal law case today, he would have no trouble following it, for the Anglo-American common law of nonhuman animals remains essentially Roman.²⁶ Professor Nussbaum's argument catches the same snag as do the arguments of those who argue that Abraham Lincoln or Thomas Jefferson favored slavery. Statements may exist from which one might infer that truth; nonetheless the Emancipation Proclamation, the Thirteenth Amendment to the United States Constitution, and the Declaration of Independence remain.

Professor Nussbaum agrees I was "basically right about the Stoics. . . . As Wise says . . . the Stoics did deny reason to animals, and thence all serious ethical concern."²⁷ But she complains I ignored Descartes, especially "his notorious remarks about animals as mere

²⁴ As to Aristotle, see JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE—ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS 13–14 (1974); HOLMES ROLSTON, III, ENVIRONMENTAL ETHICS—DUTIES TO AND VALUES IN THE NATURAL WORLD 45 (1988); WISE, *supra* note 2, at 17–34; WISE, *supra* note 22, at 21–34. For the process that led to Aristotelean and Stoic ideas to be taken into first Roman, then the common law, see Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFF. L. REV. 471, 497–505, 516–21, 525–38 (1996); see also G. INST. 1.53.

²⁵ Peter Birks, *An Unacceptable Face of Human Property*, in NEW PERSPECTIVES IN THE ROMAN LAW OF PROPERTY 61, 65 (Peter Birks ed., 1989) (translated by editor from Greek) (quoting ARISTOTLE, POLITICS 1256b20); see also A.M. HONORÉ, GAIUS 96–116 (1962).

²⁶ Wise, *supra* note 24, at 537–38.

²⁷ Nussbaum, *supra* note 4, at 1519. Nussbaum also writes, "Wise does not acknowledge that the Stoics are the great moral egalitarians of the ancient world . . ." *Id.* at 1520. But I did. See Wise, *supra* note 2, at 14, 33.

automata."²⁸ I ignored Descartes' remark because, by the time he made it, the legal thinghood of nonhuman animals had been fixed for centuries. Descartes did not significantly affect the law of nonhuman animals.

Nussbaum also criticizes my alleged leap from Descartes to Darwin, "as if it took the discovery of evolutionary theory to get our moral consciousness going and to prompt legal change."²⁹ This depends upon what sort of legal change we are discussing. Nussbaum writes that "[b]y the time Darwin published *The Origin of Species*, an animal rights movement, in both ethics and law, was in full swing in Europe," and that "[s]ignificant animal rights legislation was passed (in the UK) in 1822."³⁰ Here, she confuses animal rights with animal welfare and animal cruelty legislation.

There was no "animal rights movement" in law in the eighteenth, nineteenth, and even most of the twentieth centuries. There is a nascent one today, but nonhuman animals lack legal rights today just as they did when Lord Erskine, former Lord Chancellor of England, spoke on the floor of the House of Lords in 1809: "Animals are considered as property only: to destroy or to abuse them, from malice to the proprietor, or with an intention injurious to his interest in them, is criminal; but the animals themselves are without protection; the law regards them not substantively; they have no rights."³¹ Under the influence of the Great Chain of Being, Lord Erskine did not seek legal rights for nonhuman animals.³² Instead, he wanted to make it a misdemeanor to wound maliciously or, with wanton cruelty, to beat or otherwise abuse "every animal which comes in contact with man, and whose powers, and qualities, and instincts, are obviously constructed for his use. . . ."³³ These animals were, he declared, "created . . . for our use, but not for our abuse."³⁴ With the statute's enactment he intended to "consecrate, perhaps, in all nations, and in all ages, that just and eternal principle which binds the whole world in one harmonious chain, under the dominion of enlightened man, the lord and governor of all."³⁵

²⁸ Nussbaum, *supra* note 4, at 1522.

²⁹ *Id.*

³⁰ *Id.* at 1523.

³¹ 14 PARL. DEB., (1st ser.) (1809) 554.

³² *See id.* at 556-58.

³³ *Id.* at 555; *see also id.* at 557.

³⁴ *Id.* at 555.

³⁵ *Id.* at 557.

The UK legislation of 1822, formally entitled "An Act to prevent the cruel and improper Treatment of Cattle," known as "Martin's Act," gave no rights to nonhuman animals.³⁶ It merely extended some small protection under the criminal law to a handful of domesticated nonhuman animals—cattle, oxen, horses, and sheep—punishable, at worst, by fine.³⁷ Martin's Act was an anti-cruelty statute, not a rights statute, nor even a welfare statute.³⁸ Professor Mike Radford notes,

To cause an animal to suffer unnecessarily, or to subject it to any other treatment which amounts to an offence of cruelty, is self-evidently detrimental to its welfare. To that extent, there is a degree of affinity between cruelty and welfare, but the two are far from being synonymous: prejudicing an animal's welfare does not of itself amount in law to cruelty.³⁹

Speaking of Martin's Act and the entire body of legislation in the area of nonhuman animal welfare over the next century, Professor Radford explains that "while this legislation imposed restrictions on how animals could be treated, none of it—nor, indeed, any enacted subsequently—changed the traditional legal status accorded to animals by the courts."⁴⁰ As Lord Erskine noted, that status was property.⁴¹

II. CRITICISMS OF MY LEGAL ARGUMENTS

A. *Knowledge of the Complex Cognitive Abilities of Nonhuman Animals Is Not New*

In *Rattling the Cage*, I argued the ancient Greeks who most influenced the development of modern nonhuman animal law were Aristotle and the Stoics.⁴² They came close to believing that not even the most cognitively sophisticated nonhuman animals could reason, think, or believe.⁴³ Indeed, the Stoics denied them the abilities to perceive, conceive, remember, and experience, or know anything of the

³⁶ MIKE RADFORD, *ANIMAL WELFARE LAW IN BRITAIN—REGULATION AND RESPONSIBILITY* 39 (2001).

³⁷ *Id.* at 33–40.

³⁸ *See id.* at 39.

³⁹ *Id.* at 261.

⁴⁰ *Id.* at 99.

⁴¹ RADFORD, *supra* note 36, at 101–02.

⁴² *See WISE, supra* note 2, at 14–17.

⁴³ *Id.* at 15.

past or future.⁴⁴ I spent three chapters demonstrating how modern science has illuminated the extraordinarily complex minds of chimpanzees and bonobos.⁴⁵

Attacks on this description of chimpanzee and bonobo cognition descended from opposite sides: some critics contended that chimpanzees and bonobos lack complex cognition, while others complained that we have known that nonhuman animals are cognitively complex for a very long time. In *Commentary*, journalist Damon Linker wrote:

I will leave it to others to judge the significance of the fact that a handful of bonobos, after years of intense training by scientists, have apparently managed to "understand" "thousands" of words; to assess whether the "theory of mind" supposedly possessed by chimpanzees really deserves to be described in the same terms we use to talk about the philosophical writings of Descartes and Hegel; and to evaluate the appropriateness of attributing "self-awareness," "consciousness," and a "sense of self" to creatures who, lacking language, are utterly incapable of conceiving of such abstractions.⁴⁶

I wrote "[t]he last redoubt in the fight against animal consciousness is th[e] syllogism: Language is necessary for consciousness; only humans have language; therefore only humans are conscious."⁴⁷ But language is obviously unnecessary for consciousness, even for much higher-level cognition, as anyone with a two-year-old can attest, and chimpanzees and bonobos, who demonstrate complex mental abilities, can learn a human proto-language, complete with simple syntax without intensive training.⁴⁸

Neurologist Antonio Damasio has written that, when young, he was frequently told language produced consciousness.⁴⁹ "The answer sounded too easy, far too simple for something which I then imagined unconquerably complex, and also quite implausible, given what I saw

⁴⁴ *Id.* at 14–16.

⁴⁵ See generally *id.* at 119–237.

⁴⁶ Damon Linker, *Reply to Letters from Readers*, quoted in *COMMENT.*, Jul.–Aug. 2001, at 8.

⁴⁷ Wise, *supra* note 2, at 158.

⁴⁸ See *id.* at 158–62, 194–237. In my upcoming book, I show that gorillas, orangutans, Atlantic bottle-nosed dolphins, and African grey parrots have also learned a human proto-language, complete with a proto-syntax. STEVEN WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* (forthcoming 2002) (manuscript at 87–108, 135–50, 199–202, 207–20, on file with author).

⁴⁹ ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS* 107 (1999).

when I went to the zoo. I never believed it and I am glad I did not."⁵⁰ In his extensive work with the neurologically impaired, Damasio has discerned no link between language and at least simpler forms of consciousness.⁵¹

The editors of *Nature Neuroscience*, who oppose legal rights for chimpanzees and bonobos, agree "it is clear that their cognitive capacities exceed those of many humans."⁵² Michael Hutchins, Director of Conservation and Science of the American Zoo and Aquarium Association, and no supporter of ape rights, concedes "some nonhuman animals think and have emotions."⁵³ Judge Posner wrote "obviously animals are conscious in the sense that distinguishes being conscious from being unconscious."⁵⁴ Professor Nussbaum is convinced that chimpanzees and bonobos "have a wide range of cognitive and emotional capacities, roughly at the level of a three-year-old child."⁵⁵

Linker ignores how Professor Sue Savage-Rumbaugh educates the bonobos with whom she works at Georgia State University. She assembles a learning environment in which the bonobos learn as naturally, and in much the same way, as does a human child.⁵⁶ More seriously, Linker confuses consciousness, self-awareness, and the sense of self, all of which chimpanzees have, with an ability to conceive what those things mean. Because I cannot explain what James Joyce was saying in *Finnegan's Wake* does not mean I cannot read what he wrote.⁵⁷

Professor Richard Epstein challenges my claim from the opposite direction, writing that ancient law did not ignore the obvious point that animals are capable of having mental states.⁵⁸ One rule provided that "an animal that left its owner's home with an intention to return [the so-called *animus revertendi*] could not be taken by another, while the animal that had regained its freedom in the wild could be so cap-

⁵⁰ *Id.*

⁵¹ See *id.* at 108–12.

⁵² Editorial, *Legal Challenges to Animal Experimentation*, 3 NATURE NEUROSCIENCE 523, 523 (2000).

⁵³ Michael Hutchins, *Book Review*, 61(4) ANIMAL BEHAV. 855, 856 (2001) (reviewing STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000)).

⁵⁴ Posner, *supra* note 1, at 529. He erred however in thinking that when I refer to consciousness, I mean self-consciousness. See *id.*; WISE, *supra* note 2, at 128–29.

⁵⁵ Nussbaum, *supra* note 4, at 1533.

⁵⁶ WISE, *supra* note 2, at 222–24.

⁵⁷ See generally *id.* at 119–236.

⁵⁸ Richard A. Epstein, *The Dangerous Claims of the Animal Rights Movement*, in 10(2) THE RESPONSIVE COMMUNITY 28, 30 (2000).

tured."⁵⁹ Another rule "understood that animals can be provoked or teased, that they are capable of committing deliberate or inadvertent acts."⁶⁰ This rule would reduce the liability of an owner for an animal that attacked when provoked.⁶¹

But what mental complexity did *animae revertendi* actually require? The rule speaks primarily in terms of "instinct" and "habit."⁶² Gaius' *Institutes*, the main classical text on the occupancy of wild non-human animals, referred to wild nonhuman animals "habituated to go away and return . . . only the cessation of the instinct of returning is the termination of ownership . . . the instinct of returning is held to be lost when the habit of returning is discontinued."⁶³ With respect to *animae revertendi*, Justinian's *Institutes* reads, "they are considered yours as long as they have the intention of returning, but if they cease to have this intention, they cease to be yours. . . . These animals are supposed to have lost the intention, when they have lost the habit of returning."⁶⁴

Instinctive behavior is generally performed "without conscious design or intentional adaptation of means to ends," while "habit" is "a settled disposition or tendency to act in a certain way, esp[ecially] one acquired by frequent repetition of the same act until it becomes almost or quite involuntary."⁶⁵ Because habitual conduct tends to be "semiautomatic," it may sometimes be probative of human conduct.⁶⁶ The habits of nonhuman animals are more generally admissible, pre-

⁵⁹ *Id.*

⁶⁰ *Id.* at 32.

⁶¹ See *id.* Epstein may similarly overstate what mental complexities are generally accepted within the scientific community even today: nonhuman animals, he writes,

have extensive powers of anticipation and rationalization; they can form and break alliances; they can show anger, annoyance, and remorse . . . they can engage in acts of rape and acts of love; they respect and violate territories. Indeed, in many ways their repertoire of emotions is quite broad, rivaling that of human beings

Id. at 32.

⁶² See, e.g., G. INST. 2.68; J. INST. 2.1.15 (Peter Birks & Grant McLeod trans.).

⁶³ G. INST. *supra* note 62, at 2.68.

⁶⁴ J. INST., *supra* note 62, at 2.1.15.

⁶⁵ 7 OXFORD ENGLISH DICTIONARY 1044 (2d ed. 1989); 6 *id.* at 993.

⁶⁶ PAUL J. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE, § 4.4.9, at 170 (6th ed. 1994). McCormick, however, criticizes characterizing the difference between habit and character as "between Pavlov and Freud," overstates the point, admonishing that "[t]he doing of the habitual act may become semiautomatic." 1 MCCORMICK ON EVIDENCE, § 195, at 825-26, 825 n.4 (John William Strong ed., 4th ed. 1992), (quoting 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, § 5233 (1978)).

sumably because nonhuman animals are believed to act more automatically.⁶⁷

If an owner were entitled to reduction of liability for damage caused by a provoked nonhuman animal, Roman law was clear that the animal could never be guilty of any legal wrongdoing, for Romans believed that every nonhuman animal lacked reason or sense.⁶⁸ At best, provocation derived from emotion, not intellect. Ulpian, for example, is quoted in Justinian's *Digest* discussing an action that lies when "a quadruped does harm because its wildness is stirred."⁶⁹ It was accepted that nonhuman animals could act emotionally, they could be provoked or act aggressively or ferociously. But this does not necessarily imply they possessed other mental states, and certainly not reason.

*B. Neither Nonhuman Animals Nor Human Slaves Were
Simply Treated as Property*

Professor Epstein also takes me to task for claiming that historically nonhuman animals

were treated as property, as mere things. But that assertion massively oversimplifies a difficult area of law, and is no more accurate than the common proposition that slaves were treated as things. . . . [F]rom the earliest times slaves were governed by a set of rules that treated them as legal hybrids, part property and part human beings,⁷⁰

while animals, for their part, were treated both as living organisms and private property.

Professor Epstein is correct that the assertion that nonhuman animals were treated as property is no more accurate than the common proposition that slaves were treated as things. Nonhuman animals were treated as property. Slaves were treated as things. It is no more contradictory to be considered part property and part human being than it is to be considered both part Italian and part human being. As the institution of slavery evinces, one can be both human and property. Similarly, it is no contradiction for a nonhuman animal

⁶⁷ LIACOS, *supra* note 66, § 4.4.9, at 174.

⁶⁸ DIG. 9.1.1.3 (Ulpian, Ad Edictum 18) (Alan Watson trans.).

⁶⁹ *Id.* at 1.1.4; see also *id.* at 9.1.1.8, 11; J. INST., *supra* note 62, at 4.9 (nonhuman animals are devoid of reason and "cannot be said to have a wrong intent"; irrational animals can harm "through wantonness, rage, or ferocity").

⁷⁰ Epstein, *supra* note 58, at 30.

to be considered a living organism and private property. One can be both a living organism and private property.

"Things either fall within the sphere of private ownership or they do not."⁷¹ In civil law, nonhuman animals have generally been treated as things, with enormous consequences. I began *Rattling the Cage* by recalling the brutish life and lingering death of Jerom, a chimpanzee whom biomedical researchers imprisoned for life inside a small, dim, often chilly cell that lay within a large windowless grey concrete box at the Yerkes Regional Primate Research Center in Atlanta, Georgia.⁷² As a toddler he was repeatedly infected with various strains of HIV.⁷³ After a hellish decade, he died.⁷⁴ In a February, 2000 speech in Boston's Faneuil Hall, professor Laurence Tribe said, "Clearly, Jerom was enslaved."⁷⁵

Enslaved beings of every species are generally treated as legal things. The first definition of "slave" in the *Oxford English Dictionary* is "[o]ne who is the property of, and entirely subject to, another person, whether by capture, purchase, or birth; a servant completely divested of freedom and personal rights."⁷⁶ International law has, for most of a century, defined slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."⁷⁷ According to Professor Robert Shaw, "[u]nder Roman law, slaves were treated clearly as things, possessing no rights whatsoever."⁷⁸ Wrote Professor Thomas Collett Sanders, "a slave had no rights."⁷⁹ "[E]ven before the XVIIIth Dynasty in Egypt," Professor David Brion Davis wrote, "the slave was legally defined as a thing; and the same conception prevailed in Babylonia, Assyria, Greece, Rome, India, China, and parts of medieval Europe."⁸⁰

⁷¹ Birks, *supra* note 25, at 61.

⁷² Wise, *supra* note 2, at 1-2.

⁷³ *Id.* at 1.

⁷⁴ *Id.* at 2.

⁷⁵ Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 4 (2001).

⁷⁶ 15 OXFORD ENGLISH DICTIONARY, *supra* note 65, at 665.

⁷⁷ Slavery Convention, 60 L.N.T.S. 253, Article 1 (1926).

⁷⁸ ROBERT B. SHAW, A LEGAL HISTORY OF SLAVERY IN THE UNITED STATES 158 (1991).

⁷⁹ Thomas C. Sanders, *Introduction to THE INSTITUTES OF JUSTINIAN* 27 (Bernard D. Reams ed., Thomas C. Sanders trans., William S. Hein & Co. 1984) (1876).

⁸⁰ DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 32 (1966); see *Jarman v. Patterson*, 23 Ky. 644, 644 (1828), available at 1828 WL 1332, at *3 (Ky. 1828) ("[A] slave by our code is not treated as a person . . . but a thing, as he stood in the civil code of the Roman Empire.").

Scholars often compare the rightlessness of human slaves to that of nonhuman animals under ancient law. "The truly striking fact" about slavery, Professor Davis wrote,

is the antiquity and almost universal acceptance of the *concept* of the slave as a human being who is legally owned, used, sold, or otherwise disposed of as if he or she were a domestic animal. This parallel persisted in the similarity of naming, branding, and even pricing slaves according to their equivalent in cows, horses, camels, pigs, and chickens.⁸¹

According to Professor Patrick Mac Chombaich de Colquhoun, in Roman law, "[c]orporeal things are either moveables or immoveables. *Res mobiles* are of two kinds,—those capable of innate motion, *res sese moventes*, as animals or slaves"⁸² Dean Roscoe Pound noted that, in Rome a slave "was a thing, and as such, like animals, could be the object of rights of property."⁸³ Professor Barry Nicholas wrote that, in Roman law, "the slave was a thing. Being endowed with reason and often indeed well-educated, he was inevitably a peculiar thing and could, for example, acquire rights for his master. But he himself had no rights: he was merely an object of rights, like an animal."⁸⁴ According to Professor Nicholas, Rome's initial regulation of the treatment of slaves "took the same form as our legislation for the protection of animals. The master might be punished criminally for abuse of his powers, but the slave could not himself invoke the protection of the law."⁸⁵ Professor Peter Birks said that in Rome, "unless and until they were manumitted the same law applied to them as to the ox and the ass."⁸⁶

Judge Posner speculates that:

[I]f 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,

⁸¹ DAVID BRION DAVIS, *SLAVERY AND HUMAN PROGRESS* 13 (1984).

⁸² 2 PATRICK MAC CHOMBAICH DE COLQUHOUN, *ROMAN CIVIL LAW* 13 (1851).

⁸³ 4 ROSCOE POUND, *JURISPRUDENCE* 192 (1959) (internal quotations omitted).

⁸⁴ BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 69 (3d ed. 1962); see W.W. BUCKLAND, *A MANUAL OF ROMAN PRIVATE LAW* 37 (2d ed. 1939); 3 E.C. CLARK, *HISTORY OF ROMAN PRIVATE LAW* 61 (1990) (for almost the entire period of Roman law, the slave was "little more than a mere chattel").

⁸⁵ NICHOLAS, *supra* note 84, at 69; see JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 43 (2d ed. 1931).

⁸⁶ Birks, *supra* note 25, at 61.

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.⁸⁷

As described above, most scholars routinely deny that human slaves had any legal rights.⁸⁸ The essence of slavery is rightlessness. A stray scholar may argue to the contrary. Professor Robert Shaw wrote that in the antebellum South, "[w]hile it came to be accepted, for most purposes and in most jurisdictions, that the slave was a person, entitled to the protection of the law and against whom crimes could be committed, it was commonplace that vicious assaults upon slaves, or even murder, were treated as trespasses only, offenses against the owners, with remedies to be sought only by civil suits."⁸⁹ But these statements cannot be taken literally, for they almost always mean that criminal statutes, akin to the anti-cruelty laws enacted to protect non-human animals, merely protected human slaves from the arbitrary or unnecessary infliction of excessive force.⁹⁰

I would not admit "the only right of most, maybe all, species would be the right not to be gratuitously tortured, wounded, or killed."⁹¹ That would contradict the central claim of *Rattling the Cage*, which is that at least chimpanzees and bonobos are entitled to the ba-

⁸⁷ Posner, *supra* note 1, at 538.

⁸⁸ As did judges. See, e.g., *Peter v. Hargrave*, 45 Va. 95, 95 (Cratt) 12 (1848), available at 1848 WL 2754, at *2 (Va. 1848) (slaves "have no personal rights"). In the American South, slaves could sue for their freedom based on a claim that they shouldn't be slaves. SHAW, *supra* note 78, at 110.

Freedom suits existed not as a means for blacks to alter their legal status from slave to free, but as a recourse for those who were *in fact* free, and who thus possessed a remedy for illegal enslavement. *De jure*, those enslaved illegally were not slaves at all, but free persons wrongly deprived of their legal rights. Thus, a claimant's right to petition the court was not predicated on the assumption that a slave had any legal rights, but instead on her rights as a presumptively free person illegally held in slavery.

A. Leon Higginbotham, Jr. & F. Michael Higginbotham, "Yearning to Breath Free": *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213, 1234-35 (1993).

⁸⁹ SHAW, *supra* note 78, at 160; see *id.* at 158 ("[I]t was invariably accepted that slaves did possess a right to life and limb.").

⁹⁰ I discuss, *infra*, at 52-59, whether this gave slaves or nonhuman animals any legal rights.

⁹¹ Posner, *supra* note 1, at 538.

sic rights of bodily integrity and bodily liberty.⁹² By bodily integrity, I mean a general immunity from unconsented-to touchings, akin to what the United States Supreme Court has referred to as "the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law . . . '[t]he right . . . to be let alone.'"⁹³ The gratuitousness of the violation would be as relevant for nonhumans as it is for humans. By bodily liberty, I mean the freedom to move about unless one is a danger to oneself or others, which would certainly be the case for chimpanzees or bonobos in the United States, but would certainly not be the case, say, for Atlantic bottlenosed dolphins living along America's East and Gulf Coasts. Even chimpanzees and bonobos in America could be placed in sanctuaries in which they would have some reasonable degree of bodily liberty.

In *Rattling the Cage*, I also said "I never meant to imply that these two dignity-rights are the *only* legal rights to which [chimpanzees and bonobos] might be entitled. Should they, for example, have the legal rights to reproduce, to keep their offspring, or to have sufficient and proper habitat?"⁹⁴ I wrote that philosopher Isaiah Berlin said that

The question of whether humans should have fundamental rights must be answered . . . by invoking the myriad, multifaceted, and complex ways in which we "determine good and evil, that is to say, on our moral, religious, intellectual, economic, and aesthetic values." What rights should we have is "bound up with our conception of man, and of the basic demands of his nature." The question of whether animals should have fundamental legal rights should be answered in a similar way, similarly bound up with our conceptions of who they are, the demands of their natures, and how we determine good and evil.⁹⁵

We must recognize that the natures of other animals may be radically different from ours and that the greater our evolutionary distance, the greater may be our differences, and the greater may also be our difficulty in understanding the demands of their natures.

⁹² WISE, *supra* note 2, at 239–66.

⁹³ *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891), (quoting COOLEY ON TORTS 29).

⁹⁴ WISE, *supra* note 2, at 267.

⁹⁵ *Id.* at 66–67, (quoting Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 169 (1969)).

C. Line-Drawing Problems

1. The Criticisms

Several commentators complained that, while I criticize the common law for drawing an arbitrary line that excludes every non-human animal from eligibility for legal rights, I ignore serious line-drawing problems of my own. If one breaks through the legal wall that separates humans from every other animal, the argument goes, there can be no reasonable stopping place, either with respect to the non-human animals who would be entitled to rights or the rights to which they would be entitled.

The science journal, *Nature Neuroscience*, for example, editorialized that "the major weakness" in my argument is that

boundaries must be drawn somewhere. It would seem absurd to make no distinctions between species, but if it is wrong to discriminate between humans and chimpanzees, then what about macaques, cats or mice? Any sensible solution would seem to require criteria for evaluating different animals' mental capacities and for weighing them against the benefits of experimentation, but Wise offers little guidance on how this might be achieved.⁹⁶

In the *Military Law Review*, Lt. Commander R.A. Conrad wrote:

Wise leaves open the extension of legal personhood beyond chimpanzees and bonobos. Except for establishing the criteria that other animals granted such status should have "minds," he provides no guidelines for making such future extensions. He also concedes that not all animals have "minds," and thus not all animals have a right to legal personhood. Yet, in this concession, he is guilty of discrimination and hypocrisy that highlight the primary fallacy of his argument: where to draw the line. In effect he is stating that some animals really are animals and deserve to be treated as animals, with no rights, while other animals are essentially human, or at least deserving of human-like status.⁹⁷

A similar concern motivates Judge Posner's complaint that

⁹⁶ *Legal Challenges to Animal Experimentation*, *supra* note 52, at 523.

⁹⁷ Lt. Com. R.A. Conrad, Book Note, 166 MIL. L. REV. 226, 230 (2000).

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.⁹⁸

Finally, Professor Epstein writes:

If that higher status [of legal persons] is offered to chimps and bonobos, then what about orangutans and gorillas? Or horses, dogs, and cows? All of these animals have a substantial level of cognitive capacity, and wide range of emotions, even if they do not have the same advanced cognitive skills of the chimps and bonobos.⁹⁹

2. Liberty Rights

Judge Posner thinks *Rattling the Cage* "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."¹⁰⁰ Attorney Henry Cohen finds it "essentially a conservative book."¹⁰¹ Professor Nussbaum notes the book "develops no ambitious theories," which concerns her, as the title of her review, "Animal Rights: The Need for a Theoretical Basis," suggests.¹⁰² Professor Robert Verchick finds the work "both radical and conservative at the same time," while noting my failure "ultimately . . . to offer any new principle that is itself immune from bias."¹⁰³

Turning to bias, Professor Epstein claims, "It is not, nor has ever been, immoral for human beings, as a species, to prefer their own kind. What lion would deny it?"¹⁰⁴ Lions may indeed prefer their own

⁹⁸ Posner, *supra* note 1, at 532.

⁹⁹ Epstein, *supra* note 58, at 33.

¹⁰⁰ Posner, *supra* note 1, at 527. I take the following discussion of practical autonomy from chapter two of my upcoming book. See WISE, *supra* note 48, at 9-34. I give "realistic autonomy" the more appropriate name of "practical autonomy." *Id.*

¹⁰¹ Henry Cohen, *Rattling the Cage: Toward Legal Rights for Animals*, 47 FED. LAW. 49, 50 (Mar./Apr. 2000) (book review).

¹⁰² Nussbaum, *supra* note 4, at 1548.

¹⁰³ Robert M. Verchick, *A New Species of Rights*, 89 CAL. L. REV. 207, 215, 219 (2001).

¹⁰⁴ Epstein, *supra* note 58, at 37.

kind. But it is both immoral and unlawful for judges to bias their decisions. There are also difficulties in seeking moral guidance from non-human animals such as lions, who probably lack moral capacity. Humans preferring their "kind," whether their kind is the same race, sex, religion, nationality, or some other kind, has long infected human activity and caused enormous suffering and unfairness. The morality of a lion is nothing for a human to aspire to.

Professor Epstein argues, "We should not undermine, as would surely be the case, the liberty and dignity of human beings by treating animals as their moral equals and legal peers."¹⁰⁵ *Nature* writer Kenan Malik writes, "The real impact of the campaign for rights for apes is to diminish rights for humans."¹⁰⁶ They imply legal rights are a zero sum game. Technically they may be correct. The rights of one person may necessarily decrease with an increase in the rights of another, for the master's right over his slave becomes sharply curtailed when the slave sheds his thinghood. If Professor Epstein is correct on either count—humans may legitimately prefer their own kind or granting rights to nonhuman animals may reduce the rights of human beings—every human judge should be disqualified from determining whether non-human animals have legal rights on the ground of bias, but then no one would be left to judge.

This problem is typically solved in the United States by invoking the "Rule of Necessity": if all judges are disqualified from deciding a case, none are.¹⁰⁷ But this Rule does not give judges license to indulge their biases. To the contrary, judges ruling from necessity must exert every ounce of moral strength, every particle of objectivity they possess, to rule as fairly as they can, always keeping in mind they are prone to decide in their own favor and that long-standing inequities have, in Professor Tribe's words, only "survived this long because they have become [so] ingrained in our modes of thought; the [U.S.] Supreme Court recognized a century ago that 'habitual' discriminations are the hardest to eradicate."¹⁰⁸

Judge Posner and Professor Verchick are correct: *Rattling the Cage* was never intended to be an intellectually exciting book; nor was it intended to create intellectually ambitious theories nor develop novel legal principles. "Animal rights" may demand a firmer theoretical ba-

¹⁰⁵ *Id.* at 37.

¹⁰⁶ Kenan Malik, *Rights and Wrongs*, 406 *NATURE* 675, 676 (2000).

¹⁰⁷ See, e.g., *United States v. Will*, 449 U.S. 200, 213-16 (1980).

¹⁰⁸ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1518 (2d ed. 1988) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880)).

sis, as Professor Nussbaum argues. Yet, isn't it asking too much to demand the theoretical bases of "animal rights" be firmer than those of "human rights"? Professor Nussbaum agrees that even "human rights" is by no means a crystal-clear idea. Rights have been understood in many different ways, and difficult theoretical questions are frequently obscured by the use of rights language, which can give the illusion of agreement where there is deep philosophical disagreement about the basis, origin, function, and process of rights.¹⁰⁹

a. *Where Do Basic Rights Come From?*

At least some nonlawyer critics of *Rattling the Cage* draw from legal positivism in arguing that basic rights derive "from the state."¹¹⁰ I use "legal nonpositivism" to refer to rights claimed to derive from some source other than the state; these include natural rights, human rights, fundamental rights, and indeed, foundationalism in general.¹¹¹ Foundationalism's most serious problem is that there is no agreement about which of the many possible sources of human rights is the true or legitimate source. Legal positivism, however, is not without its flaws. As Professor Mary Ann Glendon writes:

Prior to World War II, legal positivism . . . flourished in the United States and Europe and was dogma in the Soviet Union. But legally sanctioned atrocities committed in Nazi Germany . . . caused many people to reevaluate the proposition that there is no higher law by which the laws of nation-states can be judged.¹¹²

Judge Posner embraces a pragmatism that rejects the use of first principles to determine how to treat nonhuman animals because we cannot agree on what these first principles are.¹¹³ On the other hand, Professor Tribe thinks that to search for a "non-intuitive, non-spiritual wholly objective and supposedly scientifically-based formula . . . [for] legal rights is to tilt at windmills" and that "to argue that a chimpanzee is entitled to rights because of what goes on in his mind is to commit the Naturalistic Fallacy, illegitimately moving from 'is' to 'ought.'"¹¹⁴

¹⁰⁹ MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 97 (2000).

¹¹⁰ Hutchins, *supra* note 53, at 856; see Malik, *supra* note 106, at 675.

¹¹¹ E.g., Steven M. Wise, *Hardly a Revolution*, 22 VT. L. REV. 793, 806 (1998).

¹¹² MARY ANN GLENDON, *A WORLD MADE NEW* 176 (2001).

¹¹³ Posner, *supra* note 1, at 534.

¹¹⁴ Tribe, *supra* note 75, at 5.

This conflict, often stated as a conflict between natural law and legal positivism, has been resolved in favor of natural law. Not only the international law of fundamental rights, but foreign law and United States law at every level is saturated in legal nonpositivism.¹¹⁵ The Universal Declaration of Human Rights, writes Professor Glendon, "implicitly rejected the positivist position by stating that fundamental rights are recognized, rather than conferred," therefore "trac[ing] [the Declaration's] legitimacy to [the] fundamental characteristics of human nature."¹¹⁶ She relates that UNESCO set up a philosophers committee to help determine what rights might be legitimately claimed to be universal.

The UNESCO group concluded that it was possible to achieve agreement across cultures concerning certain rights that "may be seen as implicit in man's nature as an individual and as a member of society and to follow from the fundamental right to live." But they harbored no illusions about how deep the agreement they had discovered went. [French philosopher Jacques] Maritain liked to tell the story of how a visitor at one meeting expressed astonishment that champions of violently opposed ideologies had been able to agree on a list of fundamental rights. The man was told: "Yes, we agree about the rights but on condition that no one asks us why."¹¹⁷

Over the last half-century, "a universally valid core of nonderogable human rights" have been agreed upon and recognized in at least four classes of international instruments that do not demand agreement on why.¹¹⁸ In the first are treaties, agreements, declarations, and

¹¹⁵ Wise, *supra* note 111, at 846-57.

¹¹⁶ GLENDON, *supra* note 112, at 175, 176. See generally Jack Donnelly, *Human Rights as Natural Rights*, 4 HUM. RTS. Q. 391, 401-02 (1982) (noting that natural rights theory preserves universality of human rights); Johannes Morsink, *The Philosophy of the Universal Declaration*, 6 HUM. RTS. Q. 309 (1984) (the Declaration's rights are rooted in traditional natural rights).

¹¹⁷ GLENDON, *supra* note 112, at 77, (quoting Jacques Maritain, *Introduction*, in HUMAN RIGHTS 9 (UNESCO ed., 1949)).

¹¹⁸ DAVID P. FORSYTHE, *THE INTERNATIONALIZATION OF HUMAN RIGHTS* 12 (1991). These include freedom from attacks upon bodily integrity, slavery, and torture. *Id.*; see also John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS—THE OXFORD AMNESTY LECTURES 1993 62, 71 (Stephen Shute & Susan Hurley eds., 1993); Anthony D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1128-29 (1982) (proclamations against genocide, torture, and slavery are fundamental human rights under customary international law); John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL

resolutions that emphasize inalienable negative rights and immunities and declare that humans have "inherent dignity" or possess "fundamental freedoms" or "inalienable rights," phrases that descend from such natural rights documents as the American Declaration of Independence and the French Declaration of the Rights of Man.¹¹⁹ Many, like the Universal Declaration, recognize that human rights derive from the characteristics or qualities of human personality and society.¹²⁰ A second class designates certain rights "nonderogable," even in cases of public emergency involving the life of the nation, while a third class acknowledges that certain obligations are created *erga omnes* ("flowing to all"). A fourth concerns *jus cogens* ("compelling law"), those international preemptory norms that restrict the ability of states to contract in violation of these norms and voids treaties and other instruments that violate them.¹²¹ Why should chimpanzees and bonobos, and perhaps other nonhuman animals, not be beneficiaries of a similarly valid core of nonderogable rights?

STUD. 1, 14, 14 n.22 (1987) (designation of fundamental liberties and freedoms removes them from political debate). "Human rights" refers to freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives." RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 701, cmt. a (1986). For a discussion of international dignity-rights, see Wise, *supra* note 111, at 846-57.

¹¹⁹ See Samuel S. Kim, *Global Human Rights and World Order*, in THE UNITED NATIONS AND A JUST WORLD ORDER 356, 358 (Richard A. Falk, et al. eds., 1991); PAUL SIEGHART, THE LAWFUL RIGHTS OF MANKIND—AN INTRODUCTION TO THE INTERNATIONAL LEGAL CODE OF HUMAN RIGHTS 63 (1985); Burns H. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 264-65 (1984). These instruments implicitly recognize that human beings "share some common beliefs concerning human dignity but also . . . a common concern to protect human dignity by a body of law that stands above the law of individual states." Harold J. Berman, *Towards an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 798 (1988). "The United Nations' concept of human rights embraces this natural law concept of rights." Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 17 (1982), despite the rejection of repeated attempts to attribute them to a divine source; see also SIEGHART, *supra* at 63; SURYA PRAKASH SINHA, *What Is Law?—THE DIFFERING THEORIES OF JURISPRUDENCE* 81-82 (1989).

¹²⁰ See Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 409 (1979); Warren Christopher, *Democracy and Human Rights: Where America Stands*, Address before the World Conference on Human Rights, Vienna, Austria (June 14, 1993), at 1 ("America's identity as a nation derives from our dedication to the proposition 'that all Men are created equal and endowed by their Creator with certain unalienable rights.'") (transcript on file with author).

¹²¹ While nonderogability and *jus cogens* are different principles with different concerns, a derogable human rights norm cannot be *jus cogens*. RESTATEMENT (THIRD) OF THE LAW: THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 118, at § 702, rpts. notes, ¶ 11(1986).

b. *How "Do We Ground the Moral Conviction that Each Human Being Is Inviolable and All Human Beings Are of Equal Dignity?"*¹²²

Professor Nussbaum notes the problem with Stoic views about nonhuman animals is the "sharp discontinuity in nature," resting on "the idea that moral capacity belongs to all and only humans and that this capacity is what raises us above 'the beasts.'"¹²³

Indeed, Professor Nussbaum goes on to assert:

It is not that Wise is wrong to find the Stoic views about discontinuity inadequate. The problem is, what do we do without them? How, if not in the Stoics' way, do we ground the moral conviction that each human being is inviolable and all human beings are of equal dignity? Once we recognize that nature is a continuum and that capacities of chimpanzees overlap with those of humans, what is to prevent us from recognizing a continuum within the human species, and saying (as people are always keen to do) that some humans are more capable than others, that some are worth more than others? Against that kind of thinking, the idea that every human has something precious that is found nowhere else in nature is quite a valuable resource.

Think about people living in extreme poverty, such as the women with whom I work in India . . . These Indian women are not considered important. . . . It is very important to them, and to the activists and political thinkers who try to improve their lot, to say that every human life is precious and that all are of boundless worth.¹²⁴

And, Nussbaum continues, what if there are not enough food and resources for both human and nonhuman animals?

Poor people do not like forest preserves in which they cannot forage for food, for example. The romanticism of nature that such people find in many American and European visitors scares them. They want to say, we are special. We need to live. I want to say that too. So there is a problem: if we do not

¹²² Nussbaum, *supra* note 4, at 1521.

¹²³ *Id.* at 1520.

¹²⁴ *Id.* at 1521.

cling to some form of the Stoic dichotomy, how are we to say that?¹²⁵

Judge Posner expressed a related argument claiming 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 [T]here may be a social value in a rhetoric of human speciality."¹²⁶

There are at least three arguments here. One is that, if we allow ourselves to recognize a continuum among species, we may feel more free to recognize a continuum within the human species. Professor Paul Waldau notes:

The two obvious principal ideas of speciesism are the contrasting inclusion of all members of the human species and exclusion of all members of all other species from certain privileged considerations. Merely asserting the dignity of each and every human, without any related exclusion of nonhumans' interests, value, or moral considerability, would in no way be speciesist. An element of pervasive exclusion is a critical addition . . . a working definition is given. . . . Speciesism is the inclusion of all human animals within, and the exclusion of all other animals from, the moral circle.¹²⁷

There is no logical reason why we must ground a conviction that a human being is inviolable and all human beings are of equal dignity on the exclusion of other beings. The foremost advocate of a continuum among species, Charles Darwin, hated black chattel slavery.¹²⁸ Louis Agassiz hated Darwinism, rejected evolution, and thought blacks a different species from, and inferior to, whites.¹²⁹ If we open our moral umbrella a bit to shelter apes or primates or mammals or vertebrates, and believe every one of them inviolable and equal in dignity, why would we no longer believe the same of all humans, who would be a subset of those whom we believe to be inviolable and of

¹²⁵ *Id.*

¹²⁶ Posner, *supra* note 1, at 535. Posner's and Nussbaum's articles were written near the same time and each acknowledge the help of the other. See Nussbaum, *supra* note 4, at 1506; Posner, *supra* note 1, at 527.

¹²⁷ PAUL WALDAU, *THE SPECTER OF SPECIESISM—BUDDHIST AND CHRISTIAN VIEWS OF ANIMALS* 38 (2001).

¹²⁸ See JOHN BOWLBY, *CHARLES DARWIN—A NEW LIFE* 115, 134, 155 (1990); CHARLES DARWIN, *THE VOYAGE OF THE BEAGLE* 502, 526–27 (Charles W. Eliot ed., P.F. Collier & Son 1909) (1845).

¹²⁹ See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 42–50 (1981); LOUIS MENAND, *THE METAPHYSICAL CLUB* 124–29 (2001).

equal dignity? Just as with poor Indian women, there are nonhuman animals whose cognitive abilities allow them to think their life is important to them, a matter important as well to the activists and political thinkers trying to improve their lot.¹³⁰

A second argument is that if we do not cling to the Stoic dichotomy, how can we justify always siding with humans whenever their vital interests conflict with the interests of nonhuman animals? Why should we automatically side with every human when an important interest conflicts with the vital interest of any nonhuman? This prejudices the ultimate question as to whether any nonhuman animal, even bonobos and chimpanzees, should be entitled to basic rights that might trump human interests.

The third argument is that, without the Stoic dichotomy, we might end up treating some humans as badly as we treat nonhuman animals. For "animals and human beings," substitute "blacks and whites," "Moslems and Christians," or "Catholics and Protestants" in Judge Posner's worry that "if we fail to maintain a bright line between animals and human beings, we may end up treating animals as badly as we treat human beings [T]here may be a social value in a rhetoric of human specialty."¹³¹ The sentence remains as true for one as for any of the others. There is no reason specifically linked to the rights of nonhuman animals to believe that we may ever treat humans as badly as we do nonhuman animals.

Professor Nussbaum is genuinely concerned with the poor.¹³² William Windham, Member of Parliament for Norwich, was not when he appealed to the freedom of the poor to engage in their traditional "enjoyments" of bull-baiting to defeat the first attempt at legislating anti-cruelty statutes in the UK in 1800 and 1802.¹³³ At nearly the same time, abolitionists were fighting arguments in Parliament that destruction of the slave trade would ruin Britain and her colonies and throw thousands of sailors out of work.¹³⁴ Liverpool's sailmakers, bak-

¹³⁰ *E.g.*, WISE, *supra* note 48, at 109-11, 152-54, 169-71, 188-89, 222-24 (gorillas, orangutans, Atlantic bottlenosed dolphins, African grey parrots, and Indian elephants show evidence of self-awareness); WISE, *supra* note 2, at 198-201 (chimpanzees and bonobos show evidence of self-awareness).

¹³¹ Posner, *supra* note 1, at 535.

¹³² See Nussbaum, *supra* note 4, at 1521.

¹³³ RADFORD, *supra* note 36, at 33-34.

¹³⁴ HUGH THOMAS, *THE SLAVE TRADE—THE STORY OF THE ATLANTIC SLAVE TRADE 1440-1870*, at 506, 508, 513, 525, 528, 554 (1997).

ers, and gunmakers petitioned Parliament to keep the slavers sailing.¹³⁵ To whom would they sell their sails, biscuits, and guns?¹³⁶

c. *Realistic Autonomy as Sufficient for Basic Rights*

If "discrimination" is defined as "an act based on prejudice," and its essential elements [include] . . . a decision based on invidious rather than rational grounds," it is hard to make Lt. Commander Conrad's charge of discrimination stick.¹³⁷ What is necessary for basic human rights remains controversial after centuries. I do not intend to try to resolve this controversy. Neither do I intend to burden the argument for the basic rights of chimpanzees and bonobos with a demand for certainties greater than those demanded by the arguments for basic human rights.

I have argued that the basic legal rights of nonhuman animals should be derived from the same legal sources as the basic rights of humans, and for the same reasons.¹³⁸ That is why *Rattling the Cage* may rightly be described as conservative. It so happens there is no agreement as to what those sources are. But, rightly or wrongly, fundamental human rights are often derived from liberty and equality. These are therefore the well from which the fundamental rights of nonhuman animals may be drawn.

Liberty entitles one to be treated a certain way because of how one is put together. How others are treated is irrelevant. One's liberty rights turn on one's qualities. Since World War II, nations agree the liberty to act as one pleases stops somewhere, though they do not agree where.¹³⁹ Yet some absolute and irreducible minimum degree of bodily liberty and bodily integrity are everywhere sacrosanct. If we trespass upon them we inflict the gravest injustice, for we treat others as slaves and things.¹⁴⁰

Of what he sees as my willingness "to accept the possibility that [my] theory would sacrifice rabbits and mice in exchange for stronger and more individualized liberties for 'brainier' species," Professor Verchick insightfully observes that "[h]aving chosen to base [my] design on classical rights themes, the Greek ideal of reason is one [I am]

¹³⁵ See *id.* at 515.

¹³⁶ *Id.* at 515-16.

¹³⁷ TRIBE, *supra* note 108, at 1515.

¹³⁸ Wise, *supra* note 111, at 845-68.

¹³⁹ *Id.* at 845-47.

¹⁴⁰ *Id.* at 845.

fated to embrace."¹⁴¹ Herein lies an important truth: judges and the common law have long embraced, if not the Greek ideal of reason, then autonomy or self-determination both as an important aspect of liberty and one that is, I argue, sufficient, though not necessary, for basic legal rights.¹⁴² An animal's species is irrelevant to her entitlement to rights; any who possesses a "realistic autonomy" has what is sufficient for the basic rights to bodily integrity and bodily liberty both as a matter of liberty and equality.¹⁴³

I emphasize "sufficient." Professor Nussbaum believes I argue that autonomy is necessary, not just sufficient, for basic legal rights,¹⁴⁴ as does Professor Tribe.¹⁴⁵ Alas, I make the argument that realistic or practical autonomy is sufficient, not necessary, for basic legal rights most clearly in the index of *Rattling the Cage*, much more so in an earlier law review article.¹⁴⁶ Professor Tribe understands I argue that being human is neither a sufficient nor a necessary condition for entitlement to legal rights.¹⁴⁷ That evidently concerns him:

If your theory is that simply being human cannot entitle you to basic rights, although it might be nice if they were given to you, I think you are on an awfully steep and slippery slope that we would do well to avoid. Once we have said that infants and very old people . . . have no rights unless we choose to grant them, we must decide about people who are three-quarters of the way to such a condition. I needn't spell it all out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.¹⁴⁸

First, I argue that a realistic or practical autonomy is a sufficient, not a necessary, condition for legal rights. Other grounds for entitlement to basic rights may exist. Second, Professor Tribe assumes that all human beings deserve basic rights.¹⁴⁹ While "the thesis that humans should be ascribed rights simply for being human has received

¹⁴¹ Verchick, *supra* note 103, at 220.

¹⁴² See Wise, *supra* note 2, at 243-48.

¹⁴³ See *id.* at 247-48; see also *id.* at 63-87, 243-70.

¹⁴⁴ Nussbaum, *supra* note 4, at 1533-35.

¹⁴⁵ Tribe, *supra* note 75, at 7.

¹⁴⁶ Wise, *supra* note 2, at 342 ("autonomy—sufficient for legal rights"); Wise, *supra* note 111, at 868, 875.

¹⁴⁷ Tribe, *supra* note 75, at 7.

¹⁴⁸ *Id.*

¹⁴⁹ See *id.*

practically no support from philosophers,¹⁵⁰ it has received a little. In the view of Professor Lloyd Weinreb,

The starting point [for legal rights] is a categorical distinction between persons and things . . . inclusion in one category or the other is ordinarily settled by a single, uniform rule that the category of persons is coextensive with the class of human beings: All human beings are persons, and all persons are human beings.¹⁵¹

But to Professor L.W. Sumner, "it is quite inconceivable that the extension of any right should coincide exactly with the boundaries of our species. It is thus quite inconceivable that we have any rights simply because we are human."¹⁵² I argued in *Rattling the Cage* that, because Professor Weinreb's categorical distinction conflicts with overarching Western values and principles of fairness, liberty, equality, and reasoned judicial decision-making, Professor Sumner is correct. It "is inconceivable, in the sense that it is irrational or incredible" that rights should be granted to humans simply because they are humans.¹⁵³ Of what inherent value could mere species membership possibly be? What interests could mere species membership possibly protect, unless these interests are connected to empirical qualities? Species is merely a taxonomic classification of a population of genetically similar individuals able naturally to interbreed.¹⁵⁴ It is not an empirical quality as autonomy, self-determination, cognition, and sentience are.¹⁵⁵

I imagined the discovery of a stout band of Neanderthals or *Homo erectus*, both possessed of highly complex minds, who managed to survive the millenia in some remote redoubt in Spanish Andalusia or Java.¹⁵⁶ Neither are *Homo sapiens*, yet, could we,

without hesitation capture and exhibit them, breed and eat them, and force them into biomedical research? If their

¹⁵⁰ Daniel Wikler, *Concepts of Personhood: A Philosophical Perspective*, in *DEFINING HUMAN LIFE: MEDICAL, LEGAL, AND ETHICAL IMPLICATIONS* 13, 19 (Margery W. Shaw & A. Edward Doudera, eds., 1983).

¹⁵¹ LLOYD L. WEINREB, *OEDIPUS AT FENWAY PARK* 110 (1994).

¹⁵² L.W. SUMNER, *THE MORAL FOUNDATION OF RIGHTS* 206 (1987) (referring to both the benefit/interest and choice/control models of claim-rights).

¹⁵³ Wise, *supra* note 2, at 241.

¹⁵⁴ See EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 38 (1992).

¹⁵⁵ See *id.*

¹⁵⁶ Wise, *supra* note 2, at 242-43.

minds make us hesitate and in that moment, if we open up our minds to the possibility that they might be eligible for dignity-rights, shouldn't the minds of chimpanzees and bonobos make us hesitate as well?¹⁵⁷

A liberty right grounded in autonomy demands a mind. "If you think," I wrote, "that nonhuman animals are never, ever conscious, then they are mindless, feelingless, thoughtless *brutes* that deserve no more legal rights than a toaster."¹⁵⁸ Isaiah Berlin wrote, "if the essence of men is that they are autonomous beings . . . then nothing is worse than to treat them as if they were not autonomous, but natural objects, played on by causal influences, creatures at the mercy of external stimuli."¹⁵⁹ This should hold for any autonomous being; species should be irrelevant.

According to Professor C.K. Allen:

The essential difference between person and thing seems to lie in the quality of *volition*. Animate creatures clearly possess some kind of motive-power which corresponds with the human will; it may be a very strong force indeed—thus if we wish to attribute to a man a particularly obstinate will, we compare him to a mule. But it is not a kind of will which is recognized by law; it cannot, in modern societies, involve the creature which exercises it in any consequences of right or liability. Nor do we attribute to the creatures what is closely akin to this volitional capacity, that is, the power of reason. Hence a thing has been defined [as having a] "*volitionless Nature*."¹⁶⁰

Things do not act autonomously. Persons do. Things cannot self-determine. Persons can. Things lack volition. Persons do not. Persons have will.¹⁶¹ Professor Allen implies a mule's will is unrecognized in law because, though purposeful, it comes from instinct, which is the antithesis of volition. The mule has a will, he just cannot control it. Whether we call it self-determination, autonomy, or volition, if a being has it, she is entitled to basic liberty rights.

¹⁵⁷ *Id.* at 243.

¹⁵⁸ *Id.* at 131.

¹⁵⁹ Berlin, *supra* note 95, at 208.

¹⁶⁰ Carleton Kemp Allen, *Things*, 28 CAL. L. REV. 421, 424 (1940) (quoting SIR THOMAS ERSKINE HOLLAND, JURISPRUDENCE 103 (13th ed. 1924) (emphasis added) (translating BARON, PANDEKTEN, § 37)); see POUND, *supra* note 83, at 530-31.

¹⁶¹ See POUND, *supra* note 83, at 194-99.

Philosophers often understand autonomy, which includes self-determination and volition, the way Kant did two centuries ago. I call his "full autonomy." This demands that, in determining what I ought to do in any situation I analyze what others can and ought to do, and rationally analyze whether it would be right to act in one way or another, keeping in mind that I should act only as I would want others to act.¹⁶² Kant believed nonhuman animals, and probably children, act from desire.¹⁶³ Fully autonomous beings act completely rationally and their ability to do that demands they be treated as persons.¹⁶⁴

Kant was not the only philosopher to try to knit hyper-rationality into the fabric of liberty.¹⁶⁵ The most honest concede what philosopher Carl Wellman calls a "monstrous conclusion:" a great many human beings do not make the cut.¹⁶⁶ Most normal adults lack full autonomy and, indeed, infants, children, the severely mentally retarded or autistic, the senile, and the persistently vegetative never come close.¹⁶⁷ Were judges to accept full autonomy as a prerequisite for personhood, they would have to exclude most humans.

Judges decisively reject Kant's full autonomy. Events on February 29, 2000, in the United States show how wrong Kant was. A six-year old Michigan first-grader smuggled a handgun into school and shot a classmate to death.¹⁶⁸ The County Prosecutor issued a statement that "[t]here is a presumption in law that a child . . . is not criminally responsible and can't form an intent to kill. Obviously, he has done a very terrible thing today, but legally he can't be held criminally responsible."¹⁶⁹ The child couldn't successfully be sued civilly, either.

¹⁶² WISE, *supra* note 2, at 246.

¹⁶³ See BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 229 (1993).

¹⁶⁴ See *id.* at 227-28. See also H.J. PATON, *THE CATEGORICAL IMPERATIVE—A STUDY IN KANT'S MORAL PHILOSOPHY* 180-84, 199, 242-47 (1947).

¹⁶⁵ See Berlin, *supra* note 95, at 170; see also Michael Allen Fox, *Animal Experimentation: A Philosopher's Changing Views*, in 3 *BETWEEN THE SPECIES* 260 (Spring 1987).

¹⁶⁶ CARL WELLMAN, *REAL RIGHTS* 113-14 (1995); see also DANIEL A. DOMBROWSKI, *BABIES AND BEASTS* 45-140 (1997) (discussing many modern philosophers); R.G. FREY, *INTERESTS AND RIGHTS—THE CASE AGAINST ANIMALS* 30 (1980); H.L.A. Hart, *Are There Any Natural Rights?*, in *THEORIES OF RIGHTS* 79, 82 (Jeremy Waldron ed., 1984); A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 201 n.93 (1992) (listing modern philosophers who claim that children cannot have rights because they lack the capacities for agency, rationality, or autonomy); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle*, 42 *DEPAUL L. REV.* 983, 987-99 (1993) (Hobbes, Locke, Rousseau, Bentham, and Mill).

¹⁶⁷ See Hart, *supra* note 166, at 82.

¹⁶⁸ *Boy, 6, Fatally Shoots Classmate in Mich. School*, *BOSTON GLOBE*, Mar. 1, 2000, at A1.

¹⁶⁹ *Id.*

Isaiah Berlin explained that, for Kant, "[f]reedom is not freedom to do what is irrational, or stupid, or wrong."¹⁷⁰ But in courtrooms liberty rights mean freedom to do the irrational, stupid, even the wrong. That is why judges generally honor nonrational, even irrational, choices that may even cut against a decision-maker's best interests.¹⁷¹ Self-determination may even trump human life.¹⁷² The determination of Jehovah's Witnesses to die rather than accept blood transfusions is nonrational. Yet judges accept them. The mentally ill are not usually confined, against their wishes, unless they are dangerous to themselves or others.¹⁷³

Judges who deny personhood to every nonhuman animal act arbitrarily. They don't *admit* they do. Instead they use legal fictions, transparent lies they insist we believe, that allow them to attribute personhood to humans lacking consciousness, even brains, to ships, trusts, corporations, even religious idols.¹⁷⁴ They pretend these have autonomy. Legal scholar John Chipman Gray couldn't see any difference between pretending will-less humans have one and doing the same for nonhuman animals.¹⁷⁵ Because legal fictions may cloak abuses of judicial power, Jeremy Bentham characterized them as a "*syphilis* . . . [that] carries into every part of the system the principle of rottenness."¹⁷⁶

A fair and rational alternative exists, and it is this: most moral and legal philosophers, and nearly every common law judge, recognize that less complex autonomies exist and that a being can be autonomous if she has preferences and the ability to act to satisfy them, or if she can cope with changed circumstances, or if she can make choices, even if she can't evaluate their merits very well, or if

¹⁷⁰ Berlin, *supra* note 95, at 148.

¹⁷¹ *E.g.*, *Airedale NHS Trust v. Bland*, 1 All E.R. 821, 843, 848 (Fam. 1992), *aff'd*, 1 All E.R. 858, 858 (C.A. 1993); *id.* at 852 (Hoffman, L.J.) (C.A.); *aff'd*, 1 All E.R. 858, 862 (H.L. 1993) (Lord Goff of Chieveley); *id.* at 889 (Lord Mustill); *see* WISE, *supra* note 2, at 247.

¹⁷² *Airedale*, 1 All E.R. at 851, 852 (Hoffman, L.J.); *id.* at 846 (Butler-Sloss, L.J.) (both of the Court of Appeals); *id.* at 866 (Lord Goff of Chieveley).

¹⁷³ *E.g.*, *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975); *Winterwerp v. Netherlands*, A. 33 Eur. Ct. H.R. (1979).

¹⁷⁴ *E.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Guardianship of Doe*, 583 N.E.2d 1263, 1268 (Mass. 1992); *id.* at 1272-73 (Nolan, J., dissenting); *id.* at 1275 (O'Connor, J., dissenting); *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917 (N.Y. 1917); *Pramathia Nath Mullick v. Pradyumna Kumar Mullick*, 52 I.L.R. 245, 250 (1925); *see* POUND, *supra* note 83, at 195, 197, 198.

¹⁷⁵ GRAY, *supra* note 85, at 43.

¹⁷⁶ Jeremy Bentham, *The Elements of the Art of Packing as Applied to Special Juries, Particularly in Cases of Libel Law*, in 5 THE WORKS OF JEREMY BENTHAM 92 (John Bowring ed., 1962).

she has desires and beliefs and can make at least some sound and appropriate inferences from them.¹⁷⁷ In *Rattling the Cage*, I describe these autonomies as "realistic."¹⁷⁸ I now think "practical" better describes them.¹⁷⁹ Beings have practical autonomy, and are therefore entitled to personhood and basic liberty rights, if they:

1. can desire;
2. intentionally try to fulfill their desire; and
3. possess a sense of self-sufficiency to allow them to understand, even dimly, that they want something and are trying to get it.

Consciousness, though not necessarily self-consciousness, and sentience are implicit in practical autonomy.

3. Equality

The core of equality is that like beings should be treated alike. Thus an animal might be entitled to basic rights, as a matter of equality, even if he or she lacks practical autonomy, so long as the sole point of reference is not some quality that all human, but no nonhuman animals possess.¹⁸⁰

Perhaps unsurprisingly, for he is neither a philosopher nor a lawyer, conservationist Michael Hutchins incorrectly understands my equality claim to be the following:

Individual humans may differ in their mental and physical capacities, but are none the less treated equally under the law and granted certain basic rights. . . . Some nonhuman animals, such as chimpanzees and bonobos, share many characteristics with humans and, in fact, are considered by some to be in the same genus. . . . Therefore, those nonhumans should be granted similar legal rights.¹⁸¹

¹⁷⁷ See CHRISTOPHER CHERNIAK, MINIMAL RATIONALITY 3-17 (1985); JAMES RACHELS, CREATED FROM ANIMALS 140, 147 (1990); TOM REGAN, THE CASE FOR ANIMAL RIGHTS 84-85 (1983); William A. Wright, *Treating Animals as Ends*, 27 J. VALUE INQUIRY 353, 357, 362 (1993).

¹⁷⁸ WISE, *supra* note 2, at 247.

¹⁷⁹ 5 OXFORD ENGLISH DICTIONARY, *supra* note 65, at 269-70 (definitions A.I.1.a & b; A.I.2.a, b, & c).

¹⁸⁰ See also WISE, *supra* note 2, at 82-87, 251-54.

¹⁸¹ Hutchins, *supra* note 53, at 856.

The claim is not that bonobos and chimpanzees are entitled to rights because they share many characteristics with humans or just any characteristic, for every being is both infinitely similar and infinitely different from every other. It is that they share relevant mental characteristics: whatever humans have that entitles them to basic legal rights, chimpanzees and bonobos have as well.

Hutchins's legal and moral arguments are broadly typical of many made by scientists untrained in law or moral philosophy. A recent book reviewer in *Nature* makes a similar point about the use of nonhuman animals in biomedical research:

The scientists writing . . . believe that humans matter more than animals do, but their moral arguments are often superficial. Placing emphasis on the benefits we would lose if we gave up animal research does not prove that animals have no moral rights, or that their interests are inherently less valuable than our own. Neither our superior cognitive abilities nor the fact that animals treat each other badly settles the question of our duties toward them. And one reads with embarrassment two evolutionary biologists decrying animal rights as a "maladaptive philosophy" because it fails to promote the interests of our species.¹⁸²

Hutchins, for example, doesn't value equality: "[U]nlike [Wise,] I have learned to live with paradox, rather than seeking fairness and consistency in all things. Nature is far from even handed."¹⁸³ His disdain for consistency or fairness is clearly illustrated by his statement, "I believe that animal populations must sometimes be reduced through killing to prevent overpopulation. I believe that the world's human population is also too large, and for this reason I have chosen to adopt rather than reproducing myself."¹⁸⁴ Despite his concession that some nonhuman animals have emotions and think, Hutchins writes, "my teeth are designed for an omnivorous diet, and I view the ingestion of animal as well as vegetable protein as part of my evolutionary history."¹⁸⁵ On reading this, however, anthropologist Barbara

¹⁸² William H. Shaw, *Costs and Benefits of Inflicting Pain*, 414 NATURE 396, 396 (2001) (reviewing TOM REGAN, *DEFENDING ANIMAL RIGHTS* (2001) & ELLEN FRANKEL PAUL & JEFFREY PAUL, *WHY ANIMAL EXPERIMENTATION MATTERS: THE USE OF ANIMALS IN MEDICAL RESEARCH* (2001)).

¹⁸³ Hutchins, *supra* note 53, at 856.

¹⁸⁴ *Id.* at 856.

¹⁸⁵ *Id.*; see also *supra* note 57 and accompanying text.

King noted, "If he's going to argue consistently from the point of view of his evolutionary past, he's leaving himself open to some very interesting lifestyle changes, in his diet and otherwise."¹⁸⁶ Primatologist Rob Shumaker wrote "the old 'my teeth are designed to eat meat' argument should be put on life-support. If this is true, why don't gorillas eat meat?"¹⁸⁷

Every civil rights advocate for human or nonhuman animals believes in individual rights. But "[t]he primary goal of the environmental/conservation ethic," Hutchins writes, "is to preserve naturally occurring biological diversity."¹⁸⁸ It has nothing to do with individual rights, indeed, it does not value the individual, but the species and ecosystems.¹⁸⁹ Hutchins understands this, but mistakenly believes animal rights advocates do not. They think they possess, he believes, a "pro-conservation" philosophy, when "in many cases, the goal of conserving species and ecosystems is in direct conflict with the goal of individual animal rights."¹⁹⁰ "If nonhuman animals are granted 'legal personhood,'" he says, "then many endangered species could suffer."¹⁹¹ This potential conflict is well-known within the animal rights movement and has been a staple of my "Animal Rights Law" classes since 1990.¹⁹² Animal rights advocates do not automatically value an individual of an endangered species more than any other individual in the same way that human rights advocates do not value an individual member of a minority over a member of a majority race, religion, or nationality.

The irony of Hutchins's argument with respect to highly endangered chimpanzees and bonobos is that their legal thinghood exposes them to the predations of legal persons. That is why they are being driven to extinction by an African bushmeat trade, in which wild apes are killed for food. If legal personhood and legal rights are as important as I argue they are, granting these to chimpanzees and bonobos

¹⁸⁶ Communication from Professor Barbara J. King (Nov. 25, 2001).

¹⁸⁷ Communication from Rob Shumaker (May 12, 2001).

¹⁸⁸ Michael Hutchins & Christen Wemmer, *Wildlife Conservation and Animal Rights: Are They Compatible?*, in *ADVANCES IN ANIMAL WELFARE SCIENCE* 1986/87, at 112 (Michael W. Fox & Linda D. Mickley eds., 1987).

¹⁸⁹ See *id.*

¹⁹⁰ Hutchins, *supra* note 53, at 857. See Hutchins & Wemmer, *supra* note 188, at 128.

¹⁹¹ Hutchins, *supra* note 53, at 857.

¹⁹² See generally *THE ANIMAL RIGHTS/ENVIRONMENTAL ETHICS DEBATE—THE ENVIRONMENTAL PERSPECTIVE* (Eugene C. Hargrove ed., 1992).

would go far toward protecting them. Ironically, Hutchins opposes this proposal.¹⁹³

Instead, Hutchins claims, I am being "biologically naive."¹⁹⁴ But his argument illustrates the position philosopher Robert Nozick set forth more than twenty-five years ago: "utilitarianism for animals, Kantianism for people."¹⁹⁵ In other words, what is morally right for non-human animals is utilitarianism, the greatest good for the greatest number of nonhuman animals, with the individual of no inherent value, but every human being is an end in him or herself.¹⁹⁶ When a nonhuman species overpopulates, kill the "excess"; when humans overpopulate, Hutchins decides to solve the problem by adopting a child. Who is being "biologically naive?"

Hutchins's argument is not an appeal to justice, but to speciesism, arbitrariness, and bias. Hutchins does not even commit the "Naturalistic Fallacy," confusing what *is* with what is *right*. Hutchins does not care what is right. He draws his moral and legal lessons from an amoral nature populated by amoral creatures. Nature is neither even-handed nor fair. But I do not use the behavior of amoral beings, past and present, as a model for justice or as a platform from which to argue for justice for chimpanzees and bonobos. And, unlike Hutchins, I accept that equality is, and has long been, a major value of American and international law, and understand that fundamental nonhuman rights can be derived from it in the same way that fundamental human rights can be.¹⁹⁷ Hutchins concedes that the animal rights "focus on individual animals, as opposed to populations, species, and ecosystems . . . may itself be based on the cultural biases of its progenitors. Western cultures do tend to place more emphasis on the rights of the individual, as opposed to the welfare of society as a whole."¹⁹⁸ That is why my arguments lie within the mainstream of Western justice and Hutchins's do not. No modern judge is likely to accept that paradox or evolutionary history is more acceptable than equality, fairness and consistency in judicial decision-making.

Damon Linker argued:

[T]he evidence adduced by Steven Wise to suggest that primates [*sic*] are capable of forming rudimentary plans and

¹⁹³ Hutchins, *supra* note 53, at 129.

¹⁹⁴ *Id.* at 857.

¹⁹⁵ ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 39 (1974).

¹⁹⁶ *See id.*

¹⁹⁷ Wise, *supra* note 111, at 888-90.

¹⁹⁸ Hutchins & Wemmer, *supra* note 188, at 129 (citations omitted).

expectations fails to demonstrate they are equal to human beings in any significant sense. Men and women use their "autonomy" in a world defined not by the simple imperatives of survival but by ideas of virtue and vice, beauty and ugliness, right and wrong.¹⁹⁹

Linker mixes the arguments from liberty and equality. Read most generously, he claims the relevant "like" is the ability to use one's autonomy in a complex world of ideas and ideals, which resembles Kantian "full autonomy." We know many humans live in that world, but many do not, and it is unclear why the ability to use autonomy in a complex world of ideas and ideals should be necessary for the basic immunity of bodily integrity.

Even great apes "should not be granted the same legal rights as humans," says Michael Hutchins.²⁰⁰ I never claimed they should, as Professor Nussbaum recognized:

Giving apes legal rights does not mean giving them the same rights as adult humans. As with mentally disabled humans, a right may be qualified in certain ways in keeping with the creature's level of understanding. Apes may have fewer rights in certain areas, and the rights they have may be more narrowly conceived. Finally, they may be given only certain elements of a complex right.²⁰¹

Critics fear that, if one breaks through the legal wall that separates humans from every other animal, there is no reasonable stopping place, either with respect to which nonhuman animals should be entitled to rights or the rights to which they would be entitled. Judge Posner acknowledges, for example, that I seek 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.²⁰²

¹⁹⁹ Damon Linker, *Rights for Rodents*, COMMENT., Apr. 2001, at 41, 43.

²⁰⁰ Hutchins, *supra* note 53, at 856.

²⁰¹ Nussbaum, *supra* note 4, at 1548 (citations omitted).

²⁰² Posner, *supra* note 1, at 532. Conservationist Michael Hutchins, whose views on the complexities of the judicial system should probably be taken with the seriousness of Judge Posner's views, if any, on the complexities of conservation, insists "[o]ne of the most co-

The argument that beings should be lifted from thinghood, with no rights, straight to full and equal status, as Judge Posner and Michael Hutchins imply, is more likely to be made by one who opposes lifting them from thinghood in the first place.²⁰³

In 1858, Abraham Lincoln and Stephen A. Douglas locked in a monumental series of debates across the Illinois prairie to decide a seat in the United States Senate.²⁰⁴ Douglas tarred Lincoln an abolitionist, committed to perfect equality between whites and blacks.²⁰⁵ In pre-Civil War Illinois, this was like Joseph McCarthy happening to mention in 1952 that you were a Communist.²⁰⁶ The American government, Douglas insisted, had been "made by white men for the benefit of white men and their posterity forever."²⁰⁷ By his day's standards, Lincoln was a moderately-enlightened thinker about black chattel slavery. He always opposed it, even if he did not always support social and political equality for blacks.²⁰⁸ But he made it the central issue of his Senate campaign, accentuating "the difference between those who think it wrong and those who do not think it wrong," and squarely traced it to the assertion of the Declaration of Independence that "all men are created equal."²⁰⁹ That was fine with Douglas, for it allowed him to press the attack.²¹⁰ Lincoln, he exclaimed, was a radical, committed not just to freedom for the slave, but to the complete social and political equality of white and black.²¹¹ Lincoln correctly

gent arguments against 'legal personhood' for nonhuman animals is that it could plunge our judicial system into chaos." Hutchins, *supra* note 53, at 857. It is hard to imagine how granting basic legal rights to three thousand chimpanzees and bonobos, at least, could plunge the American judicial system into chaos.

²⁰³ The same is true for those who argue that if nonhuman animals get legal rights, we will be morally obligated to keep the peace in the animal kingdom. See Linker, *supra* note 46, at 10; Epstein, *supra* note 58, at 37.

²⁰⁴ Harold Holzer, *Introduction to THE LINCOLN-DOUGLAS DEBATES 1-3* (Harold Holzer ed., 1993).

²⁰⁵ See *The Fifth Joint Debate at Galesburg (Oct. 7, 1858)*, in *THE LINCOLN-DOUGLAS DEBATES 246* (Harold Holzer ed., 1993); *The Sixth Joint Debate at Quincy (Oct. 13, 1858)*, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 205, at 300.

²⁰⁶ J.G. RANDALL, *LINCOLN AND THE SOUTH* 33 (1946).

²⁰⁷ *The Fifth Joint Debate*, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 205, at 248.

²⁰⁸ DAVID HERBERT DONALD, *LINCOLN* 221 (1995).

²⁰⁹ *Id.*; see DAVID ZAREFSKY, *LINCOLN, DOUGLAS, AND SLAVERY—IN THE CRUCIBLE OF PUBLIC DEBATE* 149 (1990); *The Sixth Joint Debate*, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 205, at 290.

²¹⁰ See ZAREFSKY, *supra* note 209, at 53.

²¹¹ See *id.*

sensed that, if Douglas succeeded, he was lost, and edged toward the center.²¹²

Lincoln called for slavery's end, while attempting to dodge the stones of "perfect equality" that Douglas kept hurling.²¹³ During their fourth debate at Charleston, Lincoln argued against the view that,

[B]ecause the white man is to have the superior position that the negro should be denied everything. I do not perceive because I do not court a negro woman for a [slave] that I must necessarily want her for a wife. My understanding is that I can just leave her alone.²¹⁴

In the sixth debate at Quincy, he was even more explicit:

I have no purpose to introduce political and social equality between the white and the black races . . . but . . . there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence—the right to life, liberty, and the pursuit of happiness.²¹⁵

Historians have made clear what Lincoln was trying to do.²¹⁶ Professor David Zarefsky argues Lincoln avoided "the slippery slope by which freedom led to racial equality" by declaring freedom an economic right that did not necessarily carry social and political equality with it.²¹⁷ Professor David Potter labeled Lincoln's the "minimum anti-slavery position," while Professor Garry Wills said Lincoln's "nub, the realizable minimum," was that "[a]t the very least, it was wrong to treat human beings as property."²¹⁸ Lincoln was a famously practical lawyer, president, and commander-in-chief, known in the courtroom, political arena, and war room for affably conceding one nonessential point after another, often lulling his opponent into believing he had

²¹² See DAVID M. POTTER, *THE IMPENDING CRISIS—1848–1861*, at 346 (1976).

²¹³ See *id.*

²¹⁴ *The Fourth Joint Debate at Charleston (Sept. 18, 1858)*, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 205, at 189.

²¹⁵ *The Sixth Joint Debate*, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 205, at 284.

²¹⁶ ZAREFSKY, *supra* note 209, at 243.

²¹⁷ *Id.*

²¹⁸ POTTER, *supra* note 212, at 346; GARRY WILLS, *LINCOLN AT GETTYSBURG—THE WORDS THAT REMADE AMERICA* 97 (1992); ZAREFSKY, *supra* note 209, at 34–35, 60–61, 193–94; see *The First Joint Debate at Ottawa (Aug. 21, 1858)*, in *THE LINCOLN-DOUGLAS DEBATES*, *supra* note 205, at 63; *The Fourth Joint Debate*, *supra* note 205, at 189; *The Sixth Joint Debate*, *supra* note 205, at 284.

conceded them all, while never allowing an essential point to slip away.

Professor Nussbaum agrees that "the basic idea (of animal rights) is to undo the regime of 'slavery' in which . . . animals now live, by the simple recognition that they are persons and that their lives are their own."²¹⁹ Obtaining any legal rights for nonhuman animals in the present legal system will require fighting from Lincoln's realizable minimum. Lincoln believed the physical, historical, legal, religious, economic, political, and psychological realities of the 1850s meant that taking more than one step at a time for black slaves would keep them enslaved. Today it means that advocating for too many rights for too many nonhuman animals too soon will keep every nonhuman animal enslaved.

D. *Can We Protect Nonhuman Animals by Making Them Property?*

Because I rely on the overarching values of Western jurisprudence, liberty and equality, and model the path toward basic legal rights for nonhuman animals on that trodden by humans in their struggle for civil rights, Judge Posner finds me just "another deer frozen in the headlights of *Brown v. Board of Education*."²²⁰ This demonstrates, in Posner's view, "a sad poverty of imagination," one

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 [for] 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.²²¹

As was clear from *Rattling the Cage*, if frozen at all, it is in the headlights of its companion case, *Bolling v. Sharpe*, not in *Brown* itself.²²² Not only did *Bolling* overrule *Plessy v. Ferguson*'s "separate but equal" rule, but, in my opinion, it "exemplifie[d] how a sure grasp of princi-

²¹⁹ Nussbaum, *supra* note 4, at 1548 (citations omitted).

²²⁰ Posner, *supra* note 1, at 539.

²²¹ *Id.*

²²² See *Bolling v. Sharpe*, 347 U.S. 497, 497 (1954); *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

ple, history, scientific fact, and the evolution of public morality can lead judges to a volte-face from a disgraceful series of rulings that conflict with a more principled tradition."²²³ That tradition was not human chattel slavery, Jim Crow laws, and "separate but equal," but the grander, more fundamental tradition of equality.

Appeal to fundamental principles at a high level of generality can transcend constitutional jurisprudence; it is how the common law operates. Lemuel Shaw, mid-nineteenth century Chief Justice of the Supreme Judicial Court of Massachusetts, and probably the most respected American state judge of his time, wrote the common law "consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to all the circumstances of the particular cases that fall within it."²²⁴ Certainly that was what Lord Mansfield, perhaps the most respected common law judge who ever lived, appealed to in *Somerset v. Stewart*, his famous eighteenth century decision to free the slave, James Somerset: "[t]he state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only [by] positive law. . . . It's so odious, that nothing can be suffered to support it but positive law."²²⁵

In *Rattling the Cage*, I bisected common law judges into those with a Formal, and those with a Substantive, vision of law.²²⁶ All Formal judges rely heavily on precedent, valuing past judicial decisions simply for having been decided.²²⁷ I further divided Formal judges into three categories.²²⁸ Precedent (Rules) Judges follow narrow legal rules because they value legal stability and certainty.²²⁹ Precedent (Principles) Judges also value stability and certainty, but believe that precedents set forth broad principles, and it is these principles, and not the narrow rules etched by particular applications, that they should follow.²³⁰

²²³ WISE, *supra* note 2, at 260; see *Bolling*, 347 U.S. at 500; *Brown*, 347 U.S. at 495; *Plessy v. Ferguson*, 163 U.S. 537, 548, 550-51 (1896). Between *Brown* and *Bolling*, the Justices unanimously held that segregated schools violated both the liberty rights and equality rights of black children. See *Bolling*, 347 U.S. at 500; *Brown*, 347 U.S. at 495.

²²⁴ *Norway Plains Co. v. Boston & Me. R.R.*, 67 Mass. (1 Gray) 263, 267 (1854).

²²⁵ 98 Eng. Rep. 499, 510 (K.B. 1772).

²²⁶ See WISE, *supra* note 2, at 94-100.

²²⁷ See *id.* at 94-95.

²²⁸ *Id.* at 95-97.

²²⁹ *Id.* at 96.

²³⁰ See *id.* at 97.

Precedent (Policy) Judges adhere to policies contained in precedents.²³¹

On the other hand, Substantive Judges look not to the past, but to the present or future.²³² Judges who value "goal reasons" and try to predict the future effect of their decisions on society, I call Policy Judges.²³³ Judges who value "rightness reasons" and find them embedded not just in precedents, but in religion, ethics, economics, politics, almost anywhere, I call Principle Judges.²³⁴

The differences between Formal and Substantive Judges was well-illustrated in the *New York Times* obituary of Lord Denning, one of the purest Substantive Judges of the twentieth century.²³⁵ One Substantive lawyer admirably noted that Denning had "steered the law towards the administration of justice rather than the administration of the letter of the law," while a Formal Lord Chancellor grouched that "[t]he trouble with Tom Denning is that he's always remaking the law, and we never know where we are."²³⁶

Judge Posner disapproves of my argument that Formal Judges grant basic legal rights to chimpanzees and bonobos as a matter of precedent, because I rely upon argument from analogy.²³⁷ Judge Posner is no Formal Judge. But arguing from analogy is how Formal Judges decide cases. Today, most common law judges invoke principles, not rules, when fundamental rights are at stake. Because liberty and equality are embedded in the common law (in the law of constitutions and international instruments as well), Precedent (Principles) Judges, arguing from analogy at a high level of generality, measure the justice and moral rightness of their re-examination of the justice of ancient legal rules, whether they involve legal thinghood of human slaves or nonhuman animals, and construct new and more just legal rules, and not just in the old ways. Because they almost always believe in the moral rightness of liberty and equality, and believe that most others believe it too, modern Principles Judges almost always ground their decisions in these two basic principles.

²³¹ See WISE, *supra* note 2, at 97.

²³² *Id.*

²³³ *Id.* at 99.

²³⁴ *Id.* at 99-100.

²³⁵ See Warren Hoge, *Lord Denning, 100, A Populist Who Enlivened British Courts*, N.Y. TIMES, Mar. 6, 1999, at A11.

²³⁶ *Id.*

²³⁷ Posner, *supra* note 1, at 533.

That is how it should be. Legal personhood should never turn on the mechanical operation of a narrow legal rule. No being should be denied legal personhood because others like him or her were denied them before or have always been denied them. This blindly perpetuates the most pernicious and invidious biases of which we humans are capable. Turning legal personhood on policy is as bad as linking it to narrow rules of precedent. Fundamental rights are intended precisely to protect a rights-holder *from* others, who might think that harming him or her is either good for them or good for society. For example, there are many reasons to support the argument that a woman should have the legal right to an abortion. But when judges of the New York Court of Appeals asserted in 1972 that the legal personhood of fetuses was a *policy* question, they were wrong.²³⁸ As one dissenter rightly complained, "[t]his argument was . . . made by Nazi lawyers and Judges at Nuremberg."²³⁹ Connecting fundamental rights to policy betrays the right, betrays the supplicant, and finally undermines the rights of the betrayer.

A judge might hold that any being—a human adult, infant, or fetus, a chimpanzee or a dog—should be a common law thing. But such a momentous decision should be made only after a careful weighing of the highest principles, for never does what is *right* more clearly trump what is *good* or what has *been* than when legal personhood, from which every legal right flows, is itself at stake.

In arguing that principle should determine legal personhood, I make no claim to objective truth. The evidence that judicial decisions are saturated with a judge's values is overwhelming and the more contentious the issue, the more influential those values will be. My argument—and I freely admit it is based on a value judgment—is this: those judges who, like me, supremely value liberty, equality, and reasoned judgment, and who despise slavery and genocide, should be prepared to analyze every claim for personhood, above all others, through the prisms of fundamental principles. Judges who do not share these values may analyze claims of basic rights in other ways.

Judge Posner is a famous Principles Judge, whose most basic principles are economic.²⁴⁰ Broadly, he argues "that the common law

²³⁸ *Bytn v. N.Y. City Health & Hosp. Corp.*, 335 N.Y.S.2d 390, 393 (1972).

²³⁹ *Id.* at 397 (Burke, J., dissenting).

²⁴⁰ See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 353–92 (1990) [hereinafter *THE PROBLEMS OF JURISPRUDENCE*]. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

does and should seek to maximize society's wealth."²⁴¹ He agrees that wealth maximization, like its first cousin, utilitarianism, or nationalism, Social Darwinism, or racialism,

treats people as if they were the cells of a single organism; the welfare of the cell is important only insofar as it promotes the welfare of the organism. Wealth maximization implies that if the prosperity of the society can be promoted by enslaving its least productive citizens, the sacrifice of their freedom is worthwhile.²⁴²

Perhaps related is his discussion of "*humanocentric* concerns . . . one which assigns no *intrinsic* value to animal welfare, but seeks reasons strictly of human welfare for according or denying rights to animals. . . . It focuses on the consequences *for us* of recognizing animal rights."²⁴³

Judge Posner agrees that his touchstone principle, wealth maximization, "is contrary to the unshakable moral intuitions of Americans," and stresses that "conformity to intuition is the ultimate test of a moral (indeed of any) theory."²⁴⁴ "[A]t least in the present relatively comfortable conditions of our society," he concedes, "the regard for individual freedom appears to transcend instrumental considerations; freedom appears to be valued for itself rather than just for its contribution to prosperity."²⁴⁵ He makes the point that "a system of rights . . . may well be required by a *realistic* conception of utilitarianism, that is, one that understands that given the realities of human nature a society dedicated to utilitarianism requires rules and institutions that place checks on utility-maximizing behavior in particular cases."²⁴⁶ It appears, therefore, that in the realm of basic human rights, Judge Posner allows that wealth maximization principle is trumped by liberty and equality, even if he believes this should not be the case.²⁴⁷

How can this be squared with Judge Posner's claim that, when it comes to the enslavement of chimpanzees and bonobos, I have "over-

²⁴¹ THE PROBLEMS OF JURISPRUDENCE, *supra* note 240; at 361.

²⁴² *Id.* at 376-77.

²⁴³ Posner, *supra* note 1, at 537. Judge Posner says he does not seek to defend the humanocentric approach, but to explain it "because it is the approach most likely to recommend itself to most people in wealthy, basically secular societies, such as the present-day United States." *Id.*

²⁴⁴ THE PROBLEMS OF JURISPRUDENCE, *supra* note 240, at 377.

²⁴⁵ *Id.* at 379.

²⁴⁶ *Id.* at 378.

²⁴⁷ See *id.* at 379-80.

looked the possibilities of commodification."²⁴⁸ It cannot. "One way," he claims, "to protect animals is to make them property, because people tend to protect what they own."²⁴⁹ But "[w]e speak of slavery as degrading to persons because in slavery, individuals are valued as mere commodities . . . rather than as persons, worthy of the higher valuation of respect."²⁵⁰ A major lesson of our long experience with human slavery is that, at the level of basic rights, there is no liberating potential in commodification whatsoever and that humans are more likely to exploit what they own than they are to protect it, especially if they can obtain more of the commodity once they have used it up. We continue to learn this hard lesson in the area of the environment.

In the United States, the commodification of nonhuman animals leads to almost ten billion slaughtered annually for food, most of them dying after living a terrible, painful life on a factory farm.²⁵¹ Each was owned and killed either by, or with the permission of, the animal's owner. Tens of millions of nonhuman animals are consumed annually in biomedical research in the United States. Each was owned at the time of death and was also killed either by, or with the permission of, his owner. The benefits to them of commodification are therefore hard to discern. Judge Posner's argument merely reiterates Nozick's "utilitarianism for animals, Kantianism for people."²⁵²

Even companion animals would not benefit from commodification, for their value to their owners is noneconomic and nonutilitarian. Otherwise, they would not be companion animals. Companion animals are not fungible, as are nonhuman animals killed in agriculture or biomedical research. At best, they have an incidental economic or utilitarian value, for they are essentially family, quasi-

²⁴⁸ Posner, *supra* note 1, at 539.

²⁴⁹ *Id.*

²⁵⁰ ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 71 (1993).

²⁵¹ USDA, *LIVESTOCK SLAUGHTER 2000 SUMMARY* 1 (2000). This includes 41.7 million cattle and calves, 115.2 million pigs, 4.3 million sheep and lambs, 8.792 billion 'broiler' chickens, 429.7 million laying hens, 304 million turkeys, and 26.1 million ducks, for a total of 9.713 billion nonhuman animals.

²⁵² NOZICK, *supra* note 195, at 39. Here I rebut Professor Epstein's unusual claim that animal rights activists often deny that human beings benefit from their current use (and abuse) of animals. See Epstein, *supra* note 58, at 34. Slave-owners always benefit from the use (and abuse) of slaves.

children.²⁵³ They may even be metaphorical extensions of the human companions themselves.²⁵⁴

Thus, one reason I appear insensitive to the "liberating" potential of commodification of nonhuman animals is that it does not exist. Another reason is that a main purpose of *Rattling the Cage* was to demonstrate that the argument for the basic legal rights of at least some nonhuman animals lies squarely in the mainstream of the most important traditional common law values and principles. This is untrue at the level of specific legal rules. Here Judge Posner is correct: I am asking judges to step onto a new path of doctrinal growth—giving nonhuman animals basic legal rights.

Precedent (Rules) Judges will be unimpressed. But viewed at a higher level of generality, I am not asking judges to do anything they have not been routinely doing for centuries and which they consider to be important work, protecting bodily integrity and bodily liberty by applying fundamental principles of liberty and equality. As I stated in *Rattling the Cage*:

The decision to extend common law personhood to chimpanzees and bonobos will arise from a great common law case. Great common law cases are produced when great common law judges radically restructure existing precedent in ways that reaffirm bedrock principles and policies. All the tools for deciding such a case exist. They await a great common law judge, a Mansfield, a Cardozo, a Holmes, to take them up and set to work.²⁵⁵

E. Legal Rights and Personhood

1. What Are Legal Rights?

What nonlawyers think of as one legal right is usually a bundle. Professor Wesley Hohfeld untied these bundles a century ago.²⁵⁶ I

²⁵³ Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33, 44-50 (1998).

²⁵⁴ See *id.* at 67-68.

²⁵⁵ WISE, *supra* note 2, at 270.

²⁵⁶ WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 64 (Walter Wheeler Cook ed., 1919); see W.L. MORISON, JOHN AUSTIN 164-65 (1982); Walter J. Kamba, *Legal Theory and Hohfeld's Analysis of a Legal Right*, JURID.

classify legal rights the way Hohfeld did. Although moral and legal philosophers have sought to classify legal rights in numerous ways, Hohfeld's system:

remains both the *lingua franca* of much scholarly rights talk and the "standard model" of legal rights with which other scholars tinker. In whole or in part, it was adopted by various Restatements of the Law, as well as by Black's Law Dictionary. Most importantly, Hohfeld's sense of a right as something that confers legal advantage expressly or implicitly dominates the working world of even those lawyers and judges who have never heard of Hohfeld.²⁵⁷

Hohfeld thought every jural relationship was binary, existing between two legal persons concerning one thing.²⁵⁸ A right is an advantage conferred by legal rules upon a legal person with one legal person having the legal advantage (the right) and the other legal person bearing the correlative legal disadvantage.²⁵⁹ Like low and high pressure systems on a weather map, neither exists alone and Hohfeld defined them in relation to each other.²⁶⁰

Hohfeld set out four kinds of legal rights, each defined in terms of its correlative.²⁶¹ The "liberty" (which correlates with "no right") allows us do what we please, but has little practical value because no one need respect the right.²⁶² The second is the "claim" (which correlates with the duty).²⁶³ It commands respect and can constrain liberty because one person has a duty to act or not in certain ways towards another person with a claim.²⁶⁴ Many hostile to the idea of "animal rights"—even those within the scientific community who know how smart and cultured apes are—assert apes cannot have legal rights because they are unable to shoulder responsibilities or, even more strin-

REV. 249, 249 (1974); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 989 n.22 (1982).

²⁵⁷ WISE, *supra* note 111, at 800-01; see WISE, *supra* note 2, at 53-61.

²⁵⁸ See SUMNER, *supra* note 152, at 19-20; WISE, *supra* note 2, at 53.

²⁵⁹ See David Lyons, *The Correlativity of Rights and Duties*, 4 NOÛS 45-46 (1970).

²⁶⁰ See WISE, *supra* note 111, at 799-822 (discussing Hohfeld's system of rights).

²⁶¹ REX MARTIN, *A SYSTEM OF RIGHTS* 30 (1993).

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ HOHFELD, *supra* note 256, at 38-39.

gently, live within a moral community.²⁶⁵ I discussed this in *Rattling the Cage*.

Must a person be able to physically *make* a claim in order to *have* one? The answer depends upon whether one emphasizes the "claim" part or the "duty" part of the claim-duty pairing. One school of legal scholars (we'll call them the Benefit/Interest School) emphasizes "duty." Any being with interests—an adult woman, a profoundly retarded man, an infant, a chimpanzee, or a dolphin—could, if allowed to be a legal person, have a claim that correlates to another person's duty. The opposing school (the Control/Choice School) accents "claims." These scholars argue that a person must actually have the mental wherewithal to be able to choose to make a claim and to control how it is made.²⁶⁶ Profoundly retarded men and infants, who lack these mental abilities, cannot then have claims. An even stricter branch of the Control/Choice School . . . says that claims and duties can only exist between members of a "moral community." Unless one has the capacity not just to choose but to act morally, one can have no claims.

If required to meet the more stringent requirements of the Strict Control/Choicers, none but the most extraordinary nonhuman animal could ever have a claim. But here's the rub: Millions of human beings would also be ineligible—and not just the profoundly retarded, but the insane, the permanently vegetative, and the very young. Many more human adults and older children, and perhaps even apes, whales, and parrots, might have claims if the Control/Choice School prevailed. But vast numbers of human beings would still be ineligible, as would most other animals. However, if the Benefit/Interest School triumphs, aside from the permanently vegetative, virtually every human being would

²⁶⁵ See FRANS DE WAAL, *GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS* 215 (1996); D. Balasubramanian, *Are Animals Persons?*, *THE HINDU*, Dec. 7, 2000, available at <http://www.indiaserver.com:80/thehindu/2000/12/07/stories/08070007.htm>; Frans de Waal, Editorial, *We the People (and Other Animals)* . . . , *N.Y. TIMES*, Aug. 20, 1999, at A21; Hutchins, *supra* note 53, at 856; Linker, *supra* note 199, at 43; Malik, *supra* note 106, at 675-76.

²⁶⁶ See, e.g., Hart, *supra* note 166, at 171, 191-92, 196-97.

be entitled to claims; but so would a large number of other animals.²⁶⁷

Advocates of the Control/Choice and Strict Control/Choice Schools are kin to Kantians who demand full autonomy for liberty rights. Benefit/Interest advocates are much closer to the realistic or practical autonomy that I argue is sufficient for basic legal rights. However, to be conservative in *Rattling the Cage*, I did not argue that nonhuman animals are entitled to claims.

In Hohfeld's third class of legal rights, a person can use a "power" (which correlates with the "liability") to affect another's legal rights, with the power to sue perhaps the most important.²⁶⁸ It is not clear whether someone has to be smart enough to assert a power in order to have it. They probably do not. Again, to be conservative, I did not argue that nonhuman animals are entitled to powers.²⁶⁹ Last, an "immunity" (which correlates with the disability) legally disables another person from interfering with the rights-holder.²⁷⁰ Claims dictate what we *should not* legally do, immunities dictate what we *cannot* legally do.²⁷¹ I may kidnap you, but I cannot enslave you because human bondage is "impossible" under domestic and international law. Persons are *immune* from enslavement.²⁷²

I did not argue that chimpanzees and bonobos necessarily have claims against humans for violation of duties toward them or the power to sue, though I implied they should.²⁷³ But rational arguments cannot be made that someone must be smart enough to assert an immunity, or be able to choose, control, or shoulder responsibilities to have an immunity, as immunities do not need to be asserted, claimed, or controlled; nor do they correlate with responsibilities or duties.²⁷⁴ Immunities as freedom from slavery and torture are the most basic kind of rights and it is these to which chimpanzees and bonobos, like human beings, are most clearly entitled.²⁷⁵ The nature

²⁶⁷ WISE, *supra* note 2, at 57.

²⁶⁸ See *Virani v. Jerry M. Lewis Truck Parts & Equip., Inc.*, 89 F.3d 574, 578 (9th Cir. 1996) (quoting JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 59 (1990)); P.J. FITZGERALD, *SALMOND ON JURISPRUDENCE* 229-30 (12th ed. 1966).

²⁶⁹ I implied, however, that they should have these rights. WISE, *supra* note 2, at 59-60.

²⁷⁰ Kamba, *supra* note 256, at 257.

²⁷¹ SUMNER, *supra* note 152, at 37-38.

²⁷² *United States v. Choctaw Nation*, 38 Cl. Cl. 558, 566 (1903), *aff'd*, 193 U.S. 115 (1903); see MARTIN, *supra* note 261, at 30.

²⁷³ WISE, *supra* note 2, at 56-57, 59-60.

²⁷⁴ See *id.* at 59.

²⁷⁵ See *id.*

of immunities insulates them from the struggle between Control/Choice Theory and Benefit/Interest Theory that characterizes claim-rights and power-rights. Even prominent Control/Choice Theorists concede that immunity-rights shield "certain freedoms and benefits now regarded as essentials of human well-being" and are "essential for the maintenance of the life, the security, the development, and the dignity of the individual."²⁷⁶ Critics who argue that legal rights require responsibilities, duties, or the abilities to choose or control fail to grasp the essence of an immunity-right or explain how the millions of humans—children, infants, the very retarded, the profoundly senile—who lack these advanced cognitive skills can have immunity rights. And though the occasional commentator admits what Professor Carl Wellman calls that "monstrous conclusion"—those who lack the ability to choose or control are not entitled to legal rights—most do not.²⁷⁷

"Why does the law provide protection for children—and for the mentally disabled, who also might not be rational and autonomous—but not for apes?" asked journalist Kenan Malik in *Nature*. His answer:

[b]ecause children normally grow up to be full members of the moral community. . . . As for mentally disabled people, we provide them protections because they once possessed the potential to be a moral being. Children and the mentally handicapped are of the same kind as adult, autonomous humans: the kind whose normal instance is a moral being. Apes are not.²⁷⁸

Malik's argument is illogical. *Homo sapiens* cannot rationally be designated as the boundary of any relevant "kind" that includes every fully autonomous human. Other "kinds" exist. Some are broader—great apes, apes, primates, mammals, vertebrates, and animals. Some "kinds" are more narrow. The categories of adult humans and normal adult humans also contain every autonomous moral human.

Malik's claim of group benefits is also morally flawed. Philosopher James Rachels has pointed out that it "assumes that we should determine how an individual is to be treated, not on the basis of *its* qualities but on the basis of *other* individual's qualities."²⁷⁹ Even Pro-

²⁷⁶ H.L.A. Hart, *Bentham on Legal Rights*, in OXFORD ESSAYS IN JURISPRUDENCE 171, 197, 198 (A.W.B. Simpson ed., 1973); see WELLMAN, *supra* note 166, at 113.

²⁷⁷ WELLMAN, *supra* note 166, at 113–14; see, e.g., Malik, *supra* note 106, at 676.

²⁷⁸ Malik, *supra* note 106, at 676.

²⁷⁹ RACHELS, *supra* note 177, at 187.

fessor Tribe, who supports racial and sexual affirmative action, has acknowledged the "tenaciously-held principle . . . with undeniable constitutional roots . . . that each person should be treated as an individual rather than as a statistic or as a member of a group—particularly of a group the individual did not knowingly choose to join."²⁸⁰

This does not mean that racial or sexual affirmative action is always wrong or should be illegal. Something like Malik's notion of group benefits is occasionally used to *correct* the effects of prior discrimination in the United States. Even so, judges often manifest what Professor Tribe called a "considerable unease" in sharply divided endorsements of affirmative action plans.²⁸¹ Judges are not alone. In a *New York Times*/CBS poll taken at the end of 1997, 25% of Americans wished to abolish affirmative action programs outright, 43% wanted them changed, and just 24% wanted to leave them as they are.²⁸²

About the constitutionality of conclusive presumptions, Professor Tribe wrote:

In fact, our laws and traditions do not typically condemn regulations that automatically group together everyone who violates some flat rule, like everyone who goes above the posted speed limit, regardless of individual circumstances. . . . In the same way, our laws and traditions don't condemn a college for giving group preferences to alumni children, or to kids from Alaska in a Missouri school that prizes geographical diversity. Our laws and traditions don't condemn a state for setting a drinking age of twenty-one without allowing exceptions for unusually mature twenty-year-olds. When Steve [Wise], who condemns assigning rights purely on the basis of where the group we call "human" begins and ends, would extend rights to chimps and bonobos as kinds of beings about which he has adduced impressive evidence relevant to the group as a whole, he wouldn't administer a battery of IQ tests to each individual chimp before declaring it eligible for those newly pro-

²⁸⁰ TRIBE, *supra* note 108, at 1527–28, 1589.

²⁸¹ See, e.g., *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996); TRIBE, *supra* note 108, at 1523.

²⁸² Sam Howe Verhovek, *In Poll, Americans Reject Means But Not Ends of Racial Diversity*, N.Y. TIMES, Dec. 16, 1997, at A1.

claimed rights. He, like all of us, would make decisions on a group basis even as he purports to condemn doing so.²⁸³

But our values and traditions do condemn the turning of fundamental rights, even personhood itself, upon some status such as race, sex, religion, or national origin in the absence of some powerful reason, as they condemn serious incursions upon dignity or fundamental interests, as well as invidious discrimination against the traditionally powerless.²⁸⁴ Our laws and traditions do not tolerate setting different drinking ages for men and women, permitting colleges to give group preferences to whites over blacks, or condemning only Jews who go over the speed limit.

Contrary to Professor Tribe's belief, practical autonomy entitles individuals, not groups, to basic legal rights. Strictly speaking, individual results are anecdotes; the results cannot be generalized to other species members. But, as comparative psychologist Marc Hauser notes:

[T]here are anecdotes and there are anecdotes. For example, Jane Goodall provides a detailed account of the murderous attacks by Passion [a chimpanzee] on all of Pom's [another chimpanzee's] infants. This is a single case study of chimpanzee brutality, but the details are extensive. In this sense, many of the cases of deception from captive apes come from detailed observations of a single animal over years and years of observation. Rejecting these single cases would be like ignoring someone who announced that they [sic] had a dog who could write computer code in Pascal, C, and Fortran. One would be foolish to ask for twenty more dogs in order to seal the case shut! One case shows that a capacity exists in the species.²⁸⁵

Professor Irene Pepperberg, acclaimed for her linguistic work with Alex, an African Grey parrot, agrees: "If one subject reliably performs a given task at a particular age, the tested aptitude is within the species' capacity at that point in development."²⁸⁶ That so many randomly chosen chimpanzees and bonobos have been shown so clearly

²⁸³ Tribe, *supra* note 75, at 6.

²⁸⁴ See TRIBE, *supra* note 108, at 1451-54, 1463-65, 1514-21.

²⁸⁵ MARC D. HAUSER, *WILD MINDS—WHAT ANIMALS REALLY THINK* 159 (2000).

²⁸⁶ IRENE PEPPERBERG, *THE ALEX STUDIES—COGNITIVE AND COMMUNICATIVE ABILITIES OF GREY PARROTS* 184 (1999).

to have practical autonomy is a powerful indicator that every normal chimpanzee has it. But to the degree that practical autonomy is necessary for basic legal rights, one who lacks it is not entitled.

Elsewhere, Professor Tribe has written that:

to tailor all determinations to the individual case would be to encourage arbitrary choices, choices that depart from the goal of treating similar cases similarly, and choices that could well conceal substantively impermissible grounds of decision. This much, at least, the notions of "suspect classifications" and "conclusive presumptions" have in common: both seem easiest to apply when the issue involves the exercise of a right we have come to regard as constitutionally "fundamental," such as the right to bodily integrity. . . . And conclusive presumptions need not be abandoned wholesale in order to concede that readily disprovable generalizations about children . . . cannot suffice to justify what would, absent the fact of childhood, constitute an action beyond the power of the state.²⁸⁷

Human newborns have legal rights. More controversially, fetuses, even ova, have rights in some American states.²⁸⁸ This may result from the legal fiction that they are autonomous; or it might result from the application of another sufficient condition for basic rights, even one, such as being human, resulting from arbitrariness or bias; or it might have something to do with autonomy. A being may not be autonomous, but she may be believed to have the potential for autonomy, and if she has that potential, she should be treated as if she were autonomous now.

Potential for autonomy, however, justifies treating one who lacks autonomy as if she does not no more (and probably less) than does the fact that one's potential for dying justifies treating her as if she were dead or one's potential for attaining the age of eighteen justifies treating a three-year old as if she has reached majority.²⁸⁹ Philosopher Joel Feinberg thinks that allocating rights based on potential is a logical error.²⁹⁰ Potential autonomy gives rise only to potential rights. Ac-

²⁸⁷ TRIBE, *supra* note 108, at 1589-90.

²⁸⁸ Wise, *supra* note 111, at 897.

²⁸⁹ ERIC RAKOWSKI, *EQUAL JUSTICE* 359 (1991).

²⁹⁰ See Joel Feinberg, *Potentiality, Development, and Rights*, in *THE PROBLEM OF ABORTION* 145 (Joel Feinberg ed., 2d ed., Wadsworth Publishing 1984).

tual autonomy gives rise to actual rights.²⁹¹ For example, any thirty-five year-old American-born citizen is a potential president of the United States. As philosopher Stanley Benn wrote, "A potential president of the United States is not on that account Commander-in-Chief."²⁹² Every sperm and every ovum can potentially unite to make a president of the United States.²⁹³ Even the potentiality argument fails to explain why the common law would grant basic human rights to adult humans who never had autonomy and never will.

Any single right I call a "bare right." Bare rights protected by other legal rights that may be judicially unenforceable I call "protected rights." A right enforceable by a court I call an "enforceable right." A bare negative liberty-right, say to bodily integrity, is not protected until embedded within an immunity-right or associated with a claim-right to noninterference. It is not enforceable until associated with a power-right to judicial enforcement. Most modern rights analyses therefore assume that a liberty-right requires a set of Hohfeldian rights to be of practical value.²⁹⁴

Protected and enforceable rights are, in Professor L.W. Sumner's term, "molecular,"²⁹⁵ appearing as "conjunctions" of Hohfeldian rights, using Professor John Finnis's term,²⁹⁶ or as "cluster-rights," in Professor Judith Jarvis-Thomson's words. Professor Wellman has persuasively argued that a protected or enforceable right has a "core" that "defines both its content (what it is a right to) and its scope (who holds the right against whom). . . . The periphery of a right is then composed of any further ingredients which are added in order to enhance or protect its core."²⁹⁷ Molecules, conjunctions, clusters, and peripheries are all metaphors for protected and enforceable rights.

²⁹¹ *Id.* at 145; see H. TRISTRAM ENGELHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* 143 (1986).

²⁹² Stanley I. Benn, *Abortion, Infanticide, and Respect for Persons*, in *THE PROBLEM OF ABORTION*, *supra* note 290, at 143.

²⁹³ See JEFFREY REIMAN, *ABORTION AND THE WAYS WE VALUE HUMAN LIFE* 63-64 (1999).

²⁹⁴ See *In re Farmers Mkts., Inc.*, 792 F.2d 1400, 1403 (9th Cir. 1986); *Standard Oil Co. v. Clark*, 163 F.2d 917, 930 (2d Cir. 1947); *Douglas v. E. & J. Gallo Winery*, 137 Cal. Rptr. 797, 801 n.7 (Cal. Ct. App. 1977); SUMNER, *supra* note 152, at 48; WELLMAN, *supra* note 166, at 7-8, 81, 108-09; Jeremy Waldron, *Introduction to THEORIES OF RIGHTS* 8 (Jeremy Waldron ed., 1984).

²⁹⁵ SUMNER, *supra* note 152, at 19.

²⁹⁶ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 200-01 (1980).

²⁹⁷ SUMNER, *supra* note 152, at 48; see WELLMAN, *supra* note 166, at 7-8.

But perhaps Hart's notion of a "protective perimeter" around core rights is most evocative.²⁹⁸

The legal rights to bodily integrity and bodily liberty are basic Hohfeldian immunities that disable others from legally interfering with liberty. An immunity is a bare or core right, unprotected and unenforceable. But even a bare immunity has value. In some circumstances it can be vindicated by others who clearly possess legal rights, as occurred in the famous case of *Somerset v. Stewart*, in which English citizens were able to vindicate the right to bodily liberty of the slave, James Somerset, by obtaining a writ of habeas corpus on his behalf. Most citizens will respect important rights of others. Even an unenforceable immunity has great symbolic or expressive value. And judges may give the holder of an immunity the power to sue to enjoin its violation.²⁹⁹

2. Why Not Just Extend and Vigorously Enforce Anti-Cruelty and Animal Welfare Laws?

a. *The Power of Legal Rights*

In *Rattling the Cage*, I wrote that legal rights are "the least porous barrier against oppression and abuse that humans have ever devised" ³⁰⁰ Because "innate rights provide stronger protections against abuse than the traditional noblesse oblige of welfare theory," ³⁰¹ I argued that chimpanzees and bonobos should be designated common-law persons with basic rights to bodily integrity and bodily liberty. ³⁰² Judge Posner accuses me of

overlook[ing] 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 vigor-

²⁹⁸ Hart, *supra* note 276, at 180.

²⁹⁹ WISE, *supra* note 2, at 59; see *Somerset*, 98 Eng. Rep. at 510.

³⁰⁰ WISE, *supra* note 2, at 236.

³⁰¹ Verchick, *supra* note 103, at 222.

³⁰² See WISE, *supra* note 2, at 239-65. I did not argue, as some have written, that chimpanzees and bonobos are entitled to constitutional rights. But see, e.g., Posner, *supra* note 1, at 531, 539.

ously to enforce, laws designed to prevent gratuitous cruelty to animals.³⁰³

A monger is a person "who attempts to stir up or spread something that is usu[ally] petty or discreditable."³⁰⁴ Should we forsake the allegedly discreditable or petty argument that chimpanzees and bonobos should have basic legal rights and work instead to extend, strengthen, and enforce anti-cruelty and animal welfare laws?

Judge Posner is not alone in questioning my decision to push for legal rights, rather than the mere extension and vigorous enforcement of existing anti-cruelty and animal welfare laws. Professor Nussbaum wrote,

Oddly, Wise does not explore other ways in which the statutes against animal cruelty that currently exist in every state might be both extended and better enforced, for example, by developing a better view of the conditions under which human beings have standing to sue in court to enforce these laws.³⁰⁵

Lt. Commander Conrad wrote that

if the current animal welfare laws are inadequate the solution is not to create instant fundamental rights, but to strengthen the current laws by more vigorously pursuing violations and increasing punishments. . . . We need to enforce existing laws better and we need to improve on those laws where they are deficient.³⁰⁶

Attorney Lisa Stansky asked, "How is legal personhood for animals more powerful than vigorous enforcement or legislative overhaul of anti-cruelty laws?"³⁰⁷

Why "animal rights" rather than "animal welfare?" Professor Verchick likens the tension between the two to that which existed between the early and present Critical Legal Studies movement.³⁰⁸ As with the early Critical Legal Studies movement, animal welfarism "dis-trusts rights rhetoric and strives for connection. For the welfarist, love

³⁰³ Posner, *supra* note 1, at 539.

³⁰⁴ MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 766 (9th ed. 1991).

³⁰⁵ Nussbaum, *supra* note 4, at 1547.

³⁰⁶ Conrad, *supra* note 97, at 231.

³⁰⁷ Stansky, *supra* note 11, at 95.

³⁰⁸ Verchick, *supra* note 103, at 221-22.

more than respect motivates us to care about nonhuman interests."³⁰⁹ Professor Verchick warns, "One must not underestimate the power of legal rights in a democracy."³¹⁰ Rights demand respect. He approves Professor Patricia Williams's charge that "[t]his 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."³¹¹ "The worst thing about rights, then," Verchick asserts, "is that there are not enough of them."³¹²

Professor Tribe agrees that legal rights are very important:

[E]ven when the assignment of rights to new entities is widely regarded as only a legal fiction—we all know the corporation isn't *really* a person—even when it's widely regarded as just a fiction, that assignment of rights can make a vast difference . . . in the real world. . . . Existing state and federal statutes depend on enforcement by chronically underfunded agencies and by directly affected and highly motivated people—and that's just not a sufficiently reliable source of protection. Recognizing the animals *themselves* by statute as holders of rights would mean that they could sue in their own name and in their own right. . . . Guardians would ultimately have to be appointed to speak for these voiceless rights-holders, just as guardians are appointed today for infants, or for the profoundly retarded, or for elderly people with advanced Alzheimer's, or for the comatose. But giving animals this sort of "virtual voice" would go a long way toward strengthening the protection they receive under existing laws ³¹³

Professor Nussbaum also notes,

[O]ne thing gained by using Wise's [rights-based] approach is moral directness. . . . Standing for humans to sue on behalf of animals has typically taken an indirect form: the human being has to claim to have an interest in looking at an

³⁰⁹ *Id.* at 222.

³¹⁰ *Id.* at 224.

³¹¹ *Id.* at 222 (quoting Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 424 (1987)).

³¹² *Id.*

³¹³ Tribe, *supra* note 75, at 3.

animal who has not been cruelly used. The rights-based view is morally superior, in that it focuses on the creature itself and in its own entitlement to a decent life.³¹⁴

b. *The Relationship Among Legal Rights, Legal Personhood, and Animal Welfare Laws*

In his review of *Rattling the Cage*, Professor Cass Sunstein thought it was "not clear why [Wise] needs to insist on 'personhood' for non-human animals."³¹⁵ Nonhuman animals, he believes, already have legal rights.³¹⁶ "In most states, it is usually a crime to abuse animals, and the legal right to be free from abuse often includes affirmative rights, including the right to adequate food and shelter."³¹⁷ Subsequently, Sunstein wrote that "[f]rom the legal point of view, there is nothing at all new or unfamiliar about the idea of animal rights; on the contrary, it is entirely clear that animals have legal rights, at least of a certain kind,"³¹⁸ that "[s]tatutes protecting animal welfare protect a form of animal rights,"³¹⁹ that "it would not be too much to say that federal and state law now guarantees a robust set of animal rights, at least nominally,"³²⁰ and that "animals have rights in the same sense that people have many rights that they cannot enforce on their own."³²¹ Contrary to Hohfeld's understanding of legal rights, Professor Sunstein thinks it unnecessary for nonhuman animals to be legal persons to have rights.³²² This follows from his pragmatic view of rights as "an enforceable claim of one kind or another," also contrary to Hohfeld's view.³²³ As Sunstein has written,

Any right has a range of components: (1) a substantive guarantee of some specified kind, often in the form of a presumptive immunity or guarantee; (2) powers of enforcement, perhaps limited to public authorities, perhaps extended to private right holders as well; (3) defenses and

³¹⁴ Nussbaum, *supra* note 4, at 1547 n.151 (citations omitted).

³¹⁵ Cass R. Sunstein, *The Chimps' Day in Court: A Lawyer Argues that Animals Should Have Legal Rights*, N.Y. TIMES, Feb. 20, 2000 (Book Review), at 26.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Cass R. Sunstein, *Standing for Animals*, 47 UCLA L. REV. 1333, 1335 (2000).

³¹⁹ *Id.* at 1335 n.9.

³²⁰ *Id.* at 1336.

³²¹ *Id.* at 1337 n.16.

³²² See *id.* at 1365.

³²³ Sunstein, *supra* note 318, at 1363.

excuses of rights violators, and (4) resources, large or small, devoted to rights protection.³²⁴

Sunstein gives the example that, before the American Civil War, black slaves were not considered persons, yet could bring suits: "[i]n particular, slaves were allowed to bring suit . . . to challenge unjust servitude."³²⁵

These so-called freedom suits, generally authorized by state statutes, allowed slaves to test the legality of their enslavement.³²⁶ Legislatures were anxious to provide a judicial forum in which illegally-enslaved whites (sometimes Indians) might prove the illegality of their enslavement.³²⁷ The important point is that freedom suits were not intended to allow the lawfully-enslaved to challenge to their enslavement, but to permit the illegally-enslaved to demonstrate this illegality. Freedom suits were similar to habeas corpus actions, but could be brought by the slave, his guardian, or next friend.³²⁸ The statutes generally assumed that slaves remained legal things with no legal rights, including the power-right to bring suit.³²⁹ These statutes allowed slaves to file avowedly fictitious suits for trespass, false imprisonment, and assault and battery, while pretending the slaves were not slaves for that single purpose.³³⁰ This was the route used by Dred Scott in his original Missouri state lawsuit.³³¹

Under Sunstein's definition, not only chimpanzees and bonobos have legal rights, but individuals belonging to many thousands of animal species as well. So do thousands of plants. The Federal Endangered Species Act, for example, defines "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature," and broadly allows citizen suits to enforce the Act

³²⁴ *Id.* at 1335.

³²⁵ *Id.* at 1361.

³²⁶ See Higginbotham & Higginbotham, *supra* note 88, at 1234-35.

³²⁷ See *id.*

³²⁸ See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR—RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD 194-95, 252-53 (1978); Higginbotham & Higginbotham, *supra* note 88, at 1235 n.125.

³²⁹ See Higginbotham & Higginbotham, *supra* note 88, at 1234.

³³⁰ *Id.* at 1234-36 (discussing the Virginia Freedom Suit Act of 1795); HIGGINBOTHAM, *supra* note 328, at 194-95 (South Carolina), 252-53 (Georgia); see *Peter*, 1848 WL 2754, at *1; *Coleman v. Dick & Pat*, 3 Va. (1 Wash) 233, available at 1793 WL 378, *5 (Va. 1793); SHAW, *supra* note 78, at 110 ("Briefly, and for the purpose of the trial, he could assume the guise of a free man.").

³³¹ *Scott v. Emerson*, 15 Mo. 387, 395 (1852).

against illegal takings.³³² In Sunstein's view, endangered plants would therefore have legal rights. Even inanimate objects such as buildings would have rights to the extent they were protected by law.

Legal personhood is "unquestionably central to American legal culture."³³³ "[B]roadly, . . . the law of the person raises the fundamental question of who counts for the purpose of law" and "is closely tied to moral and ethical considerations."³³⁴ I venture that legal rights are actually the building blocks of legal personality; without them there is no personhood. If I am correct, a "rightless person" is an oxymoron. That is certainly true in the Hohfeldian system of legal rights in which every jural relationship is constructed from a bare right and its correlative, and is, by definition, between two persons.³³⁵

The human rights scholar Professor Louis Henkin wrote:

In part, the concept of right is descriptive: jurisprudence (and language) developed it to describe legal relations, implying special entitlement, respected by the society with a sense of obligation, and generally enjoyed by the right-holder in fact. In large part, the concept of right is normative: a society develops the notion that someone has a legal right to something in order to assure, or at least enhance the likelihood, that he or she will enjoy it in fact. Recognizing that a claim is valid, giving it legal status as a right, itself contributes to the likelihood that it will be enjoyed in fact.³³⁶

A serious concern with the idea of rights without personhood is that it depreciates the importance, even the symbolism, of rights. Legal personhood counts because legal persons have rights. Legal persons count in some fundamental way. If every inanimate object and animate being who is the subject of legal protection has legal rights, they are stripped of the power and protection of its powerful expressive function; rights no longer symbolize something worth fighting, even dying, for. Rights are reduced to a public declaration that a legislature

³³² 16 U.S.C. § 1532 (16) (2000).

³³³ Note, *What We Talk About When We Talk About Persons*, 114 HARV. L. REV. 1745, 1746 (2001).

³³⁴ *Id.* at 1746, 1762.

³³⁵ Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 165 (1919-20), Kamba, *supra* note 256, at 251.

³³⁶ LOUIS HENKIN, *THE AGE OF RIGHTS* 38 (1990).

or court has decided to protect a building or a plant or an animal for any number of reasons.³³⁷

Judge Posner appears more likely to turn his scorn on Professor Sunstein's argument for legal rights than on mine. If he thinks that "[t]o be told now that slaves had rights is an example of how the movement for animal rights can depreciate human rights," what must he think of Professor Sunstein's argument for rights without personhood with rights being synonymous with some protection of law, which American slaves clearly had?³³⁸

Professor Tribe warns, "[W]e should not obsess over legal rights," for "rights are not all they are sometimes cracked up to be."³³⁹ Rights may be overridden or ineffectual, he writes, and "[i]f you lost the status of holding constitutional rights, it does not necessarily follow that you are going to be reduced to a thing."³⁴⁰ Law, he argues, "sometimes confers protections by identifying and prohibiting *wrongs*, rather than by bestowing *rights*, and it can prohibit those wrongs in terms that are sweeping enough to provide a shield that is independent of who or what the immediate victim of the wrong happens to be."³⁴¹ He notes, for example, that in one case, the United States Supreme Court wrote, "[I]t's not really material whether banks 'have' free speech rights under the Constitution, because the Constitution protects *freedom of speech*, not just the *speaker*."³⁴²

And in exactly the same way, if chimps and gorillas, for example, were deemed to possess no First Amendment rights of their own, the First Amendment would still ban government suppression of supposedly indecent sign language by these apes—at least if the sign language were directed to human listeners or observers. Similarly, the Eighth Amendment to the Constitution forbids all cruel and unusual punishments. Nothing is said about who is being punished. The language at least seems rather well-suited to the problem of cruelty to animals, although I wouldn't expect any of our current judges or justices to construe the language that generously. Best suited of all, the Thirteenth Amendment, which

³³⁷ See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2044–48 (1996).

³³⁸ Posner, *supra* note 1, at 538; see SHAW, *supra* note 78, at 160.

³³⁹ Tribe, *supra* note 75, at 3.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 3–4.

³⁴² *Id.* at 4. The case was *First National Bank v. Bellotti*, 435 U.S. 765 (1978).

prohibits slavery throughout the United States and which is not limited to government violations but extends to private conduct as well, simply says "Neither slavery nor involuntary servitude shall exist in the United States." Clearly, Jerom [the chimpanzee whose story of torture and death with which I began *Ratting the Cage*] was enslaved. I am not suggesting that today's judges would so read the Thirteenth Amendment; I am simply pointing out that our constitutional apparatus and tradition includes devices for protecting values even without taking the step of conferring rights on new entities—by identifying certain things that are simply wrong.³⁴³

Professor Tribe has also written, "Human beings are of course the intended beneficiaries of our constitutional scheme."³⁴⁴ The fetus exemplifies what happens when a being is denied the status of a federal constitutional person. This occurred in *Roe v. Wade*, where the United States Supreme Court said that a fetus was not a "person" within the meaning of the Fourteenth Amendment to the United States Constitution.³⁴⁵ The Court did not state this made the fetus a thing.³⁴⁶ But it could be destroyed.³⁴⁷

The Supreme Court of Texas has held that a fetus is not a "person" under the Texas Wrongful Death Act or Survival Statute.³⁴⁸ But the court's entire explanation for its rejection of the mother's alternative demand for damages for the destruction of her chattel was the statement, "[W]e hold as a matter of law, that a fetus is not relegated to the status of chattel."³⁴⁹ The upshot was that, in Texas, a fetus could be killed with civil impunity.³⁵⁰ And if a Texas fetus is neither person nor thing, what is it? And what of a preembryo, the term for a zygote until fourteen days after fertilization? The Tennessee Supreme Court held both that a trial court erred in holding that preembryos were persons and the Appellate Court erred in assuming they were prop-

³⁴³ Tribe, *supra* note 75, at 4 (quoting U.S. CONST. amend. XIII).

³⁴⁴ Tribe, *supra* note 75, at 108.

³⁴⁵ See 410 U.S. 113, 159-62 (1973).

³⁴⁶ See *id.*

³⁴⁷ See *id.* at 164-65.

³⁴⁸ See *Witty v. Am. Gen. Capital Distrib., Inc.*, 727 S.W.2d 503, 504-06 (Tex. 1987).

³⁴⁹ *Id.* at 506.

³⁵⁰ See *id.*

erty.³⁵¹ Preembryos "occupy an interim category that entitles them to special respect because of their potential for human life;" but the parties had "an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law."³⁵² It is not clear how this "interest in the nature of ownership" differs from a regular property interest. To the extent that a court holds that a being is not a person, it can be treated as a thing.

In the bank free speech case, somebody had rights! If the bank lacked the right to free speech, then a person in an audience had a right to receive speech, and the bank certainly had the power-right to bring the lawsuit. The Eighth Amendment's prohibition is generally limited to criminal punishments, which nonhuman animals are unlikely to suffer.³⁵³ The same goes for the signing ape. She might not have the free speech right to produce language, but some person has the right to receive it and some person has the right to bring suit. The Thirteenth Amendment states that "[n]either abolition of slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States"³⁵⁴ In *The Slaughter-House Cases*, the United States Supreme Court called it "this grand yet simple declaration of the personal freedom of all the *human race* within the jurisdiction of this government."³⁵⁵ Later, the Court said that "in Webster 'slavery' is defined as 'the state of entire subjugation of one *person* to the will of another.'"³⁵⁶ Whether the Court has incorporated the requirement of personhood into the Thirteenth Amendment or not, in the only reported case in which it was claimed the Amendment applied to a nonhuman, the

³⁵¹ *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992). "It follows that any interest that [the parties] have in the preembryos . . . is not a true property interest." *Id.* at 597; cf. LA. REV. STAT. ANN. § 9:123 (West 2000) ("An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law."); *id.* at § 9:124 (an in vitro fertilized human ovum has the right to sue and be sued); *id.* at § 9:126 (allowing a court to appoint a curator "to protect the in vitro fertilized human ovum's rights"); *id.* at § 9:129 (forbidding the intentional destruction of an in vitro fertilized human ovum).

³⁵² *Davis*, 842 S.W.2d at 597.

³⁵³ *Ingraham v. Wright*, 430 U.S. 651, 668-69 (1977).

³⁵⁴ U.S. CONST. amend. XIII.

³⁵⁵ 83 U.S. 36, 69 (1872) (emphasis added).

³⁵⁶ *Hodges v. United States*, 203 U.S. 1, 17 (1906) (emphasis added).

Florida Supreme Court concluded, without explanation, that it did not, because a greyhound was not a "party."³⁵⁷

c. *Are Legal Rights a Zero Sum Game and Is That a Bad Thing?*

Technically, legal rights may be a zero sum game. A master's rights are diminished whenever slavery, human or nonhuman, is abolished, while the slave's rights are increased. Is that a bad thing? The answer turns on a value judgment of the importance of the rights being given and those taken away. I believe the extension of dignity-rights to every being qualified to receive them strengthens the dignity-rights of all. Abraham Lincoln reminded Congress of this in the early years of the Civil War: "In giving freedom to the *slave*, we assure freedom to the *free*—honorable alike in what we give, and what we preserve."³⁵⁸ Illegitimate rights-holders, such as slave-owners, always suffer when stripped of their illegitimate rights. The extension of dignity-rights to chimpanzees and bonobos will have no greater impact upon human rights than the destruction of human slavery had upon the unjust rights of slave-owners, the regulation of child labor upon the unjust rights of sweatshop proprietors, and the abolition of sexual preferences upon the unjust rights of the hindered sex.

Correlatively, the dignity-rights of every human are undermined by the inevitable subverting of fairness, liberty, equality, and judicial integrity that occurs when dignity-rights are arbitrarily or invidiously denied to anyone qualified to receive them.

F. *Animal Rights and Religion*

Professor Tribe argues that:

crusades to protect new values, or to attach old values to new beings and new entities must take great care to avoid religious intolerance or antagonism. Here I tread on sensitive ground, and I may have misread some things in Steve's book, but at times arguing for animal rights appears to rest on a condemnation of religion, at least of Western religion, as the real culprit in helping people to rationalize self-serving subordination of the rest of the animal kingdom. True, religion and its crusades have been guilty of many things. But I think

³⁵⁷ *Wilson v. Sandstrom*, 317 So. 2d 732, 738 (Fla. 1975).

³⁵⁸ Abraham Lincoln, *State of the Union Address* (Dec. 1, 1862), in 5 *COLLECTED WORKS OF ABRAHAM LINCOLN* 537 (Roy P. Basler ed., 1953).

it a mistake to tie the protection of non-human animals so tightly, to anything, that might be understood as anti-religious or anti-spiritual. Making that link can obviously alienate scores of potential allies. And it seems to me basically fallacious.³⁵⁹

My arguments for the legal rights of chimpanzees and bonobos do not rest on a condemnation of religion. Religion is nearly irrelevant. Some religions, however, do rationalize the human subordination of all the nonhuman world. It is hard to dispute that religion has rationalized many forms of subordination, including human rights in general, human slavery, women's rights, abortion, and the environment.

Religion has often been indifferent, even hostile, toward human rights.³⁶⁰ The major Western religions, well-formed centuries before human rights appeared, long ignored them. The Atlantic slave trade was thoroughly dominated by Christians. Jews enslaved gentiles, Africans, and other Jews.³⁶¹ Islam, too, accepted slavery and its slave trade may have equaled the Atlantic slave trade.³⁶² American slave supporters trumpeted God's imprimatur on slavery from Genesis to Paul.³⁶³ Baptist Minister Thornton Stringfellow argued the institution of slavery had received "the sanction of the Almighty" and that the "control of the black race, by the white, is an indispensable Christian duty."³⁶⁴ Even the American Civil War did not strangle the claims of some orthodox Jews and Christian biblical scholars that human slavery was "an ordinance of God."³⁶⁵

Judeo-Christian theologians long articulated that women were to be subjugated by men.³⁶⁶ Gratian, the father of canon law, claimed that only men were made in God's image.³⁶⁷ Of the common law's long subjugation of married women, one seventeenth century English

³⁵⁹ Tribe, *supra* note 75, at 5.

³⁶⁰ HENKIN, *supra* note 336, at 183-88.

³⁶¹ See DAVIS, *supra* note 81, at 82-101; ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH—A COMPARATIVE STUDY* 40-41, 117 (1982).

³⁶² PATTERSON, *supra* note 361, at 117; RONALD SEGAL, *ISLAM'S BLACK SLAVES—THE OTHER BLACK DIASPORA* 1-12 (2001); THOMAS, *supra* note 134, at 37-39; see DAVIS, *supra* note 81, at 22.

³⁶³ See THOMAS, *supra* note 134, at 29-31.

³⁶⁴ THORNTON STRINGFELLOW, *SCRIPTURAL AND STATISTICAL VIEWS IN FAVOR OF SLAVERY* 105 (1856); see Thornton Stringfellow, *The Bible Argument, or, Slavery in the Light of Divine Revelation*, in COTTON IS KING AND PRO-SLAVERY ARGUMENTS 462 (1860).

³⁶⁵ DAVIS, *supra* note 81, at 112.

³⁶⁶ E.g., NANCY TUANA, *THE LESS NOBLE SEX—SCIENTIFIC, RELIGIOUS, AND PHILOSOPHICAL CONCEPTIONS OF WOMAN'S NATURE* 10-14, 157-59 (1993).

³⁶⁷ 1 Gratian, *Decretum*, col. 1254.

legal scholar thought "[t]he common laws here shaketh hand with divinitye."³⁶⁸ The struggle over abortion, says Ronald Dworkin, "has often had the character of a conflict between religious sects. In the United States, opinions about abortion correlate dramatically with religious belief. . . . The anti-abortion movement is led by religious groups, uses religious language, incessantly invokes God, and often calls for prayer."³⁶⁹ Science historian Lynn White made one of the most famous opening shots of the modern environmental movement in 1967 when, in the pages of *Science*, he wrote that our ecological problems come from "Christian attitudes toward man's relation to nature," attitudes that we are "superior to nature, contemptuous of it, willing to use it for our slightest whim."³⁷⁰

Almost everything White, and those like him, say about Christian rationalizations for despoiling the environment apply to Christian views of nonhuman animals, who are often seen as part of the environment. Recall Professor Sorabji's statement that the Stoic view of animals became embedded in Western Christianity "above all through Augustine."³⁷¹ Professor Waldau notes that, "*with regard to the status of other animals*," the subsequent Christian tradition "has been, with few exceptions, a footnote to his views" and the views of similar-thinking theologians.³⁷² Augustine thought that

members of the human species *alone* . . . matter among the earth's animals. This template is part of the inherently conservative feature of Christianity as it is bound to its scriptural inheritance and its preoccupation with tradition. The result is that the early refusal to take *any* other animals seriously has become a central, even honored, feature of the tradition.³⁷³

Augustine's ideas were heavily influenced, in turn, by the Genesis verses in which God gave humans dominion over the rest of Creation,

³⁶⁸ ANONYMOUS, *THE LAWES RESOLUTIONS OF WOMEN'S RIGHTS: OR, THE LAWES PROVISIONS FOR WOMEN* 125 (1632); see ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 7-8 (1996).

³⁶⁹ RONALD DWORKIN, *LIFE'S DOMINION—AN ARGUMENT ABOUT ABORTION, EUTHENASIA, AND INDIVIDUAL FREEDOM* 35, 36 (1993).

³⁷⁰ Lynn White, *The Historical Roots of Our Ecological Crisis*, 155 *SCI.* 1204, 1204 (1967); see also RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE—A HISTORY OF ENVIRONMENTAL ETHICS* 88-96 (1989) (discussing White's essay).

³⁷¹ See *supra* note 12 and accompanying text.

³⁷² WALDAU, *supra* note 127, at 200.

³⁷³ *Id.* at 200-01.

with dominion usually understood as equivalent to domination.³⁷⁴ Genesis and Augustine (and Aristotle for that matter) continue to influence modern religious thought. In 2001, for example, the Vatican's Pontifical Academy for Life did not object to the use of nonhuman animal transplants in human beings. "[T]he academy argues that because humans enjoy a unique and superior dignity, and God has placed non-human creatures at the service of people, the sacrifice of animals is justified as long as there will be a 'relevant benefit for humans.'"³⁷⁵ In a letter to *Nature*, two members of the Vatican's Pontifical Academy for Life wrote that "man has a right and duty to act within and on the created order, making use of other creatures to achieve the final goal of all creation: the glory of God through the promotion of man."³⁷⁶ The Catholic Catechism teaches that "[a]nimals, like plants and inanimate beings, are by nature destined for the common good of past, present, and future humanity."³⁷⁷ According to Professor Waldau, speciesism does not characterize just Roman Catholic doctrine; "mainline Christian tradition . . . has values, emphases, and exclusions that fit within the definition of speciesism used [by Professor Waldau]."³⁷⁸ Advocates did not allow the religious embrace of opposition to human rights in general, human slavery, women's rights, abortion, and the environment to stop them.

III. LOOKING TO THE FUTURE

A. A Proposal for the Determination of Basic Liberty Rights

In *Rattling the Cage*, I argued that normal adult chimpanzees and bonobos are entitled to the basic common law rights to bodily integrity and bodily liberty. In my upcoming book *Drawing the Line: Science and The Case for Animal Rights*, I examine the strength of the arguments for these basic common law rights for normal adult gorillas, orangutans, Atlantic bottlenosed dolphins, African elephants, African

³⁷⁴ See generally *id.* at 189–96, 205–06.

³⁷⁵ Xavier Bosch, *Vatican Approves Use of Animal Transplants 'to Benefit Humans'*, 413 NATURE 445, 445 (2001).

³⁷⁶ Archbishop Monsignor Elio Sgreccia et al., *Church Backing Depends on Ethical Use of Animals*, 414 NATURE 687, 687 (2001).

³⁷⁷ CATECHISM OF THE CATHOLIC CHURCH para. 2415 (2d ed. 1994).

³⁷⁸ WALDAU, *supra* note 127, at 216. The Judeo-Christian tradition does not stand alone. Professor Waldau explores Buddhist attitudes toward nonhuman animals. While not speciesist to the degree of the Christian tradition, the Buddhist tradition is also hierarchical and accepts uses of nonhuman animals that harm them. *Id.* at 113–15.

Grey parrots, dogs, and honeybees, assigning each an "autonomy value" between zero and one and setting up four categories.

When a range of behaviors in an evolutionary cousin closely resembles ours, as do those in normal adult chimpanzees and bonobos, we can confidently assign her a value of almost 1.00. I assign normal adult chimpanzees and bonobos a value of 0.98 and place any animal with an autonomy value of 0.90 or greater into Category One. These animals clearly possess practical autonomy sufficient for basic liberty rights. They are probably self-conscious and pass the mirror self-recognition (MSR) test. The standard MSR test was developed by psychologist Gordon Gallup, Jr. in the 1970s, working with chimpanzees.³⁷⁹ Gallup placed red marks on the heads of anesthetized chimpanzees, then watched to see if they touched the marks when peering into a mirror. He assumed if they did, they were self-aware.³⁸⁰ Gallup's MSR test, and variants adapted for other nonhuman species and human infants, are widely used as a marker for visual self-recognition, though there is disagreement about what it signifies and whether failure means that self-awareness is lacking. Regardless, if they pass, they should automatically be placed into Category One. These animals may also have some or all of the elements of a theory of mind (they know what others see or know), understand symbols, use a sophisticated language or language-like communication system, deceive, pretend, imitate, or solve complex problems.

Into Category Two, I place animals who fail MSR tests and who may lack self-consciousness and every element of a theory of mind, but possess a simpler consciousness, mentally represent and are able to think, perhaps use a simple communication system, have a primitive but sufficient sense of self, and are at least modestly evolutionarily close to humans. They act insightfully, with insight sometimes used as a synonym for thinking, as it allows a being to solve a problem efficiently and safely by mentally "seeing" a solution without having to engage in extensive trial and error.³⁸¹ Biologist Bernd Heinrich speculates that consciousness, which he believes implies awareness through mental visualization, developed "for one specific reason only: To

³⁷⁹ Gordon G. Gallup, Jr., *Chimpanzees: Self-recognition*, 167 *Sci.* 86 (1970).

³⁸⁰ *Id.*

³⁸¹ See MICHAEL TOMASELLO & JOSEF CALL, *PRIMATE COGNITION* 68-69 (1997) (explaining how certain animals engage in symbolic play); Bernd Heinrich, *Testing Insight in Ravens*, in *THE EVOLUTION OF COGNITION* 289, 300-01 (Cecilia Heyes & Ludwig Huber eds., 2000); Sandra T. deBlois et al., *Object Permanence in Orangutans (Pongo Pygmaeus) and Squirrel Monkeys (Saimiri Sciureus)*, 112 *J. COMP. PSYCHOL.* 137, 148 (1998).

make choices.³⁸² If he is right, insight alone is strong evidence of practical autonomy.

The strength of each animal's liberty rights claim will turn upon what mental abilities she has and how certain we are she has them. Category Two covers the immense cognitive ground of every animal with an autonomy value between 0.51 and 0.89. Whether an animal should be placed in the higher (0.80–0.89), middle (0.70–0.79), or lower (0.51–0.69) reaches of Category Two depends upon whether she uses symbols, conceptualizes (mentally represents), or demonstrates other sophisticated mental abilities. Her taxonomic class (mammal, bird, reptile, amphibian, fish, insect) and the nearness of her evolutionary relationship to humans (which are related) may also be important factors.

I assign an autonomy value below 0.50 to taxonomically and evolutionarily remote animals, whose behavior scarcely resembles ours and who may lack all consciousness and be nothing but living stimulus-response machines. The lower the value the more certain we can be they utterly lack practical autonomy, though they may or may not be eligible for equality rights. I place them all into Category Four. Finally, we do not know enough about many, perhaps most, nonhuman animals reasonably to assign them any value either above or below 0.50. Perhaps we have never taken the time to learn about them or our minds are not sufficiently penetrating to understand them. We can assign them to Category Three.

I borrow the concept of the precautionary principle from environmental law to analyze the entitlement of Category Two animals to basic liberty rights.³⁸³ The precautionary principle has constituted a "fundamental shift" in how environmental concerns are faced.³⁸⁴ It rejects science "as the absolute guide for the environmental policy maker"³⁸⁵ and

embodies the notion that where there is uncertainty regarding the potential impact of a substance or activity, "rather than await certainty, regulators should act in anticipation of environmental harm to ensure that this harm does not oc-

³⁸² BERND HEINRICH, *THE MIND OF THE RAVEN—INVESTIGATIONS AND ADVENTURES WITH WOLF-BIRDS* 337 (1999).

³⁸³ Naomi Rohit-Arriaza, *Precaution, Participation, and the "Greening" of International Trade Law*, 7 J. ENVTL. L. & LITIG. 57, 60 (1992).

³⁸⁴ *Id.*

³⁸⁵ Ellen Hey, *The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution*, 4 GEO. INT'L ENVTL. L. REV. 303, 311 (1992).

cur." Without such an approach, an activity or substance might have an irreversible impact on the environment while scientists determine its precise effect.³⁸⁶

At the principle's core is the idea that non-negligible environmental risks should be prevented, even in the face of scientific uncertainty.

If the precautionary principle is not applied, every Category Two animal would be disqualified from liberty rights. An expansive application of the precautionary principle would mean any animal with an autonomy value above 0.50 should be granted rights. I propose an intermediate reading: any animal with an autonomy value higher than 0.70 is presumed to have practical autonomy sufficient for basic liberty rights. But how should an animal scoring higher than 0.50 but less than 0.70 be treated? By definition, some evidence exists that they possess practical autonomy. But it is weak, either because at least one element is missing or the elements together are feebly supported.

More than one million animal species exist. While Darwinian evolution postulates a natural continuum of mental abilities, the animal kingdom is incredibly diverse. At some taxonomic point, the elements of practical autonomy—self, intentions, desire, sentience, and finally consciousness—begin to evaporate. We do not know precisely where. I have stood on the summit of Cadillac Mountain on Mt. Desert Island in Maine watching the summer sun rise. At four o'clock in the morning, it was indisputably night; at seven o'clock, indisputably day. When did night become day?

We could deal with this problem in one of two ways. Not using the precautionary principle would allow a judge to draw a line, and an animal beneath it would not be entitled to liberty rights. There is another way, however, that is consistent with even a moderate reading of the precautionary principle. Personhood and basic liberty rights should be given in proportion to the degree that one has practical autonomy. If you have it, you get rights in full. But if you do not, the degree to which you *approach* it might make you eligible to receive some proportion of liberty rights.³⁸⁷

This idea of receiving proportional liberty rights accords with how judges often think. They may give *fewer* legal rights to humans

³⁸⁶ Charmian Barton, *The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and as a Common Law Doctrine*, 12 HARV. ENVTL. L. REV. 509, 513 (1998) (quoting Daniel Bodansky, *Scientific Uncertainty and the Precautionary Principle*, 33 ENV'T 4, 4 (1991)).

³⁸⁷ ALAN GEWIRTH, *REASON AND MORALITY* 111, 121 (1978); WELLMAN, *supra* note 166, at 129.

who lack autonomy. But judges do not make them things. A severely mentally limited human adult or child who lacks the mental wherewithal to participate in the political process may still move freely about, though she may be accorded *narrower* legal rights. A severely mentally limited human adult or child might not have the right to move in the world at large, but may move freely within her home or within an institution. She may be given *parts* of a complex right (remember, what we normally think of as a single legal right is actually a bundle of them). A profoundly retarded human might have a claim to bodily integrity, but lack the power to waive it, and be unable to consent to a risky medical procedure or the withdrawal of life-saving medical treatment.³⁸⁸

Consistent with a moderate use of the precautionary principle, we need not grant basic liberty rights to a nonhuman animal who has just a shadow of practical autonomy; that is, we grant even animals with an autonomy value of 0.51 some tiny right. But it would be consistent with such a reading for an animal with an autonomy value of 0.65, perhaps even 0.60, to be given strong consideration for some proportional basic liberty rights.

At some point, autonomy completely winks out and with it any nonarbitrary entitlement to liberty rights on the ground of possessing practical autonomy. Judges and legislators might decide to grant even a completely nonautonomous being basic liberty rights. But it is hard to think of grounds upon which they might do it nonarbitrarily.

B. *Human Yardsticks, Nonhuman Animals*

Nature writer Henry Beston wrote that "the animal shall not be measured by man. In a world older and more complete than ours they move finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear."³⁸⁹ The liberty rights to bodily integrity and bodily liberty, however, are embedded in law precisely because they are basic to human well-being, and the autonomy values we assign to nonhumans will be based upon human abilities and human values. This argument bridges the present, when law values only human-like abilities but must still confront the argument for liberty rights of nonhuman animals who have them, and the future, when the law may value nonhuman abilities, as

³⁸⁸ WELLMAN, *supra* note 166, at 130-31.

³⁸⁹ HENRY BESTON, *THE OUTERMOST HOUSE* 25 (1967).

well. For the present, I accept that the law measures nonhuman animals with a human yardstick.

But just because law is so parochial, we must not think human intelligence the only intelligence. Intelligence is a complicated concept that intimately relates to an ability to solve problems.³⁹⁰ Professor Heinrich writes, "[W]e can't credibly claim that one species is more intelligent than another unless we specify *intelligent with respect to what*, since each animal lives in a different world of its own sensory inputs and decoding mechanisms of those inputs."³⁹¹ Dolphin expert Diana Reiss argues that intelligence cannot properly be conceived solely in human terms³⁹² and condemns any assumption that "only our kind of intelligence is 'real intelligence.'"³⁹³ We must not think the human self the only self or human abilities the only important mental abilities.

In his famous essay, *What is it Like to be a Bat?*, philosopher Thomas Nagel focused on bats, instead of flounders or wasps, because they are mammals, and "if one travels too far down the phylogenetic tree, people gradually shed their faith that there is experience there at all."³⁹⁴ Even bats, he wrote, are "a fundamentally *alien* form of life."³⁹⁵ How can we know when a nonhuman has practical autonomy? In *Rattling the Cage*, I answered with "de Waal's Rule of Thumb:" in the absence of strong contrary arguments, if closely-related species act the same, it is likely, though not certain, they share the same mental processes.³⁹⁶ Because chimpanzees and bonobos are evolutionary first cousins with senses identical to ours, we can feel confident our basic interests are similar. But the likelihood we will misunderstand or mistake these interests increases with evolutionary distance and differ-

³⁹⁰ STUART SUTHERLAND, *THE INTERNATIONAL DICTIONARY OF PSYCHOLOGY* 211 (1989).

³⁹¹ Heinrich, *supra* note 381, at 327.

³⁹² Diana Reiss, *The Dolphin: An Alien Intelligence*, in *FIRST CONTACT—THE SEARCH FOR EXTRATERRESTRIAL INTELLIGENCE* 31 (Ben Bova & Bryon Press eds., 1990).

³⁹³ *Id.* at 39.

³⁹⁴ Thomas Nagel, *What is it Like to Be a Bat?*, 83 *PHIL. REV.* 435, 438 (1974), reprinted in *THE NATURE OF CONSCIOUSNESS—PHILOSOPHICAL DEBATES* 519, 520 (Ned Block et al. eds., 1997).

³⁹⁵ *Id.* at 520–21.

³⁹⁶ See DE WAAL, *supra* note 265, at 64–65 (1996); Frans de Waal, *Foreword to ANTHROPOMORPHISM, ANECDOTES, AND ANIMALS*, at xiii, xiv (Robert W. Mitchell et al. eds., 1997) ("[I]f closely related species act the same, the underlying mental processes are probably the same, too."); Frans de Waal, *The Chimpanzee's Sense of Social Regularity and Its Relation to the Human Sense of Justice*, 34 *AM. BEHAV. SCIENTIST* 335, 341 (1991) ("[S]trong arguments would have to be furnished before we would accept that similar behaviors in related species are differently motivated.").

ences in ecology, information-processing capabilities, or the ways in which we perceive or conceive of the world. Humans, for example, can live happy solitary lives. But a single Atlantic bottlenosed dolphin is scarcely a dolphin. Humans do not need to swim. But after seventy generations of being factory farmed in cages, minks expend large amounts of energy just for the opportunity to swim, and when they cannot, their bodies produce high levels of cortisol, a "stress" hormone similar to that produced when they are denied food.³⁹⁷

Elephant researcher Joyce Poole asks us to imagine showing drawings of human and elephant heads to an extraterrestrial.³⁹⁸ It would be reasonable to assume the creature with the huge ears and nose has terrific hearing and smelling abilities, while the one with the tiny nose and big eyes can see, but is unlikely to smell, well.³⁹⁹ This would be correct. Elephants hear sounds below the human threshold.⁴⁰⁰ Elephant nasal cavities contain seven of the turbinates specialized for odor detection. Poole concludes elephants, who also detect hormones with a unique Jacobsen's organ, are so different from us they live in another sensory world.⁴⁰¹ More than forty years ago, psychologist Harry Harlow, reviled today by many for his cruel deprivation experiments on baby monkeys, wrote that "it is hazardous to compare learning ability among animals independently of their sensory and motor capacities and limitations."⁴⁰² Professor Harry Jerison writes that "the nature of self is surely significantly different in different species . . ." but human intuitions about self "are so strong that it is difficult to imagine a creature with information processing capacity comparable to ours, equal to us in intelligence . . . that has a differently constructed self."⁴⁰³ But they exist and he gives dolphins as an example.⁴⁰⁴

The animals who fall into Categories Three and Four, and some perhaps in Category Two, may not now be entitled to basic liberty rights simply because we do not value their brand of intelligence,

³⁹⁷ Georgia J. Mason et al., *Frustrations of Fur-Farmed Mink*, 410 NATURE 35, 35-36 (2001).

³⁹⁸ JOYCE POOLE, COMING OF AGE WITH ELEPHANTS 120-21 (1996).

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 121, 126.

⁴⁰¹ *Id.* at 121.

⁴⁰² Harry F. Harlow, *The Evolution of Learning*, in BEHAVIOR AND EVOLUTION 269, 269 (Anne Roe & George Gaylord Simpson eds., 1958).

⁴⁰³ Harry J. Jerison, *The Perceptual Worlds of Dolphins*, in DOLPHIN COGNITION AND BEHAVIOR: A COMPARATIVE APPROACH 141, 148 (Ronald J. Schusterman et al. eds., 1986).

⁴⁰⁴ *Id.* at 148-49.

their style of learning, their sense of self. But Category One animals and at least some of those in Category Two measure up even to human standards. Chimpanzees and bonobos do. In *Drawing the Line*, I review the evidence, make my own judgments about how certain practical autonomy exists, how strong a scientific argument has been made, how valid the data is, and applying the spirit and letter of the precautionary principle to uncertainties, then assign a fair autonomy value to honeybees, my son Christopher, Christopher's dog, Marbury, Echo the African elephant, Alex the African Grey parrot, Atlantic bottlenosed dolphins Phoenix and Ake, Chantek an orangutan, and Koko the gorilla. I find that all but honeybees and Marbury are entitled to basic liberty rights now.