

## DO ANIMALS NEED RIGHTS?

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The idea of animal rights makes many people skittish. By the word “animal” I mean non-human animal— though of course people are animals, too. And by the term “rights” I mean moral rights, and in particular, moral rights that are weighty enough to justify—even to demand—legal protection and enforcement. Some moral rights are not weighty enough or weighty in this way. My moral right to expect a friend to return my calls cannot be legally protected; but my moral right not to be subjected to harassing calls from a stranger can be, and often is, legally enforceable. And whether it is legally enforceable or not, it ought to be.

Skittishness about talk of animal rights is not confined to people who are satisfied with or indifferent to the ways in which animals are now commonly treated. There are in fact many people who sincerely wish to champion the cause of better treatment of animals but are nervous about stating their case in terms of animal rights. And many philosophers

and others who want to examine the normative issues without prejudging them, and without framing them in confusing or misleading terms, are leery of the term “animal rights” and the concept to which it would refer. For example, the editors of the *Oxford Handbook of Animal Ethics*, a collection of recent philosophical papers, deliberately chose to avoid using the term “animal rights” in the book’s title, simply because “some philosophers are actively opposed to this terminology” (4). The purpose of my paper is to look at some of the reasons for this skittishness and opposition.

The question I ask, “Do animals *need* rights?” is not the question, “Do animals *have* rights?” but it is related.<sup>1</sup> Sometimes we have and are entitled to what we don’t need, and not needing it doesn’t mean we don’t or can’t have it. But the idea of rights includes the idea of a claim, a demand; and a novel demand on behalf of someone who does not need and cannot use what it is that is demanded can’t be taken as seriously as a demand made on behalf of someone who is in genuine need of that very thing.

#### RIGHTS-TALK

To forestall any suspicion of *absolutism* is one reason often given for wanting to avoid advocating better treatment for animals in terms of animal rights. The idea is that if any

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<sup>1</sup> As Bentham said, “Hunger is not bread.” He was denouncing the very idea of “natural,” “ante-legal and anti-legal” rights as no more than “nonsense on stilts” (1843, 501). But Bentham championed the cause of animals: “The day *may* come, when the rest of animal creation may acquire those [legal] rights which never could have been withholden from them but by the hand of tyranny” (1979 282-83 n1). Bentham would not have said, “Animals have a moral right to legal protection,” any more than he would have assented to “People have a moral right to legal protection.” See Edmundson 2012 for more on Bentham.

being or kind of being is recognized as having a certain right—a right to respectful treatment, say, or a right not to be treated as a mere means—then that right automatically “trumps” the interests of other beings, no matter how great those interests are or how widely distributed. And it is also assumed that if a being or kind of being has any rights at all, they are generally the same assortment of rights that humans have.

Absolutism can be off-putting. The philosopher Rosalind Hursthouse, for example, reports that her students, upon learning of the widespread, routinized infliction of suffering upon animals, are initially drawn to vegetarianism. But then, confronting rights-based opposition to medical experimentation on animals, these students rebel, and revert to their former complacency. The language of rights and the “moral status” rights are supposed to mark are to blame for this reversion, she argues, because they “drastically underestimate the range of features relevant to good decision making about what to do.” Asserting that animals have a right not to be used in medical experimentation is, she says, “actually pernicious. It is the equivalent of hollering ‘Abolition! All or nothing,’ which is guaranteed to impede progress rather than to further it” (2011, 138). The alternative she advocates is the cultivation of a virtue of respectful love.

I leave aside, for now, Hursthouse’s suggestion that animals don’t need rights because respectful love will serve them better. Her criticism of rights-talk as absolutist in tenor is exaggerated. Rights of all kinds should always and can always be understood to be subject both to adjustment to accommodate the rights of others and to balancing against other kinds

of interests. Often, these qualifications go without saying, and that tacitness ought not to be taken to imply that the right in question is claimed to be absolute. Of course, if what is up for discussion is the nature and contours of these very qualifications, then it would be absolutist to insist woodenly, without giving further reasons, on the unqualified right. But that is not the fault of the concept.

An example drawn from U.S. constitutional law helps to make the point. The first amendment in the Bill of Rights states that “Congress shall make no law ... abridging the freedom of speech.” This is taken to mean that Americans have a constitutionally protected right to free speech. But it does not mean that Americans have a right falsely to shout “Fire!” in a crowded theatre, or to defame the reputations of others, or to use what are called “fighting words.” Legislatures may also make reasonable regulations of the “time, place, and manner” of public speech. The right to free speech is of a dimension subject both to the rights of others and to general interests in public safety and order. It would be cumbersome to pack all of these qualifications into every sentence in which the phrase “the right to free speech” occurs, just as it would be cumbersome to pack all the necessary subtleties into every sentence in which the phrase “animal rights” occurs.

Pointing this out does not show that absolutism about rights is impossible or even unlikely.<sup>2</sup> Justice Hugo Black, of the US Supreme Court, insisted upon an absolutist reading of the first-amendment right to free speech. But even Justice Black’s absolutism did not rest

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<sup>2</sup> The absolutism worry differs from the separate worry that drawing certain analogies, such as that between factory farming and Nazi death camps, will close down discussion (*cf.* Coetzee (2003)).

solely on the mistaken idea that if there is any right to free speech at all, then the right must be absolute.

#### WHAT IS SPECIAL ABOUT HAVING RIGHTS?

Thinking through the absolutism worry serves the worthwhile purpose of reminding us of what rights are good for. Having a right to something, or a right to be treated in a certain way, means that that a special kind of justification is needed before that right is infringed. Absent such a justification, the right is not merely infringed but violated. A wrong has been done: a special *kind* of wrong, which the language of rights is uniquely suited to express.

Why? What is special about rights? A brief review of the history of rights helps to explain what is unique about rights, and why they are uniquely valuable “moral furniture,” in the phrase of philosopher Joel Feinberg (1970). Historians of ideas and philosophers have disputed whether the concept of rights we use is a relatively recent innovation, rather than a concept present in the thought of ancient Greece and Rome. The modern terms “*right*,” “*droit*,” “*recht*,” and so on, do not seem, to some anyway, to have had precise equivalents in classical antiquity. But there is no dispute that the ancients approved certain actions as “right” and condemned others as “wrong.” This being so, one must ask, what is the difference between something’s *being the right thing* to do, and someone’s *having a right* that it be done? What does the latter idea add?

The question can be framed slightly differently. The value of *having* a right presumably consists in the correlative duty that others have to respect it. The value of having a right to free speech cashes out in terms of the set of duties others have not to interfere with one's speaking.<sup>3</sup> Consider this set of correlative duties. Each of them can be understood as making it wrong to do certain things, and right (or at least permissible) to do others. It is right to allow others to speak, and wrong to interfere. What does a speaker's possessing a right to speak add to the wrongness of interfering with her speaking? If nothing, why not dispense with the idea of rights and talk instead of the rights and wrongs of the various kinds of conduct that impact speech? If, on the other hand, something is added, that talk of right and wrong conduct has not already captured, what is it?

Saying what that added dimension is has been the task of the theory of rights. By "theory of rights" I don't mean practical, "applied-ethical" theorizing about who has what rights and who hasn't, and about the precise contours and qualifications of the rights that are distributed around. The theory of rights is a preliminary to those further, important but separable ground-level debates. But the theory of rights in this sense does have implications for applied moral theories. If the theory of rights represents rights as having a certain nature, that nature can entail that certain beings are incapable of holding rights, or of holding

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<sup>3</sup> I ignore here and elsewhere the fact that further Hohfeldian elements are involved in the complex molecules of which our rights consist. A congressional disability to enact legislation suppressing speech, for example, and an individual immunity from such legislation would have to be included in a complete statement of the free-speech right.

rights of certain kinds, or of having the special protection of rights at certain stages of their development.

So, the theory of rights, in answering the abstract question of the specialness of rights, can have practical implications for animals and their rightful treatment. Certain objections to “the very idea” of animal rights derive from the conceptual theory of rights, even though the theory of rights, narrowly construed, is not directly concerned with the treatment of animals. The theory of rights has also has a justificatory aspect, supplementing its conceptual aspect. As rights theorist Leif Wenar says, “A good analysis will . . . be useful for normative theory: by showing what rights *are*, it will show how to prove what rights *there are* within the different domains (what moral rights there are, what legal rights there are, and so on)” (2013, 202). The theory of rights tries to set out what kinds of consideration could justify an assertion that such-and-such a being possesses such-and-such a right.

Nobody thinks rights are all there is to morality, and many people think rights are not primitive units but derive from more basic values, like well-being, fairness, and autonomy. The justificatory department of the theory of rights is mainly concerned with fitting rights into a wider and more fundamental normative ethical theory, such as utilitarianism or contractualism. But it too can have implications for practical ethics as well, and for discussions of the treatment of animals.

One reason some rights theorists are skeptical about animal rights is, paradoxically, that animals can do no wrong. Animals cannot wrong us, or each other, because they can

owe us nothing. Of course, animals can and do sometimes harm us and regularly harm each other, but that is not the same as wronging. *Damnum absque iniuria* is the lawyer's way of putting it: animals can do harm but they cannot do wrong. Animals can disappoint us, and can even misbehave, but punishing an animal as a wrongdoer is cruel and atavistic. This fact about animals (and I will assume it as such without discussion<sup>4</sup>) resonates within the chambers of rights theory in both of its aspects: conceptual and justificatory.

#### WHAT RIGHTS DO

Rights serve those who hold them in several basic ways. One function rights serve is as a vivid way to recognize that there is nothing wrong with the right-holder's doing a certain kind of thing. Property rights are by and large of this kind, although they also serve to empower the property owner to alienate or transfer the rights she holds. There is typically nothing wrong with a property holder insisting on the exclusive possession, use, and enjoyment of her house or her car, or her farm, because that's what property rights are: moral permissions to have dominion over certain things (tangible or otherwise), coupled with duties others have not to interfere with this dominion. The right to property serves, in

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<sup>4</sup> Do some of the so-called "higher" animals know the difference between right and wrong? Are they capable of acting on this knowledge? I have been assured that punishment of a pet cat or a dog for fouling a carpet, for example, is efficacious only if administered immediately after the misdeed. If this is so (and it does not necessarily signify knowledge of wrongdoing anyway), I think the language of punishment inapt. "Operant conditioning," is the more accurate description.

this way, a *recognitional* function. Some people oppose, for example, gay rights, on the ground that to admit them is to approve conduct they believe to be wrongful.

Another function rights serve is a *reaction-constraining* function. The right holder in this sort of instance may indeed be doing something wrong, but no one has a right to interfere except by certain limited means, and many have no right to interfere at all. The reaction-constraining function comes into play when the right holder has a right to do wrong—not a right to do wrong generally, but to do some certain kind of wrong. For example, it is very wrong to cast a vote for a racist candidate, or to advocate racist policies, but it would be wrong to deny one the right to do those very things. One may express disapproval of such conduct, and shun the person who engages in it, but that is the limit of one's moral permission to react to another's wrong choices in voting and advocacy. In other cases, a wrong may be permissibly interfered with, but only by certain persons, standing in a certain relationship to the wrongdoer. An expecting mother does wrong by smoking and immoderate drinking, and may very obviously know the risks she is taking, but it is not for bystanders or casual acquaintances to upbraid her for it.<sup>5</sup>

Certain public controversies can be illuminated by attending to these different functions. Some advocates of, for example, abortion rights take the position that a woman has a right to choose regardless of the rightness or wrongness of the underlying conduct. Opponents of abortion rights insist that the rightness or wrongness of abortion is precisely

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<sup>5</sup> Godwin and Mill to the contrary notwithstanding.

the issue, and that recognition of a right to choose implicitly endorses the view that there is nothing morally problematic about it. Similarly, some advocates of gay rights insist that there is nothing wrong with being and living gay; while other advocates more cautiously bracket, or prescind from, the basic moral question and hold that punishing or demeaning homosexuality is wrongful either way.

Obviously, public debate about animal rights is not of this nature. Because animals can do no wrong, they don't need reaction-constraining rights. Because animals can have no duties, they do not need what John Rawls termed "enabling rights" (2007, 144) to allow them to perform what their duties require.<sup>6</sup> Because animals can "do no right," they don't need recognitional rights. Because animals are incapable of consenting to anything, they don't need empowerment rights. Even so, because animals have interests that can be harmed, they can use, and do need, rights that serve yet another function: one that is straightforwardly, and solely, a *protective* function.

It is at this point that many rights theorists will interject conceptual misgivings. Is a stand-alone protective function one that rights, strictly speaking, can serve? To put the question differently, isn't a merely protective function equally well served by confining the claims made on behalf of animals to the language of what is *rightful* and *wrongful* of humans to

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<sup>6</sup> Wenar takes the position that "Historically, all rights were what Rawls calls *enabling* rights: 'rights we have so that we can fulfill certain duties that are prior in the order of grounds'" (2013, 206). The duties Wenar refers to are all tied to *roles* of one kind or another. I am uneasy about both the sweeping historical claim and its attribution to Rawls, but this is not the place to discuss it.

do to animals, leaving alone any assertions about animals *rights*? If it is, then animals don't really need rights.

#### A (TOO-)QUICK CONCEPTUAL ARGUMENT FOR ANIMAL RIGHTS

Philosopher Tom Beauchamp has made the following argument on behalf of animal rights:

That there is a correlativity between obligations and rights ... has considerable significance for the theory of animal rights.... Because we are morally obligated not to be cruel to animals, they have a moral right not to be treated cruelly. The obligation strictly entails the right.... The logic of the correlativity thesis is that whenever humans have obligations to animals, then, whatever the obligations are, a creature has correlative rights.... (206-07)

This is misleading and probably a mistake. A rights theorist will point out that, in general, although rights entail duties, duties do not entail rights. Beauchamp is aware that correlativity doesn't go both ways in the case of legal rights. For example, if *A* has a legal duty not to harm *B*, it is a further question whether *B* has a legal right against *A*. The ground of *A*'s duty may be a contract with *C*, or a general regulation whose enforcement is not up to *B*. *B* may simply be out of court, despite *A*'s breach of a legal duty. Beauchamp assumes, however, that it is something specific to legal rights that blocks the general inference from duties that benefit to rights to that benefit.

Two points need to be made here. One, legal rights and duties often (not always) are a sufficient ground for corresponding moral rights and duties. Therefore, often, a legal duty to benefit *B*, that does not entail a legal right of *B*'s to be benefitted, will generate a moral duty to benefit *B* that lacks a correlative moral right of *B*'s to be benefitted. Two, leaving legal rights aside, other examples show that correlativity doesn't always go both ways in the case of moral rights. We all have a moral duty not to scribble on the Mona Lisa, for example; but it doesn't follow that the Mona Lisa has a right not to be scribbled on.

Beauchamp is aware of the difficulty. He writes, "correlativity should be understood in terms of *direct* rather than *indirect* obligations to animals—that is, in terms of obligations *to* an animal by contrast to obligations merely *regarding* the animal" (207). The Mona Lisa lacks a right not to be scribbled on because the duty we have not to scribble on her is indirect, and merely a duty *regarding* her rather than *to* her. Animals have rights because our duty not to be cruel to them is direct, *to* them rather than merely *regarding* them, in Beauchamp's view.

There is reason to doubt that there is a strict *bilateral* correlativity between rights and direct duties. Duties of friendship are direct, not indirect. Yet it seems mistaken to say that

duties of friendship, one and all, entail rights that friends hold against friends.<sup>7</sup> I have a moral right to expect my friend to return my calls; but, although I have a duty to my absent friend to defend him against criticism, it is too much to say it is his right that I do so.<sup>8</sup> That issue aside, the pertinent question here is, do animals need to have humanity bear duties directed

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<sup>7</sup> Leif Wenar suggests, as a “plausible hypothesis” that “enforceability turns directed duties into rights” and offers this example: “The gaffe-making friend owes a [direct] duty to his buddy, but the buddy has no right against him because that duty is not appropriately enforced” (2013, 214 n24). The hypothesis is in tension with the Millian view that all perfect duties—or as Wenar calls them, “strict” duties—expose the duty-bearer to some appropriate sanction for non-performance. The tension could be relieved by distinguishing somehow between “enforcement” and “sanction” or—what seems more promising to me—by appealing to proportionality. Seen against a background duty of friends to be pleasant to friends, there is a palpable difference between a permissible expression of annoyance at a gaffe, a permissible complaint of callous indifference for failure to return calls, and a permissible accusation of betrayal for a deliberate breach of confidentiality. But an accusation of betrayal for a mere gaffe would be too much, and so also would unspoken resentment to any high degree.

<sup>8</sup> Badhwar (1993) suggests that duties of friendship correlate with friends’ *rights to expect* each other to act and be disposed to act in ways appropriate to the relationship. This is undeniable, if the “right to expect” is merely an epistemic license. But what Badhwar intends is a Hohfeldian moral permission that friends have to *remind* each other of failures to act as a friend ought. Her project is to defend Rawlsian liberalism from the charge that it injects demand-laden rights-talk into the rights-free discourse of friendship. To that end, she argues that “friendship necessarily involves justice and rights, but rights may be expressed—and pressed—in different ways: sometimes as demands, sometimes even as legal threats, but in friendship, typically, merely as reminders—gentle or forceful, matter-of-fact or emotional—of legitimate expectations and entitlements” (1993, 270). Notice the difference, though, between rightly expecting something of a friend and *reminding* her of one’s right to expect it. In wanting to establish that reciprocal rights—over and above reciprocal duties—are “partially constitutive” of friendship (271), Badhwar overlooks the fact that there are certain things friends are obligated to do for friends without being reminded, just as there are (as she acknowledges) things friends have a right to expect of friends without being demanded. In some cases, the friend has the rightful expectation but it must fall to some other friend to do the reminding. In other cases, a friend’s reminding her friend of his unkept-duty to pay her more attention (an example of Badhwar’s) may signify that the relationship has veered in the direction of unrequited love.

to them, as contrasted with duties *regarding* them? What *advantage* accrues to animals in virtue of benefitting from duties to them, rather than coextensive deontological protections merely regarding them?

Notice that human duties that are merely *with regard to* animals do not necessarily rest on or reflect a recognition of a positive value animals have. Consider dietary tabus. Hindus recognize a duty not to eat beef because cattle are revered. But Jews and Muslims recognize duties not to eat pork because pigs are despised: for Jews, their meat is *treyf*, unclean.<sup>9</sup> But, from the perspective of the well-treated cow or pig, what difference can it make whether that treatment is a human duty to them or merely with respect to them? If there is no advantage, there is no need.

There would be a clear advantage if a duty owed to *B* by *A* is necessarily one that *B* can assert, and can claim; whereas a duty of *A*'s merely *regarding B* is not necessarily so. But, even assuming that direct duties have this feature, it is not an advantage for animals. They are not capable of asserting or claiming anything, if that means articulating an objection or putting forward a demand. Animals can protest or resist, but they cannot decide to forgo protest or resistance, much less, to exchange one right for another, or to seek recompense. True, some human rights holders, such as infants and the profoundly disabled, lack these abilities too. But pointing this out merely shifts the difficulty to those cases, and the question

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<sup>9</sup> I thank Brian Bix for making this point to me.

becomes: what advantage do infants and the profoundly disabled reap from being the objects of direct rather than indirect duties?

One might say that directed duties are advantageous to them because they can be exercised on their behalf by a proxy. But there is no logical connection between benefitting from a direct duty and having a proxy to exercise it in case of one's incapacity. A power of proxy might equally well attach to an indirect duty anyway. The better answer is that recognizing infants and the profoundly disabled as objects of direct duties is an expression of *respect*. Duties *regarding* them do not express respect for them in the way that duties to them do. So, to summarize: animals need rights because animals need to be respected, and need to be respected in a way that rights are uniquely capable of expressing. At this crucial juncture, the rights theorists I have in mind will demur, and will do so on both conceptual and justificatory grounds.

#### THE SKEPTIC'S CASE

An influential school of rights theorists has insisted that rights holding, strictly speaking, consists not (or not only) in benefitting from another's direct duty, but in possessing a *moral power* of insisting upon or waiving that duty. This position is known as the "choice" or the "will" theory of rights. Rights, on this view, are essentially about autonomous choice. As a consequence, rights cannot be needed—or enjoyed—by beings not capable of autonomous choice. Animals are incapable of autonomy and, therefore, as a conceptual matter, are not

possible holders of rights. Animals are given their due and due respect as beneficiaries of duties (direct or otherwise) borne by beings that are capable of autonomy. The incapability of animals is manifested in their incapability of bearing, themselves, duties of any kind.

What I have just stated is a conceptual position opposed to talk of animal rights. It has affinities to, but is distinct from, a position taken against animal rights on justificatory grounds. On this latter view, the assignment of rights to animals is unjustified on general moral-philosophical (“normative”) grounds, independently of whether or not animals are conceptually fit to hold rights.

The kernel of the justificatory objection to animal rights rests on the fact, noted several times already, that animals cannot bear duties. They can only be the beneficiaries or subjects of duties (direct or indirect) borne by autonomous beings, chiefly, by us humans. This means that there can be no *reciprocity* between animals and humans, and no accountability for violations of reciprocity. Rights are features of reciprocal moral relationships, and of networks of reciprocal moral relationships. There is a unique kind of respect that reciprocal moral relationships express. Autonomous moral agents, who are embedded in connected networks of reciprocal moral accountability, have a kind of regard for one another that is of a special kind. It is this reciprocity that makes it possible for strangers and dire enemies to respect each other as fellows.

Although animals can exhibit many welcome, even admirable, character traits in their dealings with humans, none of them involve reciprocal respect and accountability. If a

dolphin saves us from possible drowning by nudging us towards the shore, we are grateful. But if it doesn't, we can't be resentful. We would be resentful, and rightly so, if a stranger or even our worst enemy were to fail to assist in our easy rescue. Even a condemned convict could rightly resent being left to drown, even if his rescue merely resumes his journey to the gallows.

Reciprocity provides essential grounding and orientation for the ground-level task of deciding the content and contours of the rights anyone can claim. As philosophers John Rawls (1999),<sup>10</sup> T.M. Scanlon (1998),<sup>11</sup> and Stephen Darwall (2006) have argued, an inquiry into what our rights and duties are becomes manageable and determinate only when we approach it as potential addressors and addressees of others who are reciprocally related to us. Insofar as our rights reflect what we owe others, and what moral demands we may

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<sup>10</sup> “We do not normally think of ourselves as owing the duty of justice to animals ... and a plausible explanation is their lack of the capacity for a sense of justice and the other capacities which this sense presupposes” (Rawls 1999, 114). Similarly, Ranier Forst writes: “the demand for justice ... rests on the claim to be respected as a subject of justification, that is, to be respected in one’s dignity as a being who *offers* and demands justifications” (2014, 22, emphasis added).

<sup>11</sup> “[I]t is not necessary to claim that nonhuman animals fall within the scope of the narrower part of morality I have been describing [viz. of “what we owe to each other”] in order to account for the fact that there are serious moral objections to torturing animals for fun and to subjecting them to painful treatments [*sic*] in order to test cosmetics” (Scanlon 1998, 181).

reasonably make of each other, their content presupposes a reciprocity that simply does not obtain in our relations with animals or, for that matter, with the wider world.<sup>12</sup>

These conceptual and justificatory objections reflect the plausible conviction that there is a special kind of relationship that exists between humans, and that the concept of rights is misplaced outside this matrix. Rights cannot serve animals by regulating reactions to animal wrongdoing, for animals can do no wrong. Rights cannot serve animals by imparting or protecting a moral permission for them to do what they might be inclined to do, for they do not need and cannot receive any such permission. They can do no wrong, and can wrong no one. Rights have nothing to offer beings who are not members of a matrix of reciprocally accountable beings, who therefore cannot be held accountable to others, and who cannot reciprocally adjust their expectations and dealings within it. What offers one nothing cannot be something one needs. Animals need many things, above all, decent treatment by us. But they don't need rights.

#### THE SKEPTICAL CASE ASSESSED

Now, I think the skeptic's case has a lot to be said in its favor. For reasons I will give in a moment, it is not decisive. Yet even so, one might think, it is strong enough to make

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<sup>12</sup> Darwall struggles with this point: "I *am* tempted to hold that non-second-personally competent beings [like animals] can have *some* second-personal authority [and hence can be owed direct duties]. I guess I don't feel anything that would lead me to want to hold that they have the same kind of second-person authority that second-person competent beings do" (2009, 128). Hence, animals do not stand on a plane of reciprocity and equality with adult human persons. Darwall never states unequivocally whether his view counts animals as potential rights-holders.

advocates for animals back away from using the language of rights. The case for needing rights is contestable, and the use of rights rhetoric serves as a lightning rod for reaction and resistance. Beauchamp notes that “the term [animal rights] continues to be used as a form of ridicule in many influential quarters, including cable-television news services and talk radio” (199). Risking ridicule is one thing. Inviting ridicule unnecessarily, pointlessly, is another. Rallying the troops is well and good, so long as it doesn’t alienate the uncommitted and doesn’t rally the opposition to a still higher pitch.

I suggest we defer weighing the pragmatic/forensic/tactical reasons for backing off animal-rights talk until the skeptic’s case-in-chief has been scrutinized. The skeptic’s case has several weaknesses, but I will press on the most basic one. Fundamentally, the case against animal rights rests on the idea that rights are essentially premised upon the right holder’s fitness to exercise choice. The special functions rights serve in morality are all essentially ways of respecting the right-holder’s autonomous choices. Beauchamp expresses this view in these terms: “Rights are special, and especially cherished, because individuals have justified claims that they can exercise at their discretion” (2011, 202).

But what of inalienable rights, which the holder has no discretion or power to waive? No one may surrender her right not to be enslaved, or right to believe or disbelieve in gods. Nor may one surrender or bargain away one’s right to at least some minimal degree of decent treatment and material well-being. These are perhaps controversial claims, but they are not abuses of the concept of a right. An interest in avoiding suffering is intelligible as a

ground for justifying an assignment of rights, and an interest in avoiding suffering is intelligibly severable from an interest in exercising autonomous choice.

A skeptic might insist that inalienable rights too are, despite surface appearances, not about minimal welfare but rather about the minimal conditions of autonomy. Rights, as a matter of conceptual necessity, protect either autonomy or the conditions of autonomy. Beings who are not capable of what T.M. Scanlon calls “judgment-sensitive attitudes” (1998, 180) or of what Christine Korsgaard calls “reflective distance” (2011, 102) from their impulses are not capable of autonomy, or of answerability, and rights are not for them.<sup>13</sup> Strictly taken, this weakens the case for rights claims not only on behalf of animals, but of fetuses, future generations of humans, young children, and severely disabled humans as well. Dropping a requirement that the capacities be already actualized would tend to bolster rights-claims on behalf of fetuses, young children, future generations, and (perhaps) of androids – while leaving those of animals, the severely disabled, artifacts, and ecosystems behind.

#### THE SKEPTIC’S TRILEMMA

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<sup>13</sup> For purposes of the present discussion, I am using “capable of exercising autonomy” and “capable of wrongdoing in the moral-responsibility-implying sense” as though they are conceptually equivalent. But I suspect that being capable of autonomy is a necessary but not a sufficient condition of being morally responsible. Therefore, I (for one) might be persuaded that members of certain species of animal are capable of autonomous choice but still lack something else necessary to moral responsibility. Moral philosophy of the last half-century has witnessed mighty efforts to reduce morality to rationality, and moral reasoning to practical rationality, but I am unconvinced that they are close to success. I thank Brian Bix for asking me to clarify this point.

Those who deny animal rights on conceptual or justificatory grounds must either a) deny them to severely and permanently disabled human beings as well, b) confess to a “speciesism” that assigns rights to kinds rather than to individuals, or c) resort to a consequentialist apology for allowing talk of the rights of the severely, permanently disabled. I take these up in turn.

*Skeptical Line (a): a Hard Line toward Non-autonomous Humans*

A skeptic about animal rights taking line a) will insist that there are strong, non-rights deontological constraints regarding treatment of the profoundly disabled. They have welfare interests that it would be wrong to set back. This protects them from wrongdoing, even though it denies the possibility of wronging them. This line will leave many uneasy. In the treatment of the profoundly disabled, it seems to be a mistake to suggest that because all that ultimately matters is a welfare interest, the rights approach and the welfare approach are interchangeable. Justifying wrong behavior is different from justifying behavior that is not only a wrong but a wronging. The differences include the following. First, the presumption that a prima facie wronging is in need of justification is normally more demanding and tenacious than the presumption that a prima facie “non-wronging” wrong is in need of justification. Secondly, the kind of justification required is significantly different in the two cases. A non-wronging wrong normally can be justified if it is the lesser evil, for example,

whereas a wrongdoing cannot.<sup>14</sup> And, thirdly, a wrongdoing, even if justified, normally creates certain duties of repair (compensation, apology, e.g.); whereas a justified non-wronging wrong does not. A view that would deny the profoundly handicapped the benefit of these differences is unappealing, and so also the equivalent view toward animals.

*Skeptical Line (b): Speciesism and Moral Status*

The animal-rights skeptic who takes line b) grants rights to humans incapable of autonomy, but denies rights to animals, who may indeed function at a higher level and even be sentient to a higher degree than unfortunate humans.<sup>15</sup> Fitness to hold rights attaches to kinds, and only mediately to members of those kinds. It is only reasonable to attach significance to species, and so the “moral status” of rights-holder is confined by species membership (Darwin’s skepticism about the fixity of species boundaries notwithstanding).

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<sup>14</sup> An example: Sam is out on a hike that is taking much longer than he could have foreseen. He is painfully hungry and it will be hours before he can eat. He comes upon a certain edible plant, which happens to belong to a threatened and nearly endangered species. His hunger might justify eating the plant if it is unowned, but not otherwise.

<sup>15</sup> Scanlon frames the issue in terms of what a trustee might reasonably consent to (1998, 177-86). If a trustee were appropriately appointed to speak for the animals, she could justifiably demand no more for them than that they not be caused to suffer pain. “We see pain as something a trustee for a creature could reasonably object to not because it is incompatible with a creature’s natural functioning, or because it is something the creature tries to avoid, but because of how we take it to feel to that creature” (184). A trustee for the profoundly disabled human, in contrast, could rightly insist on that and more including, at the least, “protection and care, affection, and those enjoyments of which the person is capable” (186). Scanlon does not explain why the latter trustee is entitled to take into account any more than how things feel to the profoundly disabled. He doubts anyway that “we can wrong nonrational sentient creatures in exactly the same sense in which we can wrong humans” (184).

Hursthouse rightly challenges the assumption that “moral status” is a useful concept. We must ask whether what Korsgaard calls “bridge claims” (2013, 635) connecting categories of entity with an internally homogeneous moral status are entitled to the decisive significance that the animal-rights skeptic who takes line b) gives them. Compare the moral status of children. These undoubted members of our species are allotted greater or lesser rights and duties based upon relatively fine-grained (though arbitrary) presumptions about degrees of developmental fitness and vulnerability — and in application even these yield to finer-grained, multi-dimensional judgments about the individual. Why not regard the whole matter of moral status as one not of category but of degrees? Membership in the human species is not conclusive of the question what rights an individual human possesses — why should non-membership in the human species be decisive?

*Skeptical Line (c): “As If” Rights for Non-autonomous Humans*

This brings us to skeptical line c). On this line, it is confessed that species boundaries have no intrinsic significance. The moral status of humans is individually variable, but presumptively equal. Those humans that fortune has rendered incapable of autonomy are to be treated as if they were of a rights-holding status not because they are, but because treating them otherwise would be coarsening. This line is reminiscent of Kant’s position on the mistreatment of animals:

cruel treatment of animals is ... contrary to a human's duty to himself.... It dulls his natural feeling of sympathy with their suffering and so weakens and gradually uproots a natural disposition that is very useful to morality in one's relations with other humans. (*The Metaphysics of Morals* 6: 192-93)

The profoundly disabled human is sufficiently an "analogue" of an autonomous agent that it would be "demeaning to ourselves" not to treat her as one of us. The crucial difference is that regard for ourselves is supposed to require us to treat the profoundly disabled human as a fellow rights-holder, but does not require that we treat animals as anything more than the beneficiaries of our self-regarding (and perhaps other-autonomous-agent-regarding) duties.

But line c) is unattractive in several ways. The profoundly handicapped and the permanently comatose are to be treated *as if* they had rights against being tortured or experimented upon, though they do not. To insist upon a difference between a human's having a right not to be mistreated and her being the beneficiary of a duty of others to treat her as if she had a right not to be mistreated, seems itself to be demeaning. Yet we are warned that we risk giving the profoundly disabled person *more* than her full due by saying that she *really does have* a right not to be experimented upon.

Moreover, why isn't a parallel argument sufficient to show that a pig is to be treated *as if* it had a right not to be tortured? (Bear in mind that the pig's sentience may exceed that of a profoundly retarded or comatose human being or even that of a small child.) Is the answer that mistreating non-autonomous humans is not only coarsening but also productive

of anxiety among autonomous humans? If it is, it cannot stand in the face of mounting evidence that cruelty to animals correlates with intra-specific violence among human beings.

In short: skeptical line c) fails because it makes better sense to say that animals and profoundly disabled humans ought to be treated as if they had rights because, in fact, they *do*, than it does to say that *they don't have rights but ought to be treated as if they did*. Line b) failed because its taking species-membership as defining moral status is arbitrary. And line a) failed because it contradicts our unshakeable conviction that, although autonomy is hugely augmented by rights, autonomy is not an inexorable precondition to having rights.

The skeptic's last line of defense is to warn of the dilution of human rights that threatens to result from recognition of animal rights. This worry has two aspects. One is the worry that animal rights, if they are admitted, will impose strenuous burdens on humans. The answer is that this demandingness objection is more properly raised in discussion of what rights animals have, rather than in the present discussion, which is whether animals need rights at all.

The other aspect of the worry is that recognition of important human rights will be obscured if animal rights are also "on the table." Human rights recognize extraordinarily special, basic interests, and this sets them apart from rights, even moral rights, generally. We have a moral right to expect others to keep their promises. We have that right because as autonomous beings we have an important interest in being able to plan and structure our lives. But one would hesitate to call this a *human* right, or to call the breaking of a promise a

*human rights* violation per se. This is because talk of human rights serves the recognitional function of singling out extraordinarily important interests. Once it appears that some such particularly important interest is shared by nonhuman creatures – such as the interest in not being made to suffer gratuitous pain – it in no way derogates from the recognitional point to attribute the right to the nonhuman creature as well. “Even a pig has a right not to be tortured” may be just as emphatic a way of condemning the torture of a human being as it would be to say instead, “Torture violates a human right.”

#### SUMMING UP

Rights are valuable because they correlate with valuable direct duties to the right holder. But a right is more than the sum of the direct duties correlated with it. Rights, once recognized, can generate duties that had, themselves, gone unrecognized (Waldron 1993). As circumstances change and knowledge grows, a right holder has an advantage over a mere bearer of direct or indirect duties. A set of directed duties tends to have a static quality: it generates further duties as its logical products, but nothing else. A right, in contrast, has a dynamic and generative quality that makes it more valuable. Even as the phrase “animal rights” encompasses myriad tacit limitations and conditions, it also tacitly nurtures within it a multitude of suggestive extensions.

Those who, in the nineteenth century, recognized women as capable of holding rights saw them as more than mere beneficiaries of the duties of others. Women were already the beneficiaries of directed duties. These early feminists saw the set of the duties of men to

respect women as an incomplete story. This quality of rights is capable of exciting alarm and resistance precisely because rights endow their holders with a dignity that requires more than occasional ad hoc improvements in their treatment. The concept of rights connotes, if it does not entail, a kind of equality among rights holders, however unequal and diverse their rights holdings may be. This is the special, additional value that rights have.<sup>16</sup> It is what makes it the case that animals need rights.

We accord animals a special kind of respect by seeing them as holders of rights to decent treatment. To recruit a phrase of Korsgaard's, recognizing animals as rights holders is "an expression of respect for, and solidarity with, the creatures on this planet who share our surprising fate [as] beings *for whom* things can be naturally good or bad" (111, emphasis in original). Animals need rights because things can go well or badly for them, which is why we have duties to them to avoid if possible making things go badly for them, and to consider the manifold ways in which we might be making things worse for them without being aware.

This is not to deny that there are profound differences between the ways in which things can go badly for them and how they can go badly for us. Nor does it prejudice the many questions that arise in deciding what duties we have to animals. Nor does it prejudice the question how variable capacities for sentience and intelligence affect the answers to those

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<sup>16</sup> A determined skeptic might insist that respect can equally well be expressed by especially stringent indirect duties. That overlooks the point that indirect duties with regard to a thing sometimes express abhorrence rather than regard, as in the case of kosher dietary restrictions noted earlier. Tightening the stringency of the restriction moves its expressive value even farther into negative territory. I thank Andrew I. Cohen for reminding me to address this.

questions. But it does mean that these answers must be respectful of animals as, in a profound way, our fellows.<sup>17</sup>

Does what Hursthouse calls “respectful love” for animals furnish them with all they need, so that animal rights are unneeded? Love and affection between people is an insecure basis for their relations with one another, unless each is recognized as connected to a system of rights that serves a “fallback function” (Waldron 1993, 385) when affection fails. This need for fallback rights is far more acute in the case of animals. Beyond the few pets we own, we humans are typically insensitive to the fates of animals. Even the epiphanies of sensitivity we are capable of (and not all of us are capable of them) are a tenuous restraint of our stronger and far more durable disposition to treat animals as resources, mere means literally to gratify our appetites. Most humans are knit with other humans into a fabric of affections that can in some cases (and maybe in the ideal case) substitute for rights. Most animals are not. For most of them, with respect to most of us, it is not enough to say that rights might serve them as a fallback. There is nowhere from which to fall.

Rights combine directed duties with a power to enforce those duties by some proportionate means —perhaps only by reproof or complaint, but often by self-help. That power of enforcement does not vanish in case the right-holder is incapable of insisting on a duty owed her. It can devolve upon another, who may act as the right-holder’s proxy. The

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<sup>17</sup> The fearful anticipation of suffering some serious, inescapable harm is surely among the worst perceptions anyone can have.

We humans share a special fellowship with animals who are capable of such perceptions.

right-holder's interests are better protected by a proxy who is not merely complaining about a wrong with respect to another being, but a wronging of that other being.

As for respect: there is a special kind of respect for another that cannot be expressed, or held, without recognizing that other as capable of having rights (Feinberg 1970). Not by humans for humans, and especially not by humans for animals. What those rights consist in is, of course, can only be answered by a great deal of careful further discussion. But that discussion, whatever its outcome, will be one that is respectful of animals in a way that a discussion merely of how to treat them will not. And animals can and do need that.

## BIBLIOGRAPHY

Badhwar, Neera Kapur. 1993. The circumstances of justice: pluralism, community, and friendship. *The Journal of Political Philosophy* (1): 250-76.

Beauchamp, Tom L. and R. G. Frey, eds. 2011. *The Oxford Handbook of Animal Ethics*. New York: Oxford University Press.

Beauchamp, Tom L. 2011. Rights theory and animal rights. In Beauchamp and Frey, pp. 198-227.

Bentham, Jeremy. 1843. *Anarchical Fallacies*. In vol. II, *The Works of Jeremy Bentham*. John Bowring, ed. Edinburgh: William Tait.

— [1789] 1996. *An Introduction to the Principles of Morals and Legislation*. J.H. Burns and H.L.A. Hart, eds. Oxford: Clarendon Press.

Coetzee, J.M. 2003. *Elizabeth Costello*. New York: Viking.

Edmundson, William A. 2012. *An Introduction to Rights*, 2d ed.. Cambridge: Cambridge University Press

Feinberg, Joel. 1970. The nature and value of rights. *Journal of Value Inquiry* 4: 243-60.

Hursthouse, Rosalind. 2011. Virtue ethics and the treatment of animals. In Beauchamp and Frey, pp. 119-43.

Darwall, Stephen. 2006. *The Second-Person Standpoint*. Cambridge MA: Harvard University Press.

— 2009. The second-person standpoint: an interview with Stephen Darwall. Conducted by Nicholas Hayes. *The Harvard Review of Philosophy* 16: 118-38.

Forst, Ranier. 2014. *Justification and Critique*. Cambridge: Polity Press.

Korsgaard, Christine M. 2013. Kantian ethics, animals, and the law. *Oxford Journal of Legal Studies* 33: 629-48.

— 2011. Interacting with animals: a Kantian account. In Beauchamp and Frey, pp. 91-118.

Rawls, John. 1999. The sense of justice. In *Collected Papers*. pp. 96-116. Samuel Freeman, ed. Cambridge, MA: Harvard University Press.

Scanlon, T.M. 1998. *What We Owe to Each Other*. Cambridge MA: Harvard University Press.

Waldron, Jeremy. 1993. When justice replaces affection: the need for rights. In *Collected Papers 1981-1991*. pp. 370-91. Cambridge: Cambridge University Press.

Wenar, Leif. 2013. The nature of claim-rights. *Ethics* 123: 202-29.