

REBUILDING THE WALL

By
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The debate about whether nonhuman animals deserve legal rights encompasses an ever broadening range of theories and strategies. Most thinkers pushing for nonhuman animal rights reject speciesism, which they view as an often tacit foundation for their adversaries' arguments. Yet almost every current contributor to the debate—whether they favor or disfavor the extension of rights beyond the human sphere—engages in some form of intelligenceism by focusing disproportionate attention on humanlike animals. This essay submits that nonhuman animal advocates must recognize this pervasive intelligenceist bias and be wary of the detrimental effects its substitution for speciesism could have on their long-term objectives.

There is a suspicion that some crucial perspective has been omitted from consideration, that the conclusion is as much a product of myopia as of logic.¹

The voices contributing to contemporary animal rights discourse are many and varied, and understanding the differences among them is no easy task. In his 1997 book *Babies and Beasts*, Daniel Dombrowski attempts to make sense of the debate by giving his readers a whirlwind tour, analyzing the stances of such prominent figures in the field as Peter Singer, Tom Regan, R.G. Frey, and James Rachels and at least mentioning the views of nearly one hundred other contributors to the increasingly prominent philosophical discussion.² Not surprisingly, *Babies and Beasts* often comes off as jumbled and overly condensed. When supplemented and clarified by primary texts, however, it presents a good overview of the debate and the countervailing forces within it. Since this debate is defined by the nature of, and relationships among, its countervailing forces, this essay will focus on these forces and attempt to show that they are less opposed than their proponents may believe them to be. This essay's survey of animal rights literature reveals a virtual absence of voices dedicated to securing

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¹ Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 Yale L.J. 1315, 1326 (1974).

² Daniel Dombrowski, *Babies and Beasts: The Argument from Marginal Cases*, 1-7 (U. of Ill. Press 1997).

rights for nonhuman animals who lack human-like intelligence. A close relative of the speciesism unabashedly embraced by the likes of Carl Cohen and officially renounced by Peter Singer, intelligenceism—in one form or another—underlies the arguments of nearly every contributor to the debate about animal rights. Intelligenceism is even present in those arguments asserting genuine, if perhaps misguided, attempts to secure for some nonhuman animals the legal rights that humans currently enjoy.³

In the pages he devotes to the anti-animal advocate Lawrence Becker, Dombrowski notes that Becker's idea of "weak speciesism"⁴ ("when human and animal interests are equivalent (and, presumably, we can satisfy one but not both), then the human interests are to prevail") is the position that "[m]ost defenders of the AMC⁵ would be in favor of, . . . [though] they would not be willing to call it 'speciesism,' albeit weak."⁶ While "weak speciesism" is far from both "absolute speciesism"⁷ ("any human interest, even a trivial one, outweighs any sum of nonhuman interests") and "resolute speciesism" ("any significant human interest outweighs any sum of animal interests"), it is simply wrong, definitionally, to think of it as non-speciesist.⁸ To do so would be equivalent to saying it would not be racist for a white man to choose to save a white stranger over an otherwise equivalent black stranger—by measure of age, intelligence, health, emotional well-being, or what have you—merely on the basis of race. Like other defenders of the AMC, Dombrowski is blind to his own speciesism. On a page addressing the views of R.G. Frey, he writes, "[t]here is nothing speciesist in seeing normal human life as having a higher quality and greater richness than animal life. Frey is correct regarding why this is so."⁹

³ By "speciesism," this paper means the act of giving actual or theoretical preference to members of one species over members of another species or all other species. The most common form of speciesism—and the one this paper is principally concerned with—is the type that prefers the human species. By "intelligenceism," this essay means the act of giving actual or theoretical preference to animals (whether human or nonhuman) exhibiting mental abilities that equal or closely approximate those that most normal humans possess. The intelligenceism this essay confronts supports granting legal or moral preference to animals (such as humans, chimpanzees, bonobos, and dolphins) thought to possess not only "consciousness" but also the ability to plan ahead, experience emotions, solve mathematical problems, and use language to communicate with other intelligent animals. Like racism and sexism, speciesism and intelligenceism are forms of rationalized exclusion based upon certain isolated characteristics.

⁴ Dombrowski, *supra* n. 2, at 103.

⁵ By "AMC," Dombrowski means the "argument from marginal cases," which garners its support for nonhuman animal rights by focusing on the rights humans bestow upon intellectually substandard members of their own species—such as the mentally retarded and infants. *Id.* at 1-2.

⁶ *Id.*

⁷ *Id.* at 102.

⁸ *Id.*

⁹ *Id.* at 85.

Dombrowski explains that he believes humans are capable of leading richer lives than other animals because, as Frey notes, they are capable of “falling in love, marrying, experiencing with someone what life has to offer; having children and watching them grow up . . . ; listening to music, looking at pictures, reading books” and so on.¹⁰ This is the same idea Peter Singer, Tom Regan, and Dombrowski himself express when they talk of “biographical lives” (or an equivalent of this term) and the heightened respect such lives deserve.¹¹ Putting aside the question of whether it could ever be proven that nonhuman animals do not fall in love, enjoy watching their children grow up or thinking about their doing so, or appreciate entertainment, this reasoning is speciesist because it bases disparate standards for consideration upon traits that only humans and human-like animals are generally thought or observed to have. That it does not line up exactly with the boundaries of the human species does not make it any less speciesist. Rather, this fact merely allows its adherents to include a handful of nonhuman species within an argument for rights, and by so doing, make them feel—and, apparently, appear to even an expert in the field—as though they are voicing a non-speciesist view.

To see why favoring biographical lives is speciesist, it is helpful to consider what goes into making a life biographical. The fundamental ingredient for this type of life is intelligence.¹² Without sufficient intelligence, a person could never do any of the things Frey mentions in his list of what makes a life rich. Why, however, do speciesist philosophers deem intelligence to be so important? Assuming that they are not concerned with how a court of law will approach the question of extending rights to nonhumans, as Steven Wise and other animal rights practitioners are, speciesist philosophers’ focus on intelligence appears most arbitrary. Conceptualized as a quality that nearly every normal living creature enjoys to one degree or another, some virtually not at all and others to a very high level, intelligence becomes merely one potentially useful and important trait among others. The human ability to think

¹⁰ *Id.*

¹¹ *Id.* at 82 (claiming that a human is more valuable than a dog because the human’s experiences lend him enhanced intrinsic value); *id.* at 171 (stating that “killing an animal that has a rich biographical life is worse than killing one without such a life.”)

¹² “Intelligence” is, of course, a classic example of a word for which there is no adequate definition. As used in this paper, however, intelligence means the quality without which an animal would be incapable of doing such things as solving mathematical problems, using language, planning future acts, and understanding he or she is the parent of another animal. This list is not exhaustive but rather merely illustrative. Humans are generally thought to possess more intelligence than any other species, while plants are thought to possess none. All nonhuman species of animal, even the simplest—fall somewhere between these two extremes, though there is certainly no agreed-upon manner for determining which falls where. Furthermore, not all members of one species are equally intelligent. A severely brain-damaged human, for instance, might not possess enough intelligence to know that he has children or to understand human language, and therefore would fall on a very different point on the intelligence continuum than normal, non-brain-damaged members of his species.

rationally, creatively, and constructively and to plan ahead—all functions of intelligence—is merely our species' principal survival strength. This strength is analogous to an eagle's ability to spot a mouse 100 yards away from its perch or a camel's ability to survive in hot climates for extended periods without water. To say that humans have more rights than any other species of animal merely because one such strength is superior, species-wide, to the identical trait in another type of animal is equivalent to granting potentially fatal preference to, say, creatures that can go longer without water than camels, that see more keenly than eagles, or that think more complexly than humans.

Stephen R.L. Clark, perhaps the one philosopher in *Babies and Beasts* who most closely approaches advocacy of a non-speciesist position, picks up on this basic idea. Summarizing Clark's position, Dombrowski writes:

There are sentient beings all around us, and to assume that the intelligence of some of them, however intelligence may be defined, licenses abuse of animals also makes it possible for any intellectual elite (God, the angels, extraterrestrials, or the Nazis by self-proclamation) "to treat the rest of us like trash."¹³

By referencing the Nazis and imagining an invasion of aliens with intelligence clearly superior to that of humans, Clark reveals two problems with basing rights on intelligence or its byproducts. First, intelligence may be defined by the hegemony. If the Nazis believe they are intellectually superior to non-Nazis, and intelligence is accepted as a reasonable yardstick for measuring the significance of various lives, then Nazis are justified in preferring themselves over all non-Nazis. Second (and more threatening because of its objectivity), retaining the intelligence yardstick would mean that, if a group of concededly highly intelligent aliens were to alight on earth, rational individuals would—when faced with the choice—choose to save the more intelligent alien over the less intelligent, though otherwise equally situated, human. This second idea is more threatening than the first because it highlights the exclusionary power of using intelligence to distinguish among different beings. That is, while many animal rights advocates view intelligence as a trait that, when recognized in non-humans, can only lead to the granting of rights to a greater pool of living things, Clark reveals that reliance on intelligence can just as easily function in the other direction. It can take rights away from those who once enjoyed them or, at least, devalue those rights by comparing them to ones that creatures of greater intelligence should, under the theory that intelligence is relevant to the question of rights, enjoy.

Viewed in this light, intelligence-based speciesism—or, as Colin McGinn terms it more succinctly, "intelligenceism"—is a significant threat to the recognition of nonhuman animals rights. This is true largely because intelligenceism is deeply and perhaps unwittingly em-

¹³ Dombrowski, *supra* n. 2, at 96.

bedded in the arguments of many people whose express goal is to secure rights for those animals.¹⁴ Singer, with the preference he gives to "beings with a future," is intelligenceist.¹⁵ So are Leslie Pickering Francis and Richard Norman, who claim that the "developed mental lives" of chimpanzees, rhesus monkeys, dolphins and other human-like nonhuman animals entitle these creatures to greater respect;¹⁶ and Carl Cohen, who thinks that animals can have no rights because they lack the intelligence-based capacity for free moral judgment;¹⁷ and Carol Hoff, who believes that a nonhuman animal (presumably even an eagle) stricken by blindness suffers less than a human with the same affliction;¹⁸ and Richard Epstein, who denies nonhuman animals rights because "they do not have the higher capacity for language and thought that characterizes human beings as a species;"¹⁹ and Steven Wise, who writes that "[n]onhuman animals who lack minds are little more than animate versions of 'the MIT 3' [an "artificially-intelligent" computer] . . . and their entitlement to legal rights should be seriously doubted;"²⁰ and René Descartes, who reasoned that nonhuman animals' inability to use human speech reinforces the propriety of our denying them rights.²¹

At least one common idea underlies all of these thinkers' very different beliefs: similarity to humans and the degree of intelligence a normal human typically possesses is an important determinant of who gets rights, and, because of this, some animals have a stronger claim on those rights than do others. That *homo sapiens'* and other intelligent animals' rights are based upon overvaluation of one particular survival strength rather than on another, broader combination of strengths, some entirely different criterion such as the ability to feel pain or, merely, the inertia of being alive until something acts to terminate life does not seem to compel them to justify their reliance on intelligenceism. Ironically, sounder reasoning for broad-based animals rights is easier to locate in at least the initial statements—if not the conclusion to which they ultimately lead—of anti-animal philosophers than it is in the writings of those who call themselves advocates for animal rights. Steven Pinker, for example, asks: "Why should language be such a big deal? It has allowed humans to spread out over the planet and wreak large changes, but is that any more extraordinary than coral that build islands, earthworms that shape the landscape by

¹⁴ See *id.* at 133.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 162.

¹⁷ Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, 315 New Eng. J. Med. 865, 866 (1986).

¹⁸ Carol Hoff, *Immoral and Moral Uses of Animals*, 302 New Eng. J. Med. 115, 117 (1980).

¹⁹ Richard A. Epstein, *The Next Rights Revolution?* Natl. Rev. 44, 45 (Nov. 8, 1999).

²⁰ Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 268 (Perseus Books 2000).

²¹ René Descartes, *Animals are Machines*, in *Animal Rights and Human Obligations* 60, 66 (Tom Regan & Peter Singer, eds., Prentice-Hall, Inc. 1976).

building soil, or . . . photot synthesizing bacteria . . . ?"²² Absent their own egoism and the pride many humans feel about their species' intelligence and the dubiously positive results it has enabled mankind to achieve, there is little force behind arguments based on the importance of human or human-like intelligence for which beings, given the limited size of the earth and competing interests among humans and other species, should be given priority.

Arguably, the people who make the strongest case for the extension of rights to all nonhuman animals emphasize not these animals' similarity to humans but rather their differences from them. Stephen Clark puts it quite simply. Speaking initially about microcephalics or brain-damaged orphans, but also, by obvious implication, about animals, Clark makes an appeal to the basic moral principles that underlie both our laws and our society's generally agreed-upon values. "[W]e ought to care for the subnormal," he writes, "precisely because they are subnormal: they are weak, defenseless, at our mercy [while we are not] It is right to distinguish [other animals from human ones] What is wrong is to use them with cruelty and disrespect."²³

According to *Babies and Beasts*, Clark's idea is that we should treat every member of our household with respect, and if our household contains people or animals suffering from disabilities (e.g., the inability to understand or produce verbal language, or to eat without assistance), those people and animals deserve special treatment and respect. Such an argument is difficult to attack on moral grounds. Indeed, it is the very argument that makes treatment of marginal human cases a difficult issue. By its extension, "we should try to include all one's nation's animals [in our household] . . . , or, if the Hellenistic Greeks are correct that the universe is one household, all animals."²⁴ This statement—born of recognizing difference rather than asserting similarity between nonhuman and human animals—is a genuine, non-discriminatory and non-intelligenceist claim for animal rights. Peter Singer occasionally appears to advocate it ("we must . . . bring nonhuman animals within our sphere of moral concern and cease to treat their lives as expendable"²⁵), but he always retreats to his more fundamental speciesist (though, because of reliance upon what he views as fair, intelligence-derived characteristics, he claims non-speciest) belief: "Normally . . . if we have to choose between the life of a human being and the life of another animal we should choose to save the life of the human."²⁶

Scholarly books and articles are not, however, the only places where Clark's idea of respect for the physically and mentally weak appears. Unexpectedly, it surfaces in the 1888 Mississippi Supreme

²² Wise, *supra* n. 20, at 236 (quoting Steven Pinker).

²³ Dombrowski, *supra* n. 2, at 96, 97 (quoting Stephen R.L. Clark).

²⁴ *Id.* at 154.

²⁵ Peter Singer, *Animal Liberation* 20 (N.Y.Rev. 1990).

²⁶ *Id.* at 21, 22.

Court case *Stephens v. State*.²⁷ *Stephens* held that the trial court erred when it refused to instruct the jury to find for the defendant if the evidence showed he shot his neighbor's hogs not out of cruelty but rather to protect his own crops. After so holding, judge Arnold took a moment to "speak[] for himself"—and, indeed, for the many animals who cannot. He wrote:

To disregard the rights and feelings of equals, is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless, is mean and cowardly. Human beings have at least some means of protecting themselves against the inhumanity of man . . . but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature. . . . [H]uman beings should be kind and just to dumb brutes; if for no other reason than to learn how to be kind and just to each other.²⁸

Members of a moral society, Judge Arnold implies, have a duty to protect other members of that society—especially its weaker members. Whether strong members find any other reason to do this than the one the Judge mentions is irrelevant. What matters here is the broad conception of who deserves protection within a society, and that a community's weaker links are not penalized for being unintelligent in the way that many AMC-defenders would have it, but rather treated with even greater care than more intelligent members. This conception recognizes the truth that Steven Wise points out about our treatment of nonhuman animals: "We do what we do to a [chimpanzee] because he can't stop us. None of them can. We can only stop ourselves."²⁹

Indeed, Steven Wise is interested not only in changing human thinking about nonhuman animal rights but also, and more importantly, in using this new thinking to fuel the passage of new laws. His recent book, *Rattling the Cage: Toward Legal Rights for Animals*, has received a large amount of attention not only in animal rights circles but more generally—mostly because of the hours of radio and television programming and the pages of popular magazines that have already been devoted to its discussion.³⁰ With *Rattling the Cage*, Steven

²⁷ *Stephens v. State*, 65 Miss. 329, 3 S. 458 (1888).

²⁸ *Id.* at 458-59. While it is indeed quite likely that the last sentence of this excerpt evidences Arnold's desire to measure all other animals against a God-like vision of mankind, the judge could also have intended to emphasize the words "if for no other reason" more than those that follow them. That is to say, Judge Arnold might have meant the argument about humans' treatment of other humans to be a mere alternative one that he could use to win over only those who did not buy his principal argument based on protection of the weak for its intrinsic importance in a moral society. The distinction, however, is not especially important. The statement is relevant to this essay's discussion primarily because it recognizes differences among animals and forms the basis of a strong argument for protecting nonhuman animals in a manner similar to the way the law currently protects minor children, mentally incapacitated adults, and other non-normal, "weak" or "marginal" men and women.

²⁹ Wise, *supra* n. 20, at 237.

³⁰ In the legal realm, a glance at recent issues of two prominent law journals—neither of which is focused on animal rights or related topics—confirms the degree of the attention given to *Rattling the Cage*. Martha C. Nussbaum, *Animal Rights: The*

Wise has done what countless animal rights advocates have attempted to do before him; he has established at least a small foothold in the public arena for discussion of animal rights issues, and he hopes to use that foothold as a springboard to the establishment of rights for non-human animals, starting with the humanlike nonhuman species of chimpanzees and bonobos. Wise claims that he is neither a philosopher, a poet, nor a theologian—but rather simply a lawyer.³¹ His goal is to develop legal arguments for those animal rights that he believes a court might be inclined to grant rather than to philosophize about which nonhuman animals should be afforded which rights. Despite his intention to focus the arguments in *Rattling the Cage* at courts, however, Wise has written a book that has been circulated and discussed far beyond the American bar and judiciary. Written in an accessible manner that non-lawyers can readily understand, *Rattling the Cage*—regardless of what Wise may assert or believe—reads as a carefully constructed appeal to the public from its first page to its last.

What, then, does this important book say? The front cover, quoting the foreword by Jane Goodall, calls Wise's text "the animals' Magna Carta." While Goodall may have hit upon a fairly good analogy here, perhaps a more fitting one could be drawn from American, rather than British, history: *Rattling the Cage* currently grants rights to animals in the way that the Declaration of Independence granted rights to Americans. That is to say, just as the Declaration of Independence tacitly defined "all men" to mean human males with white skin, *Rattling the Cage* likewise defines "animals" (as used in the book's subtitle) to mean some human-like nonhuman animals.³² Just as in 1776 black slaves and native Americans were not covered by the American revolutionaries' use of the word "men," in 2000 rabbits, mice, dogs, birds, and other relatively unintelligent nonhuman animals are not covered by a leading animal rights activist's use of the word "animal." Wise's exclusion of nonhuman-like animals from consideration for legal rights comes through quite clearly in *Rattling the Cage*: "The entitlement of chimpanzees and bonobos to fundamental legal rights will mark a huge step toward stopping our unfettered abuse of them, just as human rights marked a milepost in stopping our abuse of each other."³³ This analogy undeniably compares a small minority of non-human animals (chimps and bonobos) to the entire human species.³⁴

Need for a Theoretical Basis, 114 Harvard L. Rev. 1551 (2001); Richard A. Posner, *Animal Rights*, 110 Yale L. J. 527 (2000).

³¹ Lance Morrow, *Standing up for Rover*, 155 Time 10, (Mar. 13, 2000) (interviews with author and attorney Steven Wise, Feb. 10, 2000 and Mar. 23, 2000).

³² See *Declaration of Independence* [¶ 2] (1776).

³³ Wise, *supra* n. 20, at 237.

³⁴ While Wise might have meant to include something less than all of humanity in the word "human" here, his comment that "one of the best ideas of the last thousand years was that 'certain fundamental rights are inherent in *all* humans'" makes this improbable. *Id.* at 243 (quoting Wole Soyinka) (emphasis added).

Rattling the Cage is intelligenceist. It argues for legal personhood for chimpanzees and bonobos on the basis of their cognitive similarity to normal humans, and the bulk of its force stems from the amount of support it offers as proof of this similarity.³⁵ It promises to demonstrate how similar chimpanzees' and bonobos' genes and brain structures are to humans'.³⁶ In a sentence whose use of "all nonhuman animals" makes it seem overbroad for the book's relatively narrow scope, *Rattling the Cage* attacks the legal wall that, "[f]or four thousand years, . . . has separated all human from all nonhuman animals," noting that one good book should be able to topple this already-crumbling wall.³⁷ It concludes, in its opening chapter, that it "is meant to be that book."³⁸

Rattling the Cage is also strategic. "We care about consciousness," Wise writes, "because species with no capacity for it lack that quality of mind that matters for legal rights."³⁹ Granted, it never outrightly states that its argument is intended as a first step, a building block, to guaranteeing rights for other nonhuman animals whose mental abilities fall far short of those of humans, chimpanzees, or bonobos. And while it may in fact be that Wise simply does not think any nonhuman-like animals should have rights, it seems more probable that Wise avoids discussion of such animals because he rightly fears it will undermine his central, intelligenceist argument. Indeed, it seems quite probable that Wise harbors the same fears—and hopes—as do Paola Cavalieri and Peter Singer. *Babies and Beasts* notes, in reference to this pair and the Great Ape Project:

No doubt some will worry that concentrating on the great apes implies a sort of intelligenceism that does not bode well for cows or mice. Cavalieri and Singer instead hope that a collective manumission of the great apes is more politically feasible than the manumission of cows and mice, such that treating them as the equals of marginal cases will enhance the situation of all animals, even the ones that are not particularly bright.⁴⁰

If this is true of *Rattling the Cage* in addition to the efforts of Cavalieri and Singer, it is troubling for those who reject intelligenceism. In asserting that there are some who deserve basic rights more than others (if this is in fact what *Rattling the Cage* is doing) and also acknowledging that even guaranteeing these rights for the arguably most deserving will necessitate a tooth-and-nail fight, Wise's book makes the idea of further extension of rights to nonhuman-like animals—once courts feel they have already done more than enough—seem like an impossibility.

³⁵ *Id.* at 4.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 5.

³⁹ *Id.* at 120; *see id.* at 236: ("cognition is a very big deal because the fundamental legal rights of animals, the least porous barrier against oppression and abuse that humans have ever devised, depend on it.")

⁴⁰ Dombrowski, *supra* n. 2, at 146.

Whether you think Wise's brand of strategic approach will ultimately be harmful or beneficial to the non-intelligent may depend upon how you believe legal change should, can, and has been accomplished. In an article published the year before *Rattling the Cage* came out,⁴¹ Wise addresses the topic of legal strategy directly. Commenting that "[s]ophisticated proponents of affirmative action" understand that "a lawyer must know when to hold on and know when to let go" of arguments that may or may not meet with a receptive audience in the courtroom, Wise notes that the current policy of these proponents is to try "to convince unsuccessful litigants asserting affirmative action claims in federal courts of appeal to forego appeals to the Supreme Court."⁴² An unfavorable Supreme Court decision, Wise's reasoning continues, would harm not only the current litigants but also—and more significantly—the many others who will live to see a court whose judges will be more willing to accept affirmative action as lawful.⁴³ This is sound advice. It applies to present-day animal rights litigation as well. After noting that, unfortunately, the time is not ripe to take animal rights suits before the Supreme Court, Wise submits that animal rights issues must be thoroughly discussed and debated in periodicals, books, and conferences before the courts will feel comfortable expanding their ideas about rights to include nonhuman animals.⁴⁴

As *Rattling the Cage's* subtitle suggests, Wise is attempting to pave the way toward recognition of "legal rights for animals." But would a rabbit in a cosmetic laboratory, or a cow in a slaughterhouse, think that Wise has followed Oliver Wendell Holmes's advice to aspiring attorneys ("Your business as lawyers is to see the relation between your particular fact and the whole frame of the universe"), which Wise quotes in the same article?⁴⁵ That is to say, if Wise's particular fact is a chimpanzee or a bonobo, what does that fact have to do with the universe occupied by so many other, nonhuman-like animals?⁴⁶ If Wise would concede that his book is a potentially important building block to a long, future struggle for animal rights, he might wonder just how, exactly, advocates will be able to use it when the time eventually

⁴¹ Steven M. Wise, *Animal Thing to Animal Person: Thoughts on Time, Place, and Theories*, 5 *Animal L.* 61 (1999).

⁴² *Id.* at 67.

⁴³ *Id.*

⁴⁴ *Id.* at 66.

⁴⁵ *Id.* at 63.

⁴⁶ Wise could respond here that such a reading is too narrow, *viz.*, that the particular fact important to consider, for strategic purposes, encompasses non-human animals in general and that the universe consists of all the many human rights already recognized by the law. In thinking about animal rights strategically, Wise could use this vision of Holmes's idea—as a way of posing the important question of what he is asking courts, realistically, to do—to justify the emphasis he places on human-like characteristics possessed by the non-human animals he wishes to see attain legal rights. Viewed this way, Wise's use of Holmes's quotation is more consistent with *Rattling the Cage* but, as explained below, is nevertheless troubling to this essay's sense of how justice for all non-human animals is most likely to be achieved.

is right for them to take its ideas to court. Before he became a Justice on the United States Supreme Court and before *Brown v. Board of Education* was argued, Thurgood Marshall, chief counsel for the National Association for the Advancement of Colored People, refused to follow his colleagues' advice to make arguments based on *Plessy v. Ferguson's* "separate but equal" standard that could provide immediate relief for his clients.⁴⁷ His refusal was long-sighted, mindful of the rights of people not yet born, and motivated by a sense of justice rather than a conception of what was achievable, at that moment, in court. It is the philosophy behind Marshall's ultimate approach—indeed, the same philosophy that Wise seems to champion in his 1999 article⁴⁸—that calls into doubt the wisdom of *Rattling the Cage*. Assuming that Wise would eventually like to see—similar to Justice Douglas in *Sierra Club v. Morton*⁴⁹—the courts open their doors to more than just a few types of humanlike animals, he perhaps might worry that the Great Wall he is attempting to knock down could be re-built, with the help of his book, two feet further from the human species line and much stronger because of its new animal rights foundations. "[T]he ancient Great Wall that has for so long divided humans from every other animal," in other words, may not be the only wall that could be labeled "biased, irrational, unfair, and unjust."⁵⁰

Both *Rattling the Cage* and countless other intelligenceist texts are reminiscent of ideas about the soul, or similar notions used to describe untouchable special qualities possessed only by humans, embodied in the "ancient Great Wall" Wise describes. Aristotle, for example, apparently thought that many living things—nonhumans included—had souls.⁵¹ The kind of soul a creature possessed, however, varied greatly from creature to creature, and there was a clear hierarchy of souls' significance. Whereas Aristotle believed that some animals possessed only the "most primitive" "nutritive" and "reproductive" souls,

⁴⁷ Discussion with Professor Randall Kennedy, Harvard Law School (Apr. 21, 2000). During the course of his Supreme Court clerkship with Thurgood Marshall, Kennedy explains that he had occasion to discuss many of Marshall's strategies for winning appellate arguments in civil rights cases. Kennedy notes that while Marshall did, for many years, rely upon *Plessy* to win cases, in the years approaching *Brown* he insisted that no *Plessy*-based arguments—whether principal or alternative—appear in the many briefs he submitted. Evidence of this strategic change first appears, five years before *Brown* was decided, in *Sweatt v. Painter*, 339 U.S. 629 (1950). In *Sweatt*, Justice Vinson states that the court need not "reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation." *Id.* at 636.

⁴⁸ Wise, *supra* n. 41, at 67.

⁴⁹ See *Sierra Club v. Morton*, 405 U.S. 727, 751 (1972) (Douglas, J., dissenting) (hoping that eventually "all of the forms of life . . . will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But . . . people . . . will be able to speak for the entire ecological community").

⁵⁰ Wise, *supra* n. 20, at 270.

⁵¹ Aristotle, *On the Soul*, in *The Basic Works of Aristotle*, 535, 559-60 (Richard McKeon, ed., Random House 1941).

“certain living beings [i.e., humans]—a small minority—possess[ed] calculation and thought that made them superior to animals that lacked these superior forms of soul.⁵² Plato held similar views. His idea of the “immortal soul”—which most adult, free men had but that children, slaves, and nonhuman animals lacked—was a convenient way of rationalizing disparate treatment of “inferior” forms of life.⁵³ In the Christian myth, God created mankind in his own image, after his own likeness, and he gave humans dominion over the entire earth and all of its nonhuman animals.⁵⁴ Saint Augustine believed that killing “irrational animals that fly, swim, walk, or creep” (which seem to cover, well, just about everything) posed no moral problem because these animals were “dissociated from us by their want of reason, and [were] therefore by the just appointment of the Creator subjected to us to kill or keep alive for our own uses.”⁵⁵ Thomas Aquinas argued that reason was the dominant force in the human experience, and that its product—the soul—has “mastership . . . [o]ver the sensitive powers.”⁵⁶

The “Great Wall” assertions of these texts, all of which come from that distant realm of a past era whose ideas have now been mostly discredited by science, continue to glow at least faintly in the intelligenceism of Wise and others. The quotations above might today sound as ludicrous as the notion that “[t]he ocean tides were designed to move our ships in and out of ports.”⁵⁷ Although their modern equivalents may not, at first, appear so foreign and prejudiced against those not similar to humans in mental capacity, meaningful dissimilarity between the old and the new is illusion.⁵⁸ *Babies and Beasts* explains that Nicholas Everitt, building upon McGinn’s introduction of the word “intelligenceism,” warns that emphasizing the complex mental states of human-like nonhuman animals could result in “a new sort of immaterial appendix to separate absolutely human being from animals.”⁵⁹ In other words, the “soul” of Plato and Aristotle may reappear—if slightly altered in form and presentation—in the current debate about animal rights. Carl Cohen brings up this idea, if indirectly, by stating: “At great human cost, the lives of fish and crustaceans must also be protected, with equal vigor, if speciesism has been forsworn. A very few consistent critics adopt this position. It is a *reductio*

⁵² *Id.*

⁵³ Wise, *supra* n. 20, at 12.

⁵⁴ *Animal Rights and Human Obligations* 51-52 (Tom Regan et al. eds., Prentice Hall, Inc. 1976).

⁵⁵ St. Augustine, *The City of God* vol. 31.

⁵⁶ Thomas Aquinas, *The Mastership Belonging to Man in the State of Innocence*, in *Basic Writings of St. Thomas Aquinas*, vol. 1, 917, 920 (Anton Pegis ed., Random House 1945).

⁵⁷ Wise, *supra* n. 20, at 9.

⁵⁸ *Id.*

⁵⁹ Dombrowski, *supra* n. 2, at 140. McGinn’s idea is not an entirely new one. Tom Regan notes that Descartes uses the terms “mind” and “soul” interchangeably. Tom Regan, *The Case for Animal Rights* 10 (U. of Cal. Press, 1983).

ad absurdum of the rejection of moral distinctions between animals and human beings."⁶⁰

Although it is unclear what the "great human cost" would be, most of Cohen's first sentence seems correct. If forswearing speciesism means believing that no animal has any more right to live on this earth than any other animal does, certainly "fish and crustaceans must also be protected." He is likewise on solid ground with his second sentence. In all of *Babies and Beasts*, there is no philosopher (with the possible exception of Stephen Clark, if his stated views are extrapolated in the way that Dombrowski suggests they could be) who appears to argue for the extension of human rights to the likes of crustaceans. That this line of thinking is a "reductio ad absurdum" is neither right nor wrong; it is merely Cohen's opinion. That this "reductio ad absurdum" is the consistent result of eliminating the "Great Wall's" idea of the soul, or, as Cohen puts it, the "moral distinctions between animals and human beings" is, however, likewise correct.

It is simply inconsistent to argue, on the one hand, that ideas about soul are outdated and illogically speciesist and, on the other, that some animals deserve more rights than others on the basis of such a soul-like characteristic as intelligence-derived moral distinction. Is preferring human-like nonhuman animals over other nonhuman animals because of intelligence really any different from preferring humans over animals because humans "possess [the capacity for] calculation and thought?"⁶¹ Other than slightly expanding the scope of Aristotle's "small minority,"⁶² the answer would appear to be "no." Is Wise's statement, "I don't argue that the great majority of animals should have rights. . . . It is all right to boil lobsters, for example, since they have no brain cortex or its equivalent"⁶³ much different from the Platonic immortal soul rationale for disparate treatment of inferior beings? Is giving preference to animals who approximate our cognitive image distinguishable from humans penning a religious text in which they create a god who gives preference to those beings who allegedly approximate his image? Or when someone asserts that we can, with moral impunity, kill animals that lack biographical lives, is he voicing ideas any newer than Saint Augustine's?⁶⁴ It seems obvious that the soul, no matter what sorts of code names it is given, remains alive and well in contemporary intelligenceist thinking. The crucial question is whether anything about this realization is problematic.

There may be nothing problematic about relying upon thousands of years of philosophical thought to develop sound arguments. On the contrary, and especially in courts of law bound by *stare decisis*, basing arguments on the writings of such respected thinkers as Aristotle and

⁶⁰ Cohen, *supra* n. 17, at 869.

⁶¹ Aristotle, *supra* n. 51.

⁶² *Id.*

⁶³ Dombrowski, *supra* n. 2; Wise, *supra* n. 41.

⁶⁴ *Sierra Club*, 405 U.S. at 727.

Plato will only make them more likely to succeed. Animal rights intelligenceists who adhere to this approach may not fairly be said to be inconsistent, though their arguments will lead them only so far. At best, intelligenceists will only secure rights for animals who possess some form of soul-like intelligence or intelligence-derived characteristics that make them objectively similar to human rights-holders. If, however, the intelligenceist animal rights activist has as his first objective attaining rights for human-like nonhuman animals and then hoping that they or someone else in the future will argue successfully for extension of rights to other animals with lower cognitive capabilities, reliance on "Great Wall" ideas about soul (and related concepts) is indeed problematic. It is a flatly contradictory position to take for those who, like Wise, wish to demolish the Wall itself—unless, of course, using parts of the Wall's foundations to topple the rest may be seen as consistent. The problem with this course of action is that those who attempt it will be stuck holding onto bits of foundation that may come back to haunt them (or, more importantly, the many species of nonhuman animal that continue to suffer because those apparently harmless vestiges of the Great Wall's foundation did not fall with the entire structure). Again, the choice here is the one Thurgood Marshall faced: continue to rely on *Plessy* to achieve results for clients in need of immediate help or reject *Plessy* and begin laying the groundwork for *Brown v. Board of Education*. And while it may be true that Marshall chose both of these options, the former for many years before the latter, it is also true not only that he and other civil rights advocates achieved a great deal more by following the second approach but also that pursuit of the first did not—in the way that intelligenceism arguably does in the field of animal rights—preclude eventual beneficial use of the second.⁶⁵

Echoing Steven Pinker, Wise writes: "No one but a professor or a deep ecologist thinks that a language-using animal is not a bigger deal

⁶⁵ Critics of my analogy to Marshall's initial use and eventual renunciation of *Plessy* will likely point out that animal rights organizations today, like the NAACP during the civil rights era, can and should rely upon multiple—even contradictory—theories of recovery since stories, like the one this paper tells about Marshall, prove that one relatively weak argument could pave the way toward legal acceptance of a stronger one. Indeed, Wise at least faintly suggests this quite reasonable proposition in *Rattling the Cage*, and does so more strongly in his other writings. This essay, however, sees a potential problem with drawing its own analogy too far: namely, that while Marshall's *Plessy*-based arguments inflicted a potential harm upon all members of a single group (African-Americans) that was later rectified as to all members of that group, the intelligenceist analog to such arguments in the animal rights field work directly in favor of some members of a group (human-like nonhuman animals) and to the direct detriment of other members of that same group (all other nonhuman animals). While it could be that this distinction will be meaningless, and intelligenceist legal arguments will lead to other, better arguments that secure rights for a broader range of nonhuman animals, this essay believes that the distinction is an important one to keep in mind and that it could imply that the struggle to achieve either rights or other protections for the great majority of animals might face insurmountable obstacles if it is pursued by means of even initial intelligenceism.

than island-building coral, soil-building earthworms, or photosynthesizing-bacteria."⁶⁶ He may be right. But how many people, other than professors and ecologists, think that chimpanzees and bonobos should have rights because some of them are smarter than their own human children? Probably very few. Wise evidently believes that it will be an easier task to convince both non-lawyer citizens and courts of law to adopt his intelligenceist argument than it would be to try to convince them to accept the equality-based argument embodied in the excerpt above. He believes this despite his own difficulty in defining consciousness, an important element of his argument. "Consciousness," Wise writes under the subheading "The Top Ten Theories of Consciousness, or Nobody Has a Clue,"⁶⁷ "seems to be a process and not a thing. It results entirely from natural, and not supernatural, causes. It has an 'aboutness' about it; it is always 'about' things, 'about' sights, 'about' noises, 'about' fear, 'about' sex."⁶⁸ If neither Wise nor any of the scientists he cites in *Rattling the Cage* can adequately define "consciousness" or "autonomy" (which Wise views as the main characteristic that distinguishes those who should have rights from those who should not), how will anyone else—a court included—be able to do so?⁶⁹ Or, if a court does define either of these terms, what assurance could anyone have that it would not define them in a way that simply reinforces, more strongly even than before, the notion that humans are the only truly—or legally—"conscious" or "autonomous" beings? Wise's approach seems to be a chancy one.

As *Babies and Beasts* makes clear, current animal rights discourse is a vast and varied ecosystem filled with both large and small voices—some easier to hear and understand than others, all competing with one another for attention. In the way, however, that many animal rights philosophers seek to show similarities among physically different animals, this essay has attempted to demonstrate that a high degree of similarity is likewise present in the ideas of the many thinkers Dombrowski describes who appear, initially, to be directly at odds with one another. Intelligenceist animal rights advocates Peter Singer and Steven Wise may well be in need of reassessing their strategic plans to make their mark on the public's ideas about animals and the legal system's treatment of them. It is to the credit of any activist who takes time to consider the effects an argument he makes will have not only on the immediate subject of his advocacy but indeed on the others—however intuitively similar or dissimilar they may be—that will follow. While many intelligenceists, perhaps most notably Wise, have made this consideration, it may be possible that they have overlooked the potential long-term ill effects their writings could produce.

⁶⁶ Wise, *supra* n. 20, at 237.

⁶⁷ *Id.* at 125.

⁶⁸ *Id.* at 129.

⁶⁹ *Id.* at 251-57 (comparing varying levels of autonomy).

Although it attempts to challenge the decision Wise has made, this essay does not pretend that its own ideas will lead to the correct answer or indeed that they are even any better than those that Wise has developed after many years of thought and countless appearances in court on behalf of various nonhuman animals, intelligent and unintelligent alike. It merely aims to plant a seed of doubt in a book that, for rabbits, mice, and every other nonhuman animal who lacks intelligence approaching that of a human—from a bacterium or a snail up to a pig or an elephant—is clearly not “that book.”⁷⁰ By relying upon modern analogs to the soul-like ideas embodied in the Great Wall they wish to demolish, Wise and other intelligenceists that share his general goal of achieving rights for human-like nonhuman animals may wreak damage difficult to undo once the time is ripe for non-intelligent animals to come before the courts. Those of us writing today are the pioneers of animal rights law. We speak and act for other animals who cannot. Our responsibility is to ensure that we speak for them all. It may well be that Stephen Clark and Judge Arnold advocate a better approach: develop arguments based upon the many elements of our social, intellectual, and legal history that point to stewardship and protection for the weak rather than equality for only those who have, often quite unjustly, been deemed our “equals.”

⁷⁰ See *supra* n. 32 and accompanying text discussing the comparison between Wise's exclusion of non-humanlike animals and the exclusion of all but white males in the *Declaration of Independence*.