TOWARDS A THEORY OF ANIMAL RIGHTS:
ADVENTURES IN METAPHYSICS AND MORALS

BY

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DISSERTATION

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ABSTRACT

At this time, we have a century of jurisprudential and philosophical discussions on the metaphysical nature of rights. We have almost half a century of moral theory arguing for the moral rights of animals. Surprisingly, these two literatures have not intersected much. This leaves open whether the nature of rights could preclude the possibility of animal rights. It also leaves open what the nature of animal rights would be, should any of the moral arguments for animal rights be successful in their tasks. In this project, I explore these questions and show that animal rights must be conceived of as a limited form of human rights. Animals possess only passive rights (i.e. claim-rights protected by immunities) which function to advance their interests, in general. So conceived, it becomes clear why the moral arguments for animal rights have been grounded in deontological moral theories (e.g. varieties of Kantianism, contractarianism) rather than in consequentialist moral theories. Finally, even with a precise understanding of the nature of and grounds for the moral rights of animals, challenges remain regarding the ultimate force and place of animal moral rights among human moral rights.
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CHAPTER ONE: INTRODUCTION

In the early twentieth century, Wesley Newcomb Hohfeld, one of America’s greatest legal jurists, published what can easily be considered a foundational work on the concept of the legal right. Hohfeld’s work has resulted in a century of nuanced and technical debate among legal and moral scholars on the nature of rights as such. Such discourse has produced theories of rights that are orthogonal to concrete views of what legal and moral rights there are, but yet capture fundamental features common to all legal and moral rights. In this way, Hohfeld set the stage for the development of a metaphysics of rights.

In the 1970s, following the civil rights movement of the sixties, there emerged an animal rights movement. This political movement began with its foundations in the idea of animal liberation, the goal being to reduce and eliminate unnecessary animal suffering caused by humans. However, it quickly became apparent that animal suffering could not capture all that was objectionable about our treatment of animals. To understand what was objectionable about our treatment of animals, we had to conceive of the possibility that animals are possessors of moral rights. We had to conceive of the possibility that animals are ends-in-themselves, deserving of moral respect and not to be used by humans as mere means to human ends. Since Tom Regan’s foundational argument for animal rights, animal rights have continued to be a central topic in applied moral and political philosophy.

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1 Hohfeld (1913).
2 Singer (2002). A note on terminology: Throughout this project, I will use the term “animal” to signify non-human animals. When I use the term “human,” I usually mean fully functional human beings. This means an individual who is a member of the human species and has fully developed mental capacities that are typically associated with individuals of the human species, e.g. reason, language, agency. When I use the phrase “marginal human cases,” I intend to capture those individuals who are members of the human species, but who lack substantial mental capacities that are typically associated with individuals of the human species, e.g. infants, the severely cognitively disabled, the vegetative.
3 Regan (1983).
4 See, e.g., Korsgaard (2018); Rowlands (2009); Donaldson and Kymlicka (2011); Warren (1997).
While a metaphysics of rights ought to be readily applicable to all rights, including animal rights, there has been no thorough exploration of the metaphysics of animal rights. The theory of rights discussions have largely ignored animal rights and instead have focused on their favorite puzzles in the realm of the legal and moral rights of humans. The (moral) animal rights theorists have largely ignored the inquiry into the nature of animal rights as their primary goal has been simply to ground human (moral) obligations to animals. This is shortsightedness by both literatures. First, a theory of rights should be capable of accepting animal rights. Failure of the metaphysics of rights to conceptually accommodate animal rights indicates either a problem with the metaphysics or a problem with the moral argument for animal rights. For the sake of this project, I do not take the moral arguments for animal rights as definitive without objection, but I do take them to be good reasons for us to take seriously the possibility that animals have moral rights. So, our metaphysics of rights should take animal rights seriously. Second, an argument for the moral rights of animals should know what the nature of those rights amounts to. I think a lack of detail and precision in this area leaves animal rights views vulnerable to practical problems. In particular, animal rights theories struggle to identify reasons why human and animal rights may not be perfectly identical, and they struggle to explain how conflicts of human and animal rights are to be resolved without appealing to (what I think could be framed as) a hidden speciesism. A theory of the nature of rights (both human and animal) can provide more insight into these problems for the animal rights theorist.

So, in general, this project aims to break down the barriers between these two literatures and allow each to illuminate the other. The project will proceed in three chapters, with a brief conclusion. In the Chapter Two, I will focus on the first part of the nature of rights debate: the form of rights. I will discuss Hohfeld’s scheme of jural relations (the claim-right, privilege,
power, and immunity relations) that capture the analytical form of rights. I will argue that animal rights are properly conceived of as only passive rights. They contain only the passive Hohfeldian relations, i.e. the claim-right and immunity relations. This means that animal rights are a subset of human rights. Animal rights are best understood to be unalterable claim-rights correlative to human duties to animals to act (or refrain from acting) in certain ways.

In Chapter Three, I will move to the second part of the nature of rights debate: the function of rights. I will discuss the traditional divide on the function of rights between the will and interest theories as well as several recent attempts to overcome that divide. I will frame this discussion around a recent metadebate in the function of rights literature about whether the function of rights is meant to identify the correct combinations of Hohfeldian relations or whether the function of rights is meant to explain the directedness of duties correlated with claim-rights. Inside of this metadebate, I will be able to highlight an important active right for humans, namely the bilateral privilege, that animals do not possess as part of their rights. This is an important difference between the nature of human and animal rights that, I think, has implications for the conflicts of human and animal rights. Ultimately, I will conclude that animal rights must be considered to function to promote the interests of animals, in the general case.

In Chapter Four, I will transition to discussing the role of rights in moral theory and the substantive moral arguments for animal rights. Rights are best understood in the context of deontological moral theories because deontological moral theories can readily accommodate directed duties (and therefore the claim-right relation) as well as privileges (in particular, privileges to not maximize the Good and to prefer oneself over others in certain cases). In this way, deontological moral theories solve challenges to consequentialist moral theories through
rights, conceived of as Hohfeldian relations. Accordingly, it comes as no surprise that the three moral arguments for animal rights that I examine are deontological views (Regan’s Kantian/natural rights view, Korsgaard’s Kantian/virtue ethical view, and Rowlands’ Kantian/contractarian view).

In concluding the project, I briefly touch upon the conflict of rights problem that animal rights pose. I have two broad concerns. On the one hand, I am concerned that our way of resolving conflicts of human and animal rights negates the equality of a rights view by making animal rights second class “rights” to human rights. On the other hand, because animal rights are claim-rights (protected by immunities) with humans as the duty bearers and because the existence of claim-rights against humans necessarily curtails our bilateral privileges, I am concerned that extending rights to animals disrupts the balance between claim-rights and privileges for humans. Claim-rights among humans create the conditions for the possibility of humans exercising their bilateral privileges, which are fundamentally how humans realize their discretion, freedom, and self-determination. However, animal claim-rights do not seem to work in this way. Ultimately, I conclude that, notwithstanding their limited form and function and the unresolved conflicts of rights issue, animal rights do produce a distinctively powerful moral considerability for animals.
CHAPTER TWO: THE FORM OF RIGHTS

I. INTRODUCTION

In this chapter, I will begin my discussion of the nature of animal rights. I will begin with the “form” of rights based on Hohfeld’s conceptual analysis of rights claims into their constituent relations. This analysis is facially neutral with respect to who has rights (the scope of rights) and what rights there are (the content of rights). Once I have discussed Hohfeld’s scheme in the context of human rights, I will explore the form of animal rights under Hohfeld’s scheme. I will argue that animal rights are more limited than the rich form of rights that we have in relations among humans because animal rights include only the claim-right relation and the immunity relation, i.e. passive rights. This comes from the fact that animals lack certain capabilities that are fundamental to being a privilege holder and a power holder and thereby lack those capabilities fundamental for possessing privileges and powers, i.e. active rights.

II. HOHFELED’S RELATIONS

Although Hohfeld’s analysis of rights was originally intended to clarify the use of the word ‘right’ in judicial opinions,¹ his system of jural relations has been widely influential in the literature on rights generally (both legal and moral).² There have been staunch defenders of theories of rights which reject Hohfeld’s analytical scheme in some way;³ however, I elect to adopt Hohfeld’s analytical scheme of rights in this exploration of the nature of rights because it will help clarify the concept ‘right’ as used in the discussion of animal rights and elucidate specific issues that arise there.

¹ Hohfeld (1913, 20).
² See, e.g., Hurd and Moore (2018, 5–6); Kramer et al. (2000); Thomson (1990); Wenar (2005); Sreenivasan (2005); Wenar (2013); Wellman (1985).
Hohfeld’s analytical scheme is definitional/conceptual and disambiguates between four distinct relations that, individually or in combination, may be what is meant by a given rights claim. For the purposes of this project, to tease apart which relations are meant by a given rights claim is to “parse a rights claim.” Within the four Hohfeldian relations are contained eight statuses, four of which are (typically) beneficial to the rights claim holder and four of which are (typically) detrimental to the rights claim bearer. The four beneficial statuses are: (1) the claim-right, (2) the privilege, (3) the power, and (4) the immunity. The four detrimental statuses are: (1*) the duty, (2*) the no-claim-right, (3*) the liability, (4*) the disability. The four beneficial statuses are correlatives with the four detrimental statuses (i.e. 1 to 1*, 2 to 2*, 3 to 3*, and 4 to 4*) to create the four Hohfeldian relations. So, (1) and (1*) entail each other; (2) and (2*) entail each other, and so on. We can consider the beneficial statuses as “holder” statuses and the four detrimental statuses as “bearer” statuses. So, an entity may be a claim-right, privilege, power, and immunity holder, whereas another entity may be a duty, no-claim-right, etc.

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4 See Kramer (2000, 22).
5 “Rights claims” can take a variety of linguistic forms such as “the human right to healthcare,” “a right to life,” “my right not to be assaulted,” “the basic right to clean water,” “a right to be compensated,” “the right to liberty,” etc. Rights claims, as I will use the term throughout this project, are those linguistic proclamations that assert a “right” in some way, shape, or form. Rights claims are usually imprecise in everyday speech, as the examples above demonstrate. However, they can be made more precise through the use of Hohfeld’s scheme, as will become clearer in this and the following chapter. In philosophical discussions of rights, many theorists mean only the claim-right relation by the term right.
6 See Wellman (1985) (approaching rights as “complexes” of Hohfeldian relations).
7 Often, a rights claim does not identify the rights claim bearer. For example, animal rights theorists may assert that “animals have the right to life.” Here, the rights claim holder, i.e. each individual animal, has a right to life. However, the rights claim does not state who the rights claim bearer is. Fundamental to the Hohfeldian scheme is that rights claims, as combinations of the Hohfeldian relations, are relational. This relational aspect of rights claims may not hold true for rights that are non-Hohfeldian in nature (e.g. some moral rights). See Hurd and Moore (2018, 318).
8 Hohfeld himself uses the term “right.” Hohfeld (1913, 30). However, this can cause linguistic ambiguity as most rights claims are phrased as “the right to ...” where “right” does not necessarily mean claim-right, but rather means rights claim. To resolve this ambiguity, I will adopt the term claim-right to signify the beneficial status correlative to the duty, and I will not use claim-right and right synonymously (although I may occasionally opt for right instead of rights claim).
9 Hohfeld calls this the “no-right.” Hohfeld (1913, 32). However, given that I will use “claim-right” in lieu of Hohfeld’s “right,” I will call this the “no-claim-right” to emphasize the relation of opposition between the claim-right and the no-claim-right.
10 Halpin (2019b) calls these active and passive statuses; however, because I use the terms active and passive to categorize the Hohfeldian relations, I will stick with the terms beneficial and detrimental.
right, liability, and disability bearer. In addition to the correlativity relation between the statuses which creates the four Hohfeldian relations, the statuses also relate to one another via opposition (1 to 2*, 2 to 1*, 3 to 4*, and 4 to 3*). What this means will become clearer as I work through the Hohfeldian relations one at a time.

A. THE CLAIM-RIGHT RELATION

First and foremost of the Hohfeldian statuses are the claim-right and the duty. These statuses create the foundational Hohfeldian relation. This relation is the preoccupation of much (if not all) of the will/interest theory debate on the function of rights. It is the preoccupation of much of the force of rights debate and worries about conflicts of rights. It is also the relation that connects Hohfeld’s system most readily to the moral because deontic moral theories rely on the notion of the moral duty. Deontic moral theories prescribe what actions are morally required (duty to φ), what actions are morally forbidden (duty to ~φ), and what actions are morally optional (no duty to φ and no duty to ~φ). The claim-right relation is able to pick out the morally required and the morally forbidden because it contains within it the duty bearer status.

In Hohfeld’s system, the claim-right held by one entity is correlated to (and equivalent to) a duty borne by another (not necessarily distinct) entity. More precisely we can define the claim-right relation thus:

\[ \text{CLAIM-RIGHT RELATION}_{\text{def}}: \text{A has a claim-right that B } \varphi \text{ if and only if B has a duty to A to } \varphi. \]

There are a couple of things to note regarding the structure of this relation. First, \( \varphi \) can stand for an affirmative action, \( \psi \), or abstention from an action, \( \sim \psi \). So, when A has a claim-

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11 See Chapter Three.
12 See Chapter Four.
13 But see Thomson (1990, Part I) who argues that the duty correlative to the claim-right is not synonymous with the moral ought.
14 Hohfeld (1913, 32).
right against B, it can be the case that B has a duty to A to perform some action (a positive right) or that B has a duty to A to abstain from performing some action (a negative right). For example, if B has promised A that he will pick A up at 7 p.m., A’s claim-right against B means that B is under a duty to A ‘to pick A up at 7 p.m.’ (an affirmative action). On the other hand, A also has a claim-right against B to not be assaulted (wrongly). This means that B is under a duty to A ‘not to assault A (wrongly)’ (an abstention from action). Because the claim-right and the duty scope over to an action, \( \varphi \), the claim-right relation is considered a first-order Hohfeldian relation. In the claim-right relation, the action that each status scopes over is the same, either \( \varphi \) or \( \neg \varphi \) depending on whether \( \varphi \) is an action or an abstention from action.

Second, A and B need not be distinct entities in Hohfeld’s system. This will be true across all four of the Hohfeldian relations. While the relations require two placeholders for two entities, as that is a fundamental property of something being a relation, there is nothing in Hohfeld’s system that requires those entities to be distinct. We can see how this works in the relations of mathematical logic. For example, the relation “x is greater than y” is a two-place relation that does not conceptually prohibit x and y being the same number. Of course, if x and y are the same number, the “greater than” relation is false (i.e. for all x, \( \neg \text{Gxx} \)). But the reflexive relation, \( \text{Gxx} \), is not inconceivable. In the case of the claim-right relation, not only is it conceivable that A and B are the same entity, the reflexive relation may hold over a set of possible As for a particular action, \( \varphi \). For example, if I have a duty to myself to, e.g., not kill myself, it is both conceivable and possibly true that I also have a claim-right against myself to not kill myself (i.e. for all A, claim-right to not kill(AA) may be a true statement where A scopes over all moral agents).\(^{15}\)

\(^{15}\) Kant was a staunch defender of the position that we each have moral duties to ourselves not to kill ourselves. For a contemporary discussion of the Kantian duty not to commit suicide, see Velleman (1999). I take no substantive
Finally, and more controversially, is the issue of just how to interpret the relationship between the claim-right held by A and the duty borne by B. I have constructed the definition using “if and only if” to indicate a relationship of mutual, logical entailment, and I will use this language in the remaining three Hohfeldian relations. However, Hohfeld himself does not use such formal language. He simply calls the claim-right and the duty correlatives (and therefore, equivalents). There has been substantial debate over correlativity in the literature on Hohfeld, particularly with respect to the claim-right relation, although all of the beneficial statuses at least nominally share this logical structure with their correlative detrimental statuses in Hohfeld’s system of relations. I will say more about correlativity throughout this section.

B. THE PRIVILEGE RELATION

Hohfeld called the privilege “the opposite of a duty and the correlative of a no-claim-right.” The initial discussion of the claim-right relation introduced the idea of correlativity between the beneficial and detrimental statuses (claim-right and duty). Here, I will be able to introduce the notion of opposition (also contentious in the literature) between the statuses across the relations by examining the statuses within the privilege relation and their relation to the statuses within the claim-right relation. But first, I will start with Hohfeld’s definition of the privilege relation in terms of the privilege and its correlative, the no-claim-right.

**Privilege Relation**\[def\]: A has a privilege to φ as to B if and only if B has a no-claim-right that A \(~φ\).

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view on whether we each do have such a duty to ourselves. I only note here that the *structure* of Hohfeld’s system allows duties directed to the self because the structure of the relations allows reflexivity, i.e. the identity of the relata.

16 Halpin (2019, 231).
17 Hohfeld (1913); Hohfeld (1917).
18 Hohfeld (1913, 32).
19 Ibid.
20 See ibid, 32–33.
To better understand this relation, I have to unpack what “B has a no-claim-right that A \neg \varphi” means to ultimately arrive at the much more commonly seen definition of the privilege that relies on the notion of the duty. First, “B has a no-claim-right that A \neg \varphi” is equivalent to “it is not the case that B has a claim-right that A \neg \varphi.” Given the definition of the claim-right, “B has a claim-right that A \neg \varphi” is equivalent to “A has a duty to B to \neg \varphi.” So, making the substitution, “it is not the case that B has a claim-right that A \neg \varphi” is equivalent to “it is not the case that A has a duty to B to \neg \varphi.” Moving the “it is not the case” linguistically back inside, we obtain the more familiar definition of the Hohfeldian privilege relation:

Privilege Relation_{der2}: A has a privilege to \varphi as to B if and only if A has no duty to B to \neg \varphi.

The statuses within the privilege relation also scope over an action, \varphi, making it a first-order relation like the claim-right relation. However, different from the claim-right relation and staying true to Hohfeld, the privilege and no duty statuses scope over opposite (i.e. negated) actions. Similar to the claim-right relation, in the privilege relation, \varphi can stand for an affirmative action, \psi, or abstention from an action, \neg \psi. For example, if A has the privilege “to sit in this spot in the park” (\psi) as to B then A has no duty not to sit in this spot in the park (\neg \psi) as to B. Note how the privilege takes the affirmative action but the no duty takes the negation of the affirmative action. If there are individuals in the park who may also wish to sit in this spot but have not yet done so when A goes to sit in this spot, then A has a privilege to sit in this spot in the park as to each of those persons individually. This means A has multiple privileges: one as to each individual person who may want to sit in this spot in the park. Additionally, A is not

22 Hohfeld viewed the privilege to enter land as the negation of the duty to stay off the land (i.e. not to enter land). Hohfeld (1913, 33). Kramer (2019, 215–17) argues that Hohfeld was mistaken to understand the no-claim-right as containing the negation of the content of the privilege. As will be made clearer in this section, I disagree with Kramer and agree with Hurd and Moore on this point of Hohfeldian interpretation.
the only one with a privilege to sit in this spot in the park. If B enters the park, sees that the spot is empty, and decides to sit down there, B is free to do so because B also has a privilege as to A to sit in that spot. Once B has sat in that spot in the park, A no longer has a privilege as to B to sit in that spot in the park. In fact, at that point, A now has a duty, and B a claim-right, that A not sit in that spot in the park, thereby giving B an entitlement to freely enjoy the spot to which both had a privilege until one took it.

To consider a case where φ is an abstention from action, we can consider a wide variety of actions that we choose not to do in the moment. For example, B drops her groceries on the ground in the parking lot on the way to her car. A sees this, but A has a privilege as to B not to assist B in picking up her groceries (¬ψ) and therefore has no duty to B to assist B in picking up her groceries (¬¬ψ). Perhaps we may consider this rude, unkind, or suberogatory on A’s part, but that does not transform A’s responsibilities into the level of a duty owed to B. Lacking in such a duty, A has a privilege as to B to abstain from helping B. Many interactions between people are like this: it would be pleasant and kind to provide assistance to folks in need but there is no obligation to them to do so. This is because, even if we believe we have some Good Samaritan duties, they are not very broad or wide-ranging, but rather relatively narrow. In such cases where a Good Samaritan duty is lacking (many to most situations), individuals possess a privilege to abstain from action.

The privilege relation is also constructed as between two entities, not necessarily distinct, similarly to the claim-right relation. While it is somewhat controversial whether there exist duties to the self, we certainly enjoy privileges as to ourselves. If I have no duty to myself to not play tennis, then I clearly have a privilege to play tennis as to myself. While this sounds

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23 Indeed, if we do not have any duties to ourselves, then we necessarily have privileges as to ourselves with respect to every possible action, φ.
strange, to really highlight the relational structure that is the quintessential property of Hohfeld’s system, it is crucial that the definitions of the relations be constructed with two entities, one which holds the beneficial status and one which bears the detrimental status. This is linguistically awkward in the case of the privilege because the detrimental status, the no-claim-right, is really a lack or absence of the holding of a claim-right. So, it is strange to say an entity is bearing the absence or lack of something. However, it is a feature of the structure of the privilege relation that is worth emphasis.

There is one final feature of the privilege relation that I have not yet highlighted, though I have implicitly accepted and applied it, and that is the way in which the privilege is opposed to the duty. This opposition is not a mere negation of the duty, but rather a negation of the duty-\emph{not} to $\phi$. In essence, opposition between the privilege and the duty contains a double negation that is ineliminable because one negation scopes over the duty and the other scopes over the action, which is operated on by the duty. This is different than the opposition of the no-claim-right to the claim-right where there is no internal negation on the action, $\phi$. Whether this structure is indicative of two different kinds of correlativity is an open question.

Hurd and Moore argue that by opposition, Hohfeld intended the opposing statuses (i.e. the privilege and the duty) to be logical contradictories, i.e. Aristotelian/deontic opposites. Pairs of logical contradictories cannot both be true or both be false. So, in essence, pairs of

\begin{footnotes}
\footnote{\textsuperscript{24} This is not to say that one does not possess the status of the no-claim-right bearer. See Hurd and Moore (2018, 307); Kramer (2019, 220–21). There are many statuses that are possessed in virtue of the absence of something. For example, individuals are “childless” in virtue of the absence of having children. Individuals are “poor” in virtue of the absence of having wealth. Being childless and being poor are real properties of individuals. I, for one, certainly possess the property of childless and the property of poor (for California, anyway). Why individuals may not be considered to possess the property of “no-claim-right” or “rightless” in virtue of the absence of a claim-right for Hurd and Moore (2019, 271–72) remains mysterious to me.}
\footnote{\textsuperscript{25} See, e.g., Wenar (2005, 225); Kramer (2000, 10) (“[E]ach liberty is held by a specific person or group of persons against another specific person or group of persons.”).}
\footnote{\textsuperscript{26} See Hurd and Moore (2018); Halpin (2019).}
\footnote{\textsuperscript{27} See Hurd and Moore (2019, 262–63).}
\end{footnotes}
logical contradictories carve up the complete space of logical possibility into mutually exclusive realms. That conclusion is easy to see between the claim-right and the no-claim-right. The entire space of claim-right possibility relating A to B for a given action, φ, is A has a claim-right that B φ or it is not the case that A has a claim-right that B φ.

We can perform the same analysis with respect to the privilege. The entire space of privilege possibility relating A to B for a given action, φ, is that A has a privilege to φ as to B or it is not the case that A has a privilege to φ as to B. Everything hangs on what it means to say “it is not the case that A has a privilege to φ as to B.” I think approaching the problem from this perspective, it is natural to think that “it is not the case that A has a privilege to φ as to B” means that either “A has a duty to B to φ” or “A has a duty to B to ¬φ.” Such an intuition relies on an implicit understanding of the privilege as a deontic option. This implicit understanding is certainly not unreasonable or uncommon in our ordinary discourse on individual freedom and liberty. We often say you are at liberty or free to do as you want (i.e. you have the option to φ or ¬φ). Privileges as options (i.e. complete lack of duty or obligation) are connected to freedom and liberty because freedom stands opposed to duty and obligation (using these terms loosely here). But I think it is incorrect to interpret the technical Hohfeldian privilege as the deontic option because of our commonsense intuitions regarding the relationship between the privilege and individual freedom.\(^\text{28}\) The Hohfeldian privilege needs to stand as a logical contradictory to the duty to stand in opposition to the duty. The opposite of the duty to φ is not the option to φ,

\[^{28}\text{See Kramer (2019) who argues that Hohfeld was wrong to not interpret the privilege as the deontic option. Hurd and Moore (2019, 266) rightly note that Kramer’s qualm with Hohfeld on this point can be accommodated by the Hurd and Moorean interpretation of Hohfeld if one holds that privileges are necessarily bilateral privileges. However, such a move clearly changes the logic of the system. Ibid. I will note that, though I adopt the Hurd and Moorean Hohfeldian logic, I tend to agree with Kramer that ‘privileges as options’ is where the moral significance of privileges lies. I am not concerned that the Hohfeldian system might require additional axioms (e.g. the necessity of bilateralness for privileges to be morally significant active rights) to produce moral significance (and neither was Hohfeld). I say more about unilateral and bilateral privileges in Chapter Three.}\]
but the permission to \(\sim \phi\) (with the option to \(\phi\) contained in the permission to \(\sim \phi\)). With this in mind, I will proceed to discuss the remaining two Hohfeldian relations.

C. THE POWER RELATION

The claim-right and privilege relations constitute the first-order Hohfeldian relations. They govern actions directly because the statuses contained within the relations scope over an action (or an abstention from action). The claim-right relation either requires an affirmative action or requires an abstention from action while the privilege relation permits an action. Claim-rights and privileges cover the spectrum of moral statuses that a particular action may have, i.e., actions may be morally required, morally forbidden, or morally permissible as between two (not necessarily distinct) entities.\(^{29}\) The second-order relations, the power relation and the immunity relation, contain correlative statuses that scope over, not actions, but the first-order relations. As second-order relations, the power and immunity relations describe the way in which first-order relations may (or may not) be altered.

Hohfeld called the power “the correlative of the [] liability.”\(^{30}\) Following my previous definitional structure, which makes the relation between the correlatives explicit, I define the power thus:

\[
\text{POWER RELATION}_{\text{def.}}: \text{A has a power as to B’s first-order Hohfeldian relation,}^{31} \alpha, \text{ if and only if B has a liability to A with respect to } \alpha.
\]

While this definition of the power is the same, structurally speaking, as the definitions of the claim-right and privilege above, it is not as obvious what the power actually is. This comes from the comfort with which we use the concept of the duty as a canonical moral and legal

\(^{29}\) I note that this interpretation of privileges as permissions prevents carving up the possibility space of actions for moral agents into exclusive parts, and so the “or” here must be interpreted as an inclusive “or.”

\(^{30}\) Hohfeld (1913, 44).

\(^{31}\) “B’s first-order Hohfeldian relation” means that B participates in a particular first-order Hohfeldian relation by being either the beneficial status holder, the detrimental status bearer, or both.
concept. The claim-right and the privilege are defined in terms of duties and lack of duties. Here, the liability is a less familiar concept than the duty, and so more should be said to adequately elucidate the concept of the power. Put simply, for A to be a power holder, A has to have an active ability to create, alter, or eliminate B’s first-order Hohfeldian relation, \( a \). As the liability bearer, B exists in a passive state whereby s/he is subject to a power holder’s (in this case, A’s) alteration of his first-order Hohfeldian relation.\(^{32}\)

Like the claim-right and privilege relations, the liability bearer may be the power holder himself or another individual, i.e. there may be reflexive power relations. Interestingly, if the power holder is altering a first-order relation between himself and a distinct entity, both the power holder and the distinct entity are liability bearers in two distinct power relations. In such a case, a single exercise of a power affects the Hohfeldian statuses of two entities with respect to one action. This is because the power operates on the first-order relations, which have beneficial and detrimental statuses usually (but not necessarily) held by two distinct entities. In essence, by operating on one first-order status, the power necessarily operates on its correlative status. Any exercise of a power that affects the duty (by creating, altering, or eliminating a duty) necessarily affects the claim-right (by creating, altering, or eliminating the correlative claim-right). Any exercise of a power that affects the privilege necessarily affects the no-claim-right in the same way. For example, if I promise to, e.g., meet my friend for dinner, I create a duty for myself, and I necessarily and simultaneously create a claim-right correlative to that duty in my friend. This means that I hold a power as to myself as a liability bearer (liable to have a duty created) and as to my friend as a liability bearer (to have a claim-right created). In this way, there are two

\(^{32}\) See Hohfeld (1913, 53) (“It is plain that this enactment imposed only a liability and not a duty. It is a liability to have a duty created. The latter would arise only when, in exercise of their powers, the parties litigant and court officers, had done what was necessary to impose a specific duty to perform the functions of a juror.”)
distinct power relations over the action “meet my friend for dinner” with me as the power holder for each.

Hohfeld observed that (legal) relations may change due to some “superadded fact or group of facts” that either is or is not under the volitional control of a human being(s). It is only the former cases, where the change in the relation is due to the volitional control of human beings, which Hohfeld considered to be exercises of the power. However, this requirement still contains some ambiguity regarding the object of the volition. Human beings can will to bring about a certain set of facts which happen to change the relations or they can will to change the relations themselves. Perhaps Hohfeld intended both to be exercises of the power. For example, when I promise to meet my friend for dinner, I am willing a change in the relation between myself and my friend. Where there was no claim-right (in my friend) and duty (on me), there now is a claim-right and a duty. But human beings can also will things in the world that more indirectly alter the relations. For example, a person can will the actions that result in conceiving and producing a child without willing that there now be new claim-rights and duties brought into existence. However, having a child does in fact create new claim-rights (in the child) and duties (on the parents) that did not exist prior to the conception and birth of the child. The heart of this distinction is the idea that an agent can either will a change in the relations themselves or will a change in the states of affairs of the world that just so happen to change the relations. I will return to this issue when I consider whether animals possess powers.

D. THE IMMUNITY RELATION

The fourth and final Hohfeldian relation is the immunity relation. The immunity is correlative to the disability.

33 Ibid, 44.
34 See Hurd (1996, 126–34) on the content of the mental state required to will the change in the first-order Hohfeldian relation.
Immunity Relation\textsubscript{def}: A has an immunity as to B with respect to A’s first-order Hohfeldian relation, $\alpha$, if and only if B has a disability as to A with respect to $\alpha$.

Hohfeld called the disability the “no-power,”$^{35}$ so A has an immunity as to B with respect to some first-order Hohfeldian relation, $\alpha$, just when B lacks the power to create, alter, or eliminate $\alpha$.\textsuperscript{36} The power and the disability, therefore, stand in opposition to one another as statuses. This means that the immunity and the liability will also stand in opposition: where there is no liability, there will be immunity. For example, in the United States, individuals have the right to refuse to speak while undergoing custodial interrogation by a law enforcement officer.\textsuperscript{37} This rights claim, properly parsed, means that the right holder is a privilege and immunity holder, i.e. the right against self-incrimination is a combination of the privilege and immunity relations. Each individual lacks a duty to answer a law enforcement officer during custodial interrogation (the privilege) and no individual or institution can create such a duty on the individual (the immunity). The state’s attorney, a judge, and any law enforcement officer all lack a power to create a duty on the individual to respond. So, they are disability bearers as to the (usually) arrested individual with respect to his Hohfeldian privilege not to speak while undergoing custodial interrogation.

The immunity shields certain of the immunity holder’s first-order relations from exercises of power by others (or himself) just like the privilege shields certain of the privilege holder’s actions from prohibition/requirement (via duties) to others. In the case of the right not to respond to custodial interrogation, an accused may respond to law enforcement questioning, as the underlying relation protected by the immunity is the privilege relation, which permits action.

\textsuperscript{35} Hohfeld (1913, 55).
\textsuperscript{36} I suspect that concerns regarding the ontological status of the disability as the no-power could be made similar to those made regarding the ontological status of the no-claim-right. See Kramer (2019); Hurd and Moore (2019).
\textsuperscript{37} This is commonly known as one of the Miranda rights, which is typically interpreted to be a set of rights claims under the Fifth Amendment right against self-incrimination. Miranda v. Arizona.
However, even an accused does not have the power to create a duty to continue to respond to law enforcement questioning. At any time that an accused is responding to police questions, he may stop, entirely at his discretion, and no authority can compel him to continue. So, that an accused may talk to police officers after being Mirandized in no way reflects the accused exercising a power to alter his underlying privilege. This is an example of a reflexive immunity relation, where the immunity holder is the same as the disability bearer. So, reflexivity is a structural feature of all four of the Hohfeldian relations. Whether a particular relation is reflexive as a substantive matter depends on the action, $\phi$, or the first-order Hohfeldian relation, $\alpha$, over which the statuses scope.

E. SUMMARY OF HOHFELD’S SYSTEM

Table 1: The Hohfeldian statuses

<table>
<thead>
<tr>
<th>Beneficial Statuses (Incidents, Entitlements)</th>
<th>First-Order Relations (Statuses scope over actions)</th>
<th>Second-Order Relations (Statuses scope over first-order relations)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claim-Right</td>
<td>Privilege</td>
<td>Power</td>
</tr>
<tr>
<td>Detrimental Statuses (Correlatives)</td>
<td>Duty</td>
<td>Liability</td>
</tr>
<tr>
<td></td>
<td>No-Claim-Right</td>
<td>Disability</td>
</tr>
</tbody>
</table>

Now that I have worked through the four relations individually, I can visually represent them as a system. All the beneficial statuses are listed in the second row. The detrimental statuses, their correlatives, are listed in the bottom row. So, correlativity can be seen vertically

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38 See Thomson (1990, 59) for a discussion of inalienable rights as immunities we possess as against ourselves.
between rows two and three. Opposition can be seen within the first-order and second-order relation groups diagonally.

There have been many attempts over the years to disprove the universality of correlativity between the beneficial and detrimental statuses. The primary focus of attack has been on the correlativity between claim-rights and duties. The proposed counterexamples attempt to find duties that appear to lack correlative claim-rights or claim-rights that appear to lack correlative duties. For example, everyone has a duty to pay taxes. Yet, it is argued, there is no claim-right correlative to this duty as there is no individual to whom the paying of taxes is owed. A rights-based example might be each child’s claim-right to an education. Whose duty is it to provide that child with an education? Certainly not my duty; I am not personally obligated to provide an education for each and every child.

A solution to both of these examples that has not been widely explored in the Hohfeldian literature is to acknowledge that collectivities, as distinct entities from their constituent individuals, are capable of possessing claim-rights and duties (and other statuses) in Hohfeld’s system. So, with regard to each person’s duty to pay taxes, it is the state, a collectivity, that possesses the correlative claim-right. With regard to each child’s right to an education, it is the state that is obligated to provide an education for each child. The obvious cost of such a solution is that collectivities are metaphysically troublesome entities. It is not obvious whether a collectivity is just the aggregation of its individuals or something itself unique and apart from the

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39 See, e.g., MacCormick (1976, 309–10); Feinberg (1966, 140–43); Hart (1984, 80–83); Waldron (1984, 12). 40 See, e.g., Feinberg (1966, 140–43); Raz (1984b); Raz (1984c, 195–97). For more recent discussions regarding Hohfeldian correlativity between claim-rights and duties, see Halpin (2019), Hurd and Moore (2018, 318–23), and Kramer (2000, 22–23). 41 MacCormick (1976, 309–10); Feinberg (1966, 143). More modern versions of this example might include the individual right to health care or the individual right to the internet. It is fairly clear that such rights claims have a similar structure, i.e. the individual claiming s/he is owed something from the collective (i.e. society). 42 Indeed, in these kinds of “claims against the world” type of claim-rights, it is clearly society’s obligation to satisfy certain of their members’ needs. This is in part why we have governments.
aggregation of its individuals. To admit of collectivities as Hohfeldian status holders would require treatment of the collectivity qua collectivity, not as an aggregation of its individuals.\textsuperscript{43} The issue of collectivities as Hohfeldian status bearers is not very germane to the issue of animal rights, as animal rights theorists adhere to individualistic notions of animal rights. However, I do believe some concerns over rights (both here and in Chapter Three) can be solved by adopting a view that collectivities qua collectivities can be Hohfeldian status holders.

A more theorized issue attempting to drive a wedge between claim-rights and duties comes from the somewhat older debate between rights-based duties and duty-based rights. This debate focuses on the question of justification of one status and showing that such justification does not ground the correlative status. For example, Mackie argues that because rights are something we would like to have (rather than be burdened by “irksome” duties), rights have an advantage in grounding our duties and our morality.\textsuperscript{44} Kant is the quintessential example of a duty-based morality, where claim-rights add nothing more to the moral system which is grounded in duties. Indeed, most of our deontological moralities are duty-based, where the aim is to ground moral obligation from which claim-rights arise. The problem that this question of priority or grounding causes for correlativity comes from the fact that correlativity seems to contain some kind of notion of identity.\textsuperscript{45} As Halpin has recently pointed out, however, sneaking notions of identity into the notion of correlativity is a mistake and one which has been at least partly responsible for these debates and apparent rejections of Hohfeldian correlativity.\textsuperscript{46} If the

\textsuperscript{43} See Jones (1999, 82) (“A right is a group right only if it is borne by the group qua group. If individuals who form a group hold rights as separate individuals, their several individual rights do not add up to a group right.”).

\textsuperscript{44} Mackie (1984, 171).

\textsuperscript{45} The notion of identity clearly comes from the fact that the act-type, $\phi$, is the same between the correlative statuses, as we can see in the way I have defined the Hohfeldian relations. This is true even for the privilege relation where $\phi$ is negated across the statuses. The addition of the negation does not change the content of $\phi$. It is possible that this implicit understanding of the relationship between identity and correlativity is what drives Kramer (2019) and Halpin (2019) to reject Hohfeld’s clear definition of the no-claim-right as containing $\neg\phi$ for its content.

\textsuperscript{46} Halpin (2019, 229–31); see also Hurd and Moore (2018, 321–23).
correlative statuses are identical, then what justifies one status ought to justify the other. So, what justifies a claim-right ought to justify the duty, but this is often not the case. Once the separation between logical, mutual entailment and identity is made, one can see that justifications for either side of the relation may differ while the logical, mutual entailment between the statuses still holds. This logical, mutual entailment is what Halpin calls “shallow correlativity” and is what I rely on in this project.

III. HOFELD’S RELATIONS AND ANIMAL RIGHTS

Having laid a basic groundwork for the Hohfeldian system of the structure of rights claims, I now want to turn to animal rights and explore what animal rights might look like under Hohfeld’s system. However, before delving into the individual Hohfeldian relations as they apply to claims of animal rights, I need to discuss a general matter regarding the language employed in animal rights theory. Generally, animal rights views almost always speak of animals having a right to such and such. Such a formulation appears to grant a single right to animals as a collectivity; however, I do not interpret animal rights views as making claims regarding collectivities of animals. I interpret this way of speaking as simply a shorthand way of saying that each individual animal possesses the right to such and such. This is a common shorthand used when speaking of human rights as well. For example, when we say “humans have the right not to be enslaved,” we generally do not mean that humans as a collectivity possess a single right not to be enslaved. What we mean is that each individual human has a right not to be enslaved.

This distinction is important for different reasons in the context of human versus animal rights. In the context of human rights more generally, recognizing that collectivities can be Hohfeldian status holders/bearers (and therefore the holders of rights claims) is one mechanism
for responding to certain (alleged) counterexamples to correlativity. In the animal context, there are distinct concerns regarding the moral considerability\textsuperscript{47} of collectivities such as species and ecosystems.\textsuperscript{48} For example, ecology recognizes such collectivities are valuable and worth preserving/saving, and some environmental ethics, like Aldo Leopold’s land ethic, place a preeminent value on biotic systems rather than on individuals within the system.\textsuperscript{49} If such collectivities are morally considerable, there are questions whether that considerability takes the form of being a Hohfeldian claim-right holder (i.e. could we have duties to such collectivities?).

On the whole, I understand animal rights theory as focusing on individual animals, not on collectivities. So, while animal rights theory makes claims such as “chimpanzees have the right not to be experimented on,” it is more accurate to interpret this as a conjunction of individual rights claims, rather than a single right held by the species as a whole. This interpretation implies that animal rights theory is focused on \textit{individual} animals rather than on collectivities of animals (including species). That animal rights theory usually rejects arguments for the culling/elimination of individual animals for the benefit the species or ecosystem supports such an interpretation.\textsuperscript{50}

A. THE CLAIM-RIGHT RELATION AND ANIMAL RIGHTS

Shifting focus back to Hohfeld’s analytical framework regarding rights, I believe that animal rights claims should be understood as containing the claim-right relation. Let us consider, for example, the rights claim “dogs have a right not to be experimented on.” As I articulated earlier, what this really means in the context of animal rights theory is that each dog

\textsuperscript{47} “Moral considerability” is a term used to capture the concept of the scope of a moral theory, in particular, who or what can be considered a moral patient, i.e. deserving of moral respect, in a given moral theory. See Goodpastor (1978). “Who is morally considerable?” is a question that can be asked of any moral theory, and so in a sense, moral considerability is a concept that transcends different moral theories. I will use the term “moral considerability” more extensively in Chapter Four.

\textsuperscript{48} See Callicott (1989, Ch. 8); Russow (1981).

\textsuperscript{49} Leopold (1970).

\textsuperscript{50} Regan (1983, 354–56); Donaldson and Kymlicka (2011, 158–59); Francione (2000, 185).
has an individual right, unto itself, not to be experimented on, i.e. “this dog, A, has a right not to be experimented on” and “this dog, B, has a right not to be experimented on,” and so forth. This first level of parsing the animal rights claim leaves open the question of which of Hohfeld’s relations is contained in the claim “this dog, A, has a right not to be experimented on.”

Generally, all of the recent animal advocacy movements, whether they be rights-based\(^{51}\) or welfare-based,\(^{52}\) have had as their aim changing the way that humans treat animals. The heart of animal advocacy is about human behavior.\(^{53}\) What is man’s proper relationship with other animals? The most generic answer, which applies broadly across animal rights theory, is that humans owe animals… something. Exactly what is owed is a matter of debate that I will touch upon in Chapter Four, but the general notion is that animals are owed some kind of behavioral change, most often, some kind of abstention from action by humans. For example, an extensive amount of animal rights theory is focused on the question of humans raising, killing, and eating animals, whether through hunting or more recent animal husbandry practices.\(^{54}\) Another major issue for animal rights theorists is humans’ use of animals in experimentation. What is at issue in these debates is how humans act, the \(\varphi\) in the first-order Hohfeldian relations, towards animals. The claim-right is correlative to the duty, and it is the duty that imposes obligations on an entity to affirmatively act or abstain from acting in certain ways. Of the four Hohfeldian relations, the claim-right relation, because it contains the duty, is the best equipped to establish boundaries on human behavior that are owed directly to animals.\(^{55}\) A right that does not compel

\(^{51}\) See, e.g., Regan (1983).
\(^{52}\) See, e.g., Singer (2002).
\(^{53}\) See Regan (1983, 357); Singer (2002, 226); Beauchamp (2011, 205).
\(^{54}\) See, e.g., Korsgaard (2018, 220–25); Donaldson and Kymlicka (2011, 76); Rowlands (2009, 162–75); Francione (2000, 16–17); Regan (1983, 330–53); Singer (2002, Ch. 4) (while not a rights theorist proper, Singer is appropriately considered part of animal rights theory, as will be made clear in Chapter Four).
\(^{55}\) See Beauchamp (2011).
a change in human behavior would seem to have little effectiveness for changing the current interactions between humans and animals.

So, if “this dog, A, has a right not to be experimented on” contains at least the claim-right, what does that look like? Applying Hohfeld’s definition, we obtain the following:

**ANIMAL CLAIM-RIGHT RELATION:** This dog, A, has a claim-right that B not experiment on it (referring to A) if and only if B has a duty to A not to experiment on A.

As an initial question, I should ask to whom or to what “B” refers. The usual assumption is that A and B only scope over humans, and minimally competent humans (e.g. moral persons or moral agents) at that. However, moving away from an entirely anthropocentric notion of rights as exemplified in the animal rights views, there becomes a legitimate question as to what B can refer. In the context of animal rights theory, the concern is not whether (human) morality governs animal behavior, so we have no strong reason to think that B refers to an animal or other entity in the context of animal rights claims. Additionally, B does not refer to “humans-as-collectivity” or “humanity.” As I interpret animal rights theory, B refers to individual humans, in particular, those who are capable of being subject to duties (because not every human is capable of being subject to a duty).

The next question to ask is whether A can really scope over individual animals. Steven Wise, a lawyer and leading animal rights activist, has applied Hohfeld’s framework to animal rights and refuses to take the position that animals possess claim-rights because there are (probably) no animals smart enough to assert such claim-rights. Such an approach assumes that to be a claim-right holder, an entity must be able to assert its claim-right. However, in the case of the claim-right, there is nothing in Hohfeld’s scheme that requires that A (the claim-right

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56 Animal rights theory does not aim to govern the behavior of animals among themselves. It is intended to guide the behavior of humans (and those other entities) capable of being guided by reasons.

holder) be capable of claiming the right. Claiming is what one does to assert one’s rights, but it is not a condition precedent to possessing such rights. If intelligence sufficient enough to claim one’s rights were necessary for possessing the claim-right, then no marginal human cases would possess claim-rights. This would mean that no human has a duty to such individuals (since any such directed duties are correlative to a claim-right). Surely, that is incorrect, and surely, Wise would not want to endorse such an outcome since his, just as many animal rights theorist’s, view depends heavily on the argument from marginal human cases.\textsuperscript{58}

The act of claiming (what it is, who does it, and how it is done) is certainly crucial to a complete theory of rights, be it animal or human rights. However, Hohfeld’s analysis does not limit the scope of possible “A”s in the definition of the claim-right relation to only those who can actively claim their rights. It does limit the scope of possible “B”s in the definition of the claim-right to only those who can be subject to a duty. Allowing an entity that cannot be subject to a duty to be within the scope of “B” would result in the assertion of a relation between A and B that does not make any sense. For example, if we allowed infants to be in the scope of B, we would end up with some very bizarre relational claims, e.g. this dog, A, has a claim-right that B, this infant, not experiment on it and B, this infant, has a correlative duty to A not to experiment on A. It is hard to see the sense in such a statement since infants are not capable of being subject to any duties in the first place (although they usually develop into being subject to duties later in life).

It may seem like I have done something unfair in making this move: I have read a restriction into the scope of possible Bs in the claim-right relation, but I have rejected Wise’s similar restriction on the scope of possible As. I believe this move is defensible based on the

\textsuperscript{58} Wise’s error is to conflate the necessary condition(s) for being a right holder under the will theory of rights (see Chapter Three), in particular as espoused by Hart, with the condition(s) necessary for being a Hohfeldian status holder. Additionally, I touch on the argument from marginal human cases in Chapter Four.
structural features of Hohfeld’s system. The Hohfeldian analysis breaks down the concept of a right into smaller, more precise relations of distinct statuses, some of which are more familiar than others. In particular, the duty is a very familiar moral concept. It performs all of the heavy lifting in traditional moral theorizing where we talk about what we owe, what our obligations are, and so forth. Arguably, we learn something new about the nature of rights when the conceptual analysis reveals the claim-right relation which relates a less familiar (though certainly not unknown) concept, the claim-right, to the more familiar concept, the duty, through the relation of correlativity. Perhaps the familiarity of the duty, and the work it does in establishing moral maxims, is one reason we are inclined to think it prior to the claim-right. Indeed, the claim-right is truly a passive status, whereas the duty is an active status.

In sum, it is too quick to conclude at this stage that animal rights do not contain the claim-right relation on the basis that animals cannot claim and claiming is necessary for being a claim-right holder. Hohfeld’s analysis is silent regarding the necessary or sufficient conditions for being a rights holder (or indeed a holder/bearer of any of the eight Hohfeldian statuses), and we should not read such conditions into his system of relations absent good reason. In addition, animal rights theory, generally speaking, aims at changing man’s relationship to animals, and therefore his actions with them. The duty is the most powerful concept in Hohfeld’s system to effectuate such a change because it is the only concept which requires an affirmative action or an abstention from action. Animal rights theory needs the claim-right relation because it needs the power to change human behavior. That power is contained uniquely within the duty.

B. THE PRIVILEGE RELATION AND ANIMAL RIGHTS

Whether animal rights claims can contain the privilege relation depends on a couple of things. First, some animal rights claims simply do not appear to contain the privilege relation
based on the nature of the right being asserted. For example, a chimpanzee’s right not to be experimented on by a scientist just does not contain the privilege relation. That right does not say anything substantive about what the chimpanzee may do. It is silent about permissible actions. At its heart, the privilege relation is about permissible actions. In this example, the chimpanzee’s right is about the scientist being under a duty to abstain from specific actions, something that falls squarely within the scope of the claim-right relation, but not within the scope of the privilege relation. So, I need another animal rights example, one that plausibly suggests the existence of a privilege relation within the rights claim.

If I consider some other common examples of animal rights, the right not to be enslaved/owned, the right not to be hunted or trapped, the right not to be killed, these do not seem to contain a privilege relation either. Such rights claims are concerned with how humans treat animals, and therefore what behavior animals are entitled to from humans. They do not touch on what animals may or may not do. Because the essence of the privilege relation is articulating permissible behavior for the privilege holder, it does not appear that animal rights theory is aimed at making such statements. But let us assume that we are aiming to attribute privileges to animals, such as the right to go wherever one pleases or the right to fly wherever one pleases, could we make sense of this?

Assuming that we can at least make sense of the claim that animals can possibly be privilege holders, I would argue that it is only meaningful if we also assume that animals are capable of being under a duty to affirmatively act or abstain from acting. That animals are capable of being under a duty is a tenuous assumption that relies heavily on scientific investigation into animal behavior, but it is not outside of the realm of possibility. The

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59 But see Donaldson and Kymlicka (2011, 102) where they frame the animal rights issue as one in which we do not see animals as having agency, cooperation, and participation in mixed human-animal settings.
interesting theoretical question is why does the ability to be under a duty matter to whether an entity can be a privilege holder?

Recall that the privilege stands in opposition to the duty (i.e. the privilege is the no duty-not to φ). For the privilege to be a meaningful status to ascribe to an entity, as opposed to vacuous and trivial, there must be some possibility that that entity could be a duty (to φ) bearer but is in fact not one. If it is impossible for an entity to bear the status of duty bearer, then bearing the status of privilege holder is ultimately trivial for that entity. For example, consider if someone were to claim “I have a right to travel faster than the speed of light,” and we were to interpret this as containing a privilege, i.e. “I have a privilege (with respect to A, B, C, etc.) to travel faster than the speed of light” (which is equivalent to “A, B, C, etc. have no-claim-right that I not travel faster than the speed of light”). When A, B, C, etc. have no-claim-right that I not travel faster than the speed of light, I have no duty not to travel faster than the speed of light. However, in the reality we live in with the constraints of the laws of nature, I simply cannot travel faster than the speed of light. So, have I really stated anything meaningful by claiming that I have no duty not to travel faster than the speed of light? To put me under a duty to not travel faster than the speed of light is meaningless since I could not do it if I tried. So, if I assert that “I have a right to travel faster than the speed of light,” intending to include at least the privilege relation, I have not articulated a meaningful rights claim. I do not have a privilege to do that which the laws of nature forbid.

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60 See Thomson (1990, 49). If an entity’s “lack of the duty” is considered entirely independent from the entity’s “possibility of being under the duty,” the privilege relation is extremely weak because even non-living items, such as shoes, can be privilege holders. As I argue in this section, such an interpretation makes the privilege relation unnecessarily trivial. The privilege relation is much better understood (and indeed, resumes some strength without relying on the claim-right relation) as existing only when the potential privilege holder is capable of being under the relevant duty, but is in fact not.
Let me consider another example. I have the privilege to walk on the sidewalk at midnight. The correlative to this is that the city has a no-claim-right that I do not walk on the sidewalk at midnight. Part of what makes this privilege meaningful is that the city could possess a claim-right that I not walk on the sidewalk at midnight. And so, I could have a duty to the city to not walk on the sidewalk at midnight. This in fact occurs when cities set curfews requiring their inhabitants to remain indoors during certain hours of the evening. Humans possess an exceptionally large quantity of these kinds of privileges. For example, I have a privilege to raise my right hand, to lower my right hand, to turn my head left, etc. In principle, however, since humans are generally capable of being placed under duties, none of these inordinate number of privileges runs the risk of being trivial in the same way that the privilege becomes trivial when ascribed to an entity that is incapable of being placed under a duty. I may have the privilege to raise my right hand, but I am capable of being placed under a duty not to do so, e.g. if I were taking part in an experiment requiring me not to raise my right hand. It is this capability of being placed under a duty that makes the privilege meaningful.

This issue of being capable of being placed under a duty is distinct from the issue of being entitled to the non-interference of one’s exercise of one’s privilege. Merely possessing a privilege does not entail that others are required to refrain from interfering with one’s exercise of that privilege. Without more, privileges as such are generally considered unprotected from outside interference. The more important privileges are sometimes considered protected from outside interference, in that external entities are under some duty not to interfere with one’s

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61 Thomson (1990, 45–46).
62 Because we live in societies that generally prohibit (unjust) assaults, batteries, murders, etc., technically, all privileges are “protected” in one sense, namely, they are protected by “a normally adequate perimeter of general obligations.” Hart (1982, 171). However, this broad sense of protectedness is not the purpose of my discussion here. Privileges can be much more narrowly protected, and that is the sense of protectedness I intend in this discussion.
exercise of the privilege, and sometimes this protectedness is claimed to be that in virtue of which a privilege is meaningful.\textsuperscript{63} So, for example, my privilege to walk down the sidewalk exactly where I please is generally unprotected from interference. No one is required to allow me to walk on the sidewalk exactly where I please; sometimes, I must adjust my course because others occupy the desired location before I arrive there.\textsuperscript{64} On the other hand, my privilege to move about freely in my house is protected from interference. Others have a duty not to interfere with my movements in my own house, and I have a claim-right against others that they not interfere with me moving in my own house as I please. This privilege to move about freely in my house, because it is specifically protected, is meaningful whereas the former is not.

It is worth noting that the labels of “protected privilege” and “unprotected privilege” are slightly misleading because the notion of protectedness is not contained within the privilege itself. When a privilege is protected, others are under a duty not to interfere with the privilege holder’s exercise of the privilege in certain ways. This means that the privilege holder also has a claim-right that others not interfere with his exercise of his privilege in certain ways. So, the protected privilege is really a complex rights claim that contains (at least) two Hohfeldian relations. The unprotected privilege is a rights claim that contains only the privilege relation and no claim-right to non-interference with the privilege holder’s exercise of it. Based on all this, the notion of protectedness (and the way in which it makes the privilege meaningful) is quite distinct from what I discussed earlier about an entity’s capability of being placed under a duty (rather than possessing no duty-not). Indeed, the issue of protectedness does not even arise if we cannot overcome the triviality I suggested earlier (i.e. being incapable of being placed under a duty).

\textsuperscript{63} Kramer and Steiner (2007, 297); Hurd and Moore (2018, 335–36).

\textsuperscript{64} The “perimeter of general obligation” still exists around this privilege. Others cannot assault or batter me as I move about towards that spot on the sidewalk. But I have no claim-right against someone who is already in a spot on the sidewalk to demand he move from that spot or not occupy that spot before I get there.
So, how does all this relate to animals and privileges? There is little evidence that any animals are capable of being under a duty to affirmatively act or abstain from acting. While it is true that certain animal species (e.g. dolphins, elephants, great apes, even dogs) demonstrate highly social forms of life constrained sometimes by what appear to be some kinds of normative boundaries within their social groups, I do not take this as particularly compelling evidence for concluding that animals are capable of being under a duty. If animals are not capable of being under a duty to act or refrain from acting, then ascribing to them privileges (of any kind) is essentially vacuous and trivial and the issue of protectedness is not relevant. To say that a bird has the privilege to fly wherever it pleases when it can never be placed under a duty not to fly wherever it pleases does not amount to much. Because the bird can never be under a duty not to fly wherever it pleases, no one can ever have a claim-right as to the bird not to fly here or there. If there can never be a claim-right against the bird, then the bird’s “privilege” to fly wherever it pleases is trivial. The bird will just fly wherever it pleases. The overwhelming majority of the animal kingdom is not capable of being placed under a duty to act in a certain way. Humans are the only animals who can act from reason;\textsuperscript{65} they are the only animals that can be considered full moral agents.\textsuperscript{66} To meaningfully be said to be under a duty, there has to be a sense in which the duty can impact the individual’s action. Duties count as reasons for action or abstention from action; they are not external stimuli that produce an instinctive response. To proclaim that migratory animals have the privilege to migrate along a particular path, e.g., does not say anything meaningful because they could not be obligated, or convinced by any other reason, to do otherwise.

\textsuperscript{65} Korsgaard (2018, 39, 48).
\textsuperscript{66} Regan (1983, 357).
Let me next consider the possibility that the claim that “all animals are incapable of being under a duty” is false in some marginal cases (it may be), and that the privilege is meaningful (in my first sense) to ascribe to some animal rights claims. If we assume that some marginal, high-functioning animals are capable of being under duties, there are two distinct issues to consider. The first issue concerns the mechanism by which such animals are placed under or removed from a duty to affirmatively act or abstain from acting in a particular way. It is widely assumed that animals, even high functioning ones, cannot provide consent. I cannot recall ever seeing a claim that animals can promise. Can animals perceive moral facts (assuming a realist metaethics)? I do not believe there have been attempts to demonstrate that animals have sufficient reason to apprehend their moral obligations, like moral philosophers. So, there is a real question of how animals would end up recognizing they are under a duty to us in the first place.

A possible explanation for this concern (that also provides a view that animals are under duties in certain cases) could be what Donaldson and Kymlicka suggest in their citizenship account of domesticated animal rights. For Donaldson and Kymlicka, the mere presence of domesticated animals in human lives makes them “advocates and agents of change,” “helping to shape their shared community with humans.” As citizens participating in “the cooperative project of social life, they must engage in various forms of self-restraint,” meaning that they, domesticated animals, have responsibilities. For example, the pet dog sacrifices certain freedoms, e.g. to eat anything it comes across, and has certain responsibilities, e.g. to not pee in the house, in return for certain goods from its humans, e.g. a warm bed at night, regular feeding, veterinary care when necessary.

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67 Donaldson and Kymlicka (2011, Ch. 5).
69 Ibid, 116.
As an initial matter, I find it hard to say that dogs are under a duty not to pee in the house in such cases as it is hardly clear that the dog does not pee inside based on any kind of reason. Donaldson and Kymlicka adopt an extreme non-cognitive view of what can constitute moral action to defend their citizenship theory of domesticated animals. They extend moral action beyond those actions done “out of commitment to abstract justifications,” and they are willing to call actions “moral” even if they are done because of love, compassion, fear, and loyalty. What Donaldson and Kymlicka miss here is that even if the passions play a role in moral action, it is not the case that reason plays no role in moral action. Even Hume did not go so far as to say that reason played no role in moral action. For Hume, the moral maxims alone could never generate moral action; in this way, the passions are fundamental for moral action for Hume. But, reason is also necessary to perform the deliberation to achieve the passion’s goals. This, it is not clear animals do at all.

But let us assume that line of reasoning is unsuccessful, and the dog is under a duty not to pee in the house. In virtue of what is it under such a duty? From habitual commands from its human? From regular behavior training teaching it to pee outside? From some natural fact of the universe that commands domesticated dogs not to pee inside their human’s house? Dogs are not under a duty because they have chosen to give up peeing in the house in return for regular feeding and a human family or reasoned that that is what they ought to do to best satisfy their passions (i.e. their basic desires for food and shelter). No study has yet demonstrated that animals make such conceptually-rich bargains, or reason to or intuit directly moral facts. It is an extremely complex concept to not pee in the house in return for regular feedings and a safe and warm home. Dogs do not have the requisite sense of temporality to understand it. It is simply

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70 Ibid.
71 Hume (1888, Book III, Part 3, Sec. 1, 459); Callicott (1989, 118–23) noting that Hume’s moral philosophy depends fundamentally on humans possessing moral sentiments, not just reason.
habitual behavior that housebroken dogs do not pee in the house. Indeed, I find it entirely strange to call behaviors imposed on animals by human conditioning behaviors that an animal is responsible or duty-bound to perform. Animals usually behave the way they do with us because we mold their behavior through conditioning that we consciously (or unconsciously) impose. That is hardly a duty in the sense that we mean in moral theory. And furthermore, even if it were a duty in some exceptionally expansive sense, it would be humans who determine the precise scope of the duties for animals through such conditioning. Not a very comfortable result for animal rights views I would wager.

Contained in this discussion I have defended the claims (1) that an individual has to be capable of bearing duties to have a meaningful privilege and (2) that animals are not capable of bearing duties and so animals are not capable of being privilege holders. Even if my defense of these claims fails, there is still the concern of the protectedness of the privilege. If animals only have unprotected privileges, then there is hardly a point to having privileges for them. The privilege becomes trivial in a different sense than I discussed above, namely that human beings have no duty to not interfere with the animal’s exercise of the privilege. So, to harken back to my previous example, if a bird has a privilege to migrate along this particular route, where, e.g., the city wants to install a new highway system interfering with the bird’s chosen migratory route, there is nothing in the unprotected privilege that protects the bird from the harms of human interference. Only if that privilege is coupled with a claim-right to non-interference by the city would such a privilege be meaningful for the bird. Unprotected privileges do nothing to rectify human-inflicted harms and abuses on animals.

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72 Donaldson and Kymlicka’s view incorporates domesticated animals’ expressions of their subjective good into the scope of the just relationship between humans and domesticated animals. Yet, many a dog and many a cat would very much love to lie on their owners’ couches and beds rather than on the floor, and it is the owners who ultimately determine what the dog and cat may do. Domesticated animals express their subjective good all the time; what they are permitted to do (in a non-Hohfeldian sense) is decided by their human owners.
In sum, I am quite skeptical that animals are capable of being duty bearers, and for this reason, I conclude that it is trivial to claim that animal rights claims contain privilege relations. To so claim provides little to no insight into the place of animals in our rights theory. However, for someone less skeptical that animals are capable of being duty bearers, there are still two issues regarding the value that the privilege relation would bring to animal rights claims. First, it would be humans who set and define the scope of the duties for animals, resulting in a less than desirable hierarchy in our moral theory. Second, such privileges would carry little meaning in the animal-human context absent accompanying claim-rights to non-interference. But such claim-rights to non-interference are correlative to duties on humans not to interfere with animals’ privileges. So, to the extent that animals even have privileges, they would have to be protected privileges and would therefore only be meaningful in reference to human duties to not interfere with animals in certain ways.

C. THE POWER RELATION AND ANIMAL RIGHTS

Let me first recall that the power, loosely speaking, is an entity’s ability to change Hohfeldian relations (and therefore, Hohfeldian statuses). By “change Hohfeldian relations.” I mean create, eliminate, and alter first-order Hohfeldian relations. Hohfeld considered powers to be exercised through the “volitional control of human beings.”73 Thus, the power is explicitly tied to the right-holder’s capabilities. However, to conclude from this that animals cannot be power holders and leave the discussion at that is somewhat question-begging. The main inquiry is whether animals possess the kind of volition that Hohfeld thought was at play in cases where humans are exercising powers. The answer to this would determine whether animal rights claims contain power relations.

73 Hohfeld (1913, 44).
It is true that animals may affect others’ (and possibly their own) Hohfeldian relations through their actions. The mere alteration of a Hohfeldian relation, however, is not necessarily a power in the sense that Hohfeld intended. For example, let me assume that some migratory species of birds migrates along a particular route and that human beings have a duty not to interfere with the birds’ migration along that route. In such a scenario, the birds have claim-rights against us that we not interfere with (damage or block through, e.g., construction) their migration route. Now, it is possible that those birds alter their migration route based on, e.g., changes in winter weather patterns. And so, the next year they migrate along a slightly different route, with which we are duty-bound not to interfere. The birds’ claim-rights have been altered, but not through any exercise of a power on the part of any of the birds.

Another example is the very common claim of animal rights theory that animals each have a claim-right against us (each and collectively) not to be killed. There are many circumstances where we may think that this claim-right no longer exists due to certain behavior on the part of the animal. For example, the dog that attacks one’s child (or any human really) loses his claim-right not to be killed.\textsuperscript{74} This elimination of the claim-right relation is certainly through no exercise of a power as Hohfeld envisioned it. And even though a notion of self-defense may seem to underlie this intuition, the claim-right relation is not eliminated because the dog attacked the child culpably. It is eliminated because it is generally accepted that humans have a(n) (absolute) privilege to protect themselves against life-threatening aggressors, culpable or not. This privilege conflicts with the dog’s claim-right when the dog becomes a life-threatening aggressor, and it is the claim-right relation that must bow out of existence.

\textsuperscript{74} See, e.g., Donaldson and Kymlicka (2011, 41).
Individuals are not generally thought to be morally required to allow themselves to be physically harmed or killed by innocent or culpable aggressors.\textsuperscript{75}

If animals can act to alter first-order Hohfeldian relations but not necessarily by exercising powers, we should be tempted to ask: what does it look like for an entity to exercise a Hohfeldian power? Common examples of exercises of the Hohfeldian power include promising and consenting.\textsuperscript{76} In the case of promising, power holders create duties for themselves owed to others. For example, promising to meet a friend for dinner at a specific time creates a duty for me and simultaneously creates the correlative claim-right (for my friend). In the case of consenting, the power holder is often eliminating a duty another has towards him. For example, consenting to be struck in a boxing match removes the duty that one’s opponent has not to hit you. This effectively creates a privilege in another (and a no-claim-right on oneself) where before there was a duty (and a claim-right).

Even the most adamant animal rights theorists do not appear to ascribe these kinds of abilities to animals, although perhaps Donaldson and Kymlicka’s “mere presence” view could be interpreted to ascribe powers to animals. What would be troubling about adopting such a view? The trouble would be that Hohfeldian powers are not “superadded facts” that fail to be under the volitional control of a human being, i.e. they are in essence a particular kind of (human) mental state. As Hurd argues, this kind of mental state has special moral force because it is essential to the autonomous will of the power holder to be a legislator of moral rights and duties.\textsuperscript{77} To will an alteration of first-order Hohfeldian relations (which can be effectuated simply by willing an

\textsuperscript{75} See, e.g., Thomson (1971) (discussing some types of abortion cases as self-defense against innocent aggressors). It is possible to approach this example from the perspective of the specification of the content of the content, \( \phi \), of the Hohfeldian statuses. Perhaps the content of the claim-right not to be killed is actually “not to be killed unjustly,” where unjustly can be specified to mean “when not posing a threat to the life of another.” If we accept such reasoning, then there is no claim-right not to be killed in self-defense cases, contrary to the typical handling of self-defense cases as examples of conflicts of rights. I generally skirt the content of rights problem throughout this project.

\textsuperscript{76} See Hurd (1996, 121).

\textsuperscript{77} See ibid, 124–25.
alteration of duties) is to be a self-legislator of moral claim-rights and duties. This, animals cannot and do not do based on the evidence that we now have.

I do not dispute that the actions of animals can indirectly alter the first-order Hohfeldian relations, but this is something that Hohfeld considered and rejected as sufficient for the exercise of a power. To exercise a power, there must at least be “intentionality,” i.e. the requisite *mens rea*, behind the actions which alter Hohfeldian relations. Though the content of this volition is not very clear in Hohfeld’s writings, animals do not appear close to exercising powers because they lack the requisite intentionality regardless of concerns over content. So do many marginal human cases. Therefore, I conclude that animal rights claims do not contain power relations.

D. THE IMMUNITY RELATION AND ANIMAL RIGHTS

At its core, the immunity relation creates a sphere of protection for the immunity holder against others exercising their Hohfeldian powers to create, alter, and eliminate the immunity holder’s first-order Hohfeldian relations. In simpler terms, the immunity relation prevents changes to certain first-order relations between entities by certain entities. For example, all humans have the right not to be enslaved. This rights claim is really a conjunction of privileges that are each protected by an immunity relation. Each person has a no-claim-right that I act as his/her slave, and nobody can eliminate the no-claim-right and create a claim-right that I act as his/her slave. This is not achievable by conquest or even by my consent. That privilege relation is protected from alteration by any (attempted) exercise of a power.

This kind of protection for certain first-order Hohfeldian relations is significant, and it is not surprising that Wise finds it to be the most compelling of the Hohfeldian relations to ascribe

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78 See also Alexander (1996) agreeing with Hurd (1996) that consent (as an example of a power) must be a subjective, intentional mental state and not mere conduct/action on the part of the power holder.
79 See Hurd (1996, 126–34) for a detailed account of the propositional content required for effective consent.
to animal rights claims.\textsuperscript{80} However, as I have discussed in the case of human slavery, the right not to be enslaved contains not just the immunity relation. This is because the immunity relation, like the power relation, is necessarily referential to some first-order Hohfeldian relation. Put another way: there is no “bare” immunity in the way that Wise seems to claim.\textsuperscript{81} Immunities protect first-order Hohfeldian relations from alteration by power holders. They do not stand alone. Again using the case of slavery, there has to be an underlying Hohfeldian relation that the immunity protects from alteration by the exercise of a power by a (potential) power holder. To simply say “I have an immunity against you not to be enslaved” skips the relevant conceptual framework of the immunity relation that Hohfeld articulated. At an intuitive level, it is appealing to say this and mean something like: you can never make me your slave. But this is very far afield from the precision of Hohfeld’s framework. Let us apply Hohfeld’s framework precisely in the case of animal rights claims.

If animal rights claims contain immunity relations, they must also contain at least one first-order Hohfeldian relation which the immunity relation protects. Animal rights claims will not contain the right not to be enslaved as I parsed it above into a privilege relation and an immunity relation because I have argued that animal rights claims do not contain the privilege relation. However, animal rights claims could be parsed into a different right not to be enslaved, one that is based on the claim-right rather than the privilege. For example, when I say I have the right not to be enslaved, I may mean that all other humans have duties not to treat me like property.\textsuperscript{82} We could ascribe a similar claim-right to animals: each animal has a claim-right against every human being that each human not treat that animal as property.\textsuperscript{83} This would mean

\textsuperscript{80} Wise (2004, 27).
\textsuperscript{81} Ibid; Wise (2000, 59).
\textsuperscript{82} See Francione (2004) tying the rejection of slavery to the right not to be property.
\textsuperscript{83} Ibid.
that we are all under a duty not to treat animals as property. These claim-right relations could be protected by immunity relations where the animals are the immunity holders and each human is a disability bearer. This would mean that we have no power to alter our duties to each animal not to treat him/her/it as property.

The claim-right and immunity relations are considered *passive* rights. The claim-right and immunity are passive statuses. An entity that is a claim-right and immunity holder does not have to actively assert those entitlements to in fact possess them. If we have duties to animals, then they have the correlative claim-rights against us. If we are disabled from altering those duties (i.e. we lack the power to alter those duties), then they have immunities protecting their claim-rights against us. Our duties and disabilities do not depend on animals possessing any particular capabilities.

As will become clear in Chapter Four, animal rights theory has largely been focused on arguing that humans have duties to animals. It has not been explored whether we, as entities capable of being power holders, in fact lack a power to alter those duties. The inquiry into whether animal rights claims contain immunities has two distinct facets: one conceptual and one pragmatic. Conceptually, Hohfeld’s system requires that for any first-order relation, it must be combined with either a power relation or an immunity relation. This is because the first-order relations are either alterable or not alterable. If they are alterable, they are combined with a power relation. If they are not alterable, they are combined with an immunity relation. So, whenever a rights claim is parsed into the claim-right relation and/or the privilege relation, there must be some power relation or immunity relation operating on that first-order relation contained within the rights claim as well.

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84 There is a hidden assumption in this argument, namely that the rights holder, i.e. the entity holding the beneficial status in the first-order relation, must be capable of being a power holder. I make this point clear in the following paragraph.
The pragmatic concern has a couple of components unique to animal rights claims. My conceptual argument assumes that the claim-right holder can be either a power holder or an immunity holder. However, in the case of animals, it is not possible for them to be power holders (as in the case of human claim-right holders), so it would seem, based on my argument, that the only option would be that animals hold immunities for each and every one of their claim-rights. But this does not follow. It is possible that animals hold claim-rights, do not hold powers, and do not hold immunities because human beings have powers to alter the animals’ claim-rights. Indeed, it is perhaps tempting to think that we do in fact possess powers to alter any such duties that we owe to animals and that their claim-rights are not combined with immunities.\textsuperscript{85} If that were the case, animal rights claims would amount to “bare” claim-right relations, alterable at human discretion. Interestingly, in such a case, human beings would then have rights claims that amount to “bare” power relations: a right to alter our duties to animals.\textsuperscript{86}

Perhaps this pragmatic concern is why Wise focused on the immunity relation with respect to animal rights claims. There is a sense in which the immunity relation appears to make the first-order relation (i.e. those human duties to animals) absolute, in that it can \textit{never} be altered. However, I do not believe that that was Hohfeld’s original intention with respect to the immunity relation. The immunity relation does not provide that kind of absoluteness of the first-order relation because the facts of the world may change that alter the first-order relation. The immunity relation is better understood as a sphere of protection against the alteration of the first-order relation \textit{by other agents}.\textsuperscript{87} Even though humans are generally free to structure the relations

\textsuperscript{85} What human would not want to freely eliminate duties when they are burdensome, inconvenient, annoying, or conflict with our hedonistic ends, etc.?

\textsuperscript{86} This same argument would apply to the rights of marginal human cases.

\textsuperscript{87} See Wise (2000, 58) (“Claim[-right]s tell us what we \textit{should not} do. Immunities tell us what we \textit{cannot} do.”). While I do not think Wise was particularly careful in his parsing of Hohfeld’s scheme, he does make a real attempt at considering the four Hohfeldian relations in the context of animal rights, unlike other animal rights theorists.
among themselves as they see fit through exercises of our Hohfeldian powers, certain relations
cannot be altered by us through the mere exercise of our agency. That is the value of the
immunity relation: it protects a particular first-order relation from alteration by agents.

Animal rights theory would do best to appreciate Wise’s insight with respect to the
immunity relation and combine those immunity relations with the underlying claim-right
relations that they protect. As I have sketched in the alternative, to deny that animal rights
claims contain immunity relations, would remove an important component of protection from the
agency of persons that makes animal rights claims meaningful against those same persons.
Having “bare” claim-rights that other agents can freely alter eviscerates the value of having the
claim-right. Such “bare” claim-rights do not come up in considering the rights claims of
persons because in that situation, persons will at least themselves have powers to alter those
claim-rights as well as (possibly) other agents. But, even so, it still may be concerning in the
case of persons to think that one has a claim-right that is not protected by an immunity relation
and is, therefore, freely alterable by other agents at will.

In sum, the immunity relation clearly plays an important role in setting proper and
meaningful boundaries in the relations between humans and animals through rights claims.
Because animal rights claims are really claim-rights (and therefore human duties), it is the
immunity relation scoping over these claim-rights that provides a genuine entitlement for animal
claim-right holders. This is because the immunity relation defines a sphere of protection for a
rights claim holder’s first-order relations from interference by other agents at will.

88 Kramer and Steiner (2007, 297) ("[T]he presence of such immunities is necessary for a claim-right’s status as a
genuine entitlement or legal position of any sort.")
IV. Brief Reflection

I want to briefly pause on the larger picture regarding the implications of my arguments in this chapter. Hohfeld’s analytical scheme disambiguates between four relations that can be parsed out from our ordinary usage of the concept “right.” What this disambiguation shows is just how complex the relations are between individuals who stand in some rights relationship. It demonstrates a kind of richness in the possibility of human-to-human relations. I have essentially argued that this richness is made possible to its fullest extent only when the two entities have normal, full-functioning human mental capabilities (perhaps agency, perhaps the faculties of personhood).

This comes from the fact that there is more to Hohfeldian correlativity than shallow correlativity. Consider other kinds of correlativity relations, such as spatial correlativity. I am located to the right of the desk; the desk is located to the left of me. “Being located to the right/left of” is not a relation that requires any mental capabilities on the part of the individuals so related because spatial relations generally do not require any mental capabilities. All that matters is that certain spatial facts about objects hold. Other kinds of correlativity that do not require certain mental capabilities may require certain other properties (besides spatial properties), like being (or having been) alive. For example, X is the biological mother of Y, and Y is the biological daughter of X. One of these statements cannot be true without the other being true, and neither X nor Y need to have certain mental capabilities to stand in their reciprocal, biological relationship of parent to offspring. Rocks could not participate in a parent-offspring relationship, but rocks can “participate” in spacial relations.89

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89 Halpin would categorize spacial and biological lineage correlativity as forms of factual correlativity. Halpin (2019b); Halpin (2019, 236–37).
The relations captured by rights claims are more complex than relations of spacial location or biological lineage because they are normatively correlative (not merely factually correlative). If my arguments above are successful, the privilege and power (as beneficial statuses of the active relations) presume that the individuals holding those statuses are capable of participating in a common normative scheme with the status’s correlative-bearer in particular ways that require certain mental capabilities. This might mean that there is a further typology of kinds of correlativeity internal to Hohfeld’s system that distinguishes the active relations (i.e. the privilege and power relations) from the passive relations (i.e. the claim-right and immunity relations).

Indeed, this is arguably what I have attempted to show in my discussion of which Hohfeldian relations are properly considered to be contained in animal rights claims. Such a possibility is perfectly compatible with the claim that animals possess rights. But, it also emphasizes an often-lost perspective on the nature of rights in uniquely human forms of normative life. Some of our rights relations, as expressed in Hohfeldian terms, require that the entities in the relation possess certain normative capabilities (as expressed by possessing certain mental capacities). It should come as no surprise that animals (and marginal human cases) will not participate in certain of those relations. Just as it is nonsensical to say that a rock is the parent of another rock (because rocks do not participate in biological relations), so too it is nonsensical to say that animals (and marginal human cases) possess privileges and powers.

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90 Halpin (2019b); Halpin (2019). This is why categorizing the Hohfeldian statuses as beneficial and detrimental is more precise than active and passive. The terms active and passive apply in all correlativeity relations, but the terms beneficial and detrimental incorporate a normative connotation that is appropriate for describing the Hohfeldian statuses as part of normative correlativeity relations.

91 Perhaps it captures Halpin’s “rights to your conduct” and “rights to my conduct” distinction drawn between the claim-right relation and the privilege relation. Halpin (2019b, 96). It would certainly seem that such a distinction at least loosely maps onto immunities and powers, respectively.
V. CONCLUSION

In this chapter, I have explored the form of animal rights through the lens of Hohfeldian analysis. I have argued that animal rights claims do not contain privilege or power relations. This comes from animals’ lack of ability to participate fully in normative human relations. They are not capable of being under a duty to act or refrain from acting. Furthermore, they are not capable of exercising powers, such as promising and consenting. I also argued that the claim-right is the primary relation that we mean when we talk about animal rights. Saying that animals possess rights is a way to say that we, humans, have duties to them to act (or refrain from acting) in particular ways. Finally, I argued that we must conclude that animal rights claims, conceived of as claim-right relations, ought to be considered to be combined with immunity relations where animals possess immunities against humans from freely altering our duties to them. Lacking immunity relations in animal rights claims will leave such claim-right relations “bare,” and ultimately impotent to require that there be any change in human behavior towards animals.
CHAPTER THREE: THE FUNCTION OF RIGHTS

I. INTRODUCTION

In Chapter Two, I explored the first component of the nature of animal rights claims, what is commonly called the “form” of rights. In this chapter, I take up the second component of the nature of rights discussion, what is commonly called the “function” of rights, and explore what we might learn about the nature of animal rights from it. The debate regarding the function of rights has traditionally been split into two camps: the will theory and the interest theory. I will argue that animal rights theory must be committed to the interest theory of the function of rights. To show this, I will start by examining the debate on the function of rights, independent of animal rights. This will include an unavoidably windy exploration of the will and interest theories as well as attempts to overcome the will/interest theory divide. Following that discussion, I will argue that animal rights are not possible under any theory of the function of rights except the interest theory. So, animal rights theory must be committed to an interest theory of rights.

The debate over the function of rights is part of the debate on the nature of rights. Like Hohfeldian analysis, this debate occurs outside of the realm of any particular set of normative commitments, so it continues the discussion about the metaphysical nature of rights as such. But unlike exploring the form of rights under Hohfeld’s system, which is a conceptual analysis of the concept of a right into its constituent relations, the function of rights debate centers on the issue of what rights do for the rights holder. Similar to Hohfeld’s scheme, the debate over the function of rights is facially neutral with regards to who is a rights holder. However, certain entities may fail to qualify as rights holders if they are not capable of having the relevant property claimed to be furthered by possessing rights. For example, entities that lack autonomy and sovereignty will
fail to be rights holders according to the will theory (generally speaking), and entities lacking interests will fail to be rights holders according to the interest theory (generally speaking). What this means will become clearer as the chapter progresses.

In order to explore the specific function of rights theories, I must first address what appears to me to be a metadebate regarding the proper scope of a theory of the function of rights. The metadebate distinction between capacious and narrow theories of the functions of rights will impact my categorization and analyses of the will and interest theories as well as the other function of rights theories that attempt to overcome the will/interest theory divide. I maintain that capacious views are valuable for a general inquiry into the nature of rights. However, when it comes to animal rights, taking the capacious or narrow view will not make much of a difference as to what function of rights theory animal rights theory must take. Animal rights theory must adopt an interest theory (capacious or narrow) of rights. In this chapter, I take no general stance on the function of rights debate.

II. A METADEBATE IN THE FUNCTION OF RIGHTS DEBATE

There appears to be a metadebate in the function of rights debate regarding the scope that a function of rights theory should take given Hohfeld’s analytical scheme. Several theorists contend that the function of rights debate is best understood as limited only to the claim-right (accompanied by immunities).\(^1\) I will call this the “narrow” view. Yet, there are those who view the function of rights debate as not confined to the claim-right.\(^2\) I will call this the “capacious” view. The result of having two such divergent goals in providing a theory of the function of rights is that there are essentially two different conversations in the function of the rights debate. The narrow view is concerned only with explaining the relationship between duties and claim-

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\(^1\) Kramer and Steiner (2007, 294–98); Sreenivasan (2005); Wenar (2013); MacCormick (1976, 306–07).
\(^2\) Hart (1982, 188–89); Simmonds (2000, 211–25); Cruft (2004); Wenar (2005).
rights through a function of rights theory. The capacious view treats the Hohfeldian relations as atomistic units and focuses on what those units, individually or combined with other relations, do for the right holder.³

To focus a theory of the function of rights on the claim-right (accompanied by immunities) seems to place improper importance on claim-rights over the privilege and the power. One may argue that to the extent we talk about privileges and powers as being rights, they are only rights in virtue of the claim-rights that attach to their non-interference.⁴ For example, I have a privilege to walk down the street. Kramer and Steiner (and Raz) argue that calling this a right comes not from anything the privilege represents or brings to the table, but from the claim-rights that protect the privilege from interference, such as the claim-right not to be assaulted or murdered or obstructed while walking down the street.

There are a couple of things to think about with respect to this problem. First, I cannot think of a privilege that is not protected by the claim-right not to be assaulted (unjustly) or murdered. The claim-right not to be assaulted (unjustly) or murdered (generally) is the sine qua non of exiting a Hobbesian state of nature and making human civilization possible.⁵ All privileges in a state of civilization are protected by a “perimeter of general obligation.”⁶ So, I do not see how claim-rights of “general obligation” add anything to my privilege to walk down the street, let alone the fundamental element that makes the privilege into a right, as Kramer and Steiner seem to suggest. In other words, the privilege itself is meaningful in understanding why I

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⁴ Kramer and Steiner (2007, 297); Raz (1984, 20–21).
⁵ See Chapter Four.
⁶ Hart (1982, 171–73). Such a perimeter of general obligation would not exist in the state of nature, and any such privileges would be “naked,” in Hart’s terms. Ibid, 173; Thomson (1990, 50). Bentham and Hobbes would consider such naked privileges to constitute rights. A concept that makes sense of this is the idea of natural rights. Natural rights are those rights that each man possesses prior to society in virtue of his nature as man. See MacDonald (1984). Perhaps this is reason to think that rights are more properly discussed only after exiting the state of nature, i.e. as embedded in a particular political society, as Simmonds (2000) suggests.
can claim that I have a right to walk down the street, and it is meaningful without reference to the claim-rights I also have against being assaulted (unjustly) and murdered.

Second, we have to think about whether other claim-rights to non-interference (i.e. not claim-rights of perimeter of general obligation) are the fundamental element which makes a privilege into a right. Generally, privileges to go and be physically located somewhere at some point in time are not protected from interference from others through obstruction. We may call this acceptable interference with a privilege, and acceptable interference with a privilege means that there is no claim-right to non-interference in that way. So, I have the privilege to walk down the street (actually, it would be on the sidewalk next to the street). So does every other free person in society, but we cannot all simultaneously exercise our privilege in the same location at the same time. None of us have a claim-right to be free of such obstruction from others equally exercising their privileges to walk down the street. When pushing through crowded city sidewalks, I certainly have a privilege to move in the direction I please, but I do not have any claim-rights against anyone in the crowd that they move out of the public space they currently occupy and I wish to occupy. It is on me to go around them if they are in my way (even though courtesy or the supererogatory may dictate people move to the extent they can to let me pass). In this case of acceptable interference, others are passively interfering with my privilege to walk down the street.

Alternatively, obstruction could be taken to mean something more like some kind of unjustified, active restraint or interference. We may call this unacceptable interference with a privilege, and unacceptable interference with a privilege means that there is a claim-right to non-interference in that way. The actions contained in the perimeter of general obligation would undoubtedly constitute unacceptable interferences. However, it is possible that not all
unacceptable interferences would be actions contained in the perimeter of general obligation. For example, while I am walking down the sidewalk, a preacher purposefully steps out into my path and begins preaching how I am a sinner for wearing shorts. As I try to avoid the preacher and continue on my way, as is my privilege, he continually walks backward, matching my step, calling me a sinner, and not allowing me to move past him. The preacher does this for ten, twenty, thirty seconds, and brings me to halt in my journey down the sidewalk. I eventually have to demand that he let me pass, after which I am finally able to walk around and past the preacher. It is reasonable to say that the preacher’s interference with my privilege here rose to the level of being unjustified, and I have a claim-right that he not so interfere. I even asserted my claim-right to non-interference with my privilege to end the interference itself. I would not say that such interference is part of the perimeter of general obligation. It was unacceptable, yes, but the sine qua non of society as such? Not so much.

The query is now more precise: Are privileges rights only when and because they are protected (via claim-rights) from unacceptable interference? Claim-rights against unacceptable interference provide the circumstances surrounding and the conditions for the possibility of exercising a privilege. They do not have anything to do with the decision to exercise a privilege (other than making it possible). Continuing with the earlier example, my claim-rights against unacceptable interference do not have anything to do with my decision to walk (or not walk) down this street on this day at this time. Those claim-rights set the baseline conditions under which I actually have a meaningful choice and opportunity to walk down the street (or refrain from doing so). Such baseline conditions are required for a meaningful choice and opportunity to exercise most (if not all) privileges. They have little to do with what the privilege itself should
mean for the privilege holder, namely that he has a kind of discretion over his actions.\textsuperscript{7} Those claim-rights only set the ground rules for the possibility of the privilege holder having such meaningful discretion. But it does not follow that a theory of the function of rights should only focus on the relations that govern the circumstances under which such discretion is meaningfully possible. The discretion itself is distinctly important beyond (or at least in addition to and independently of) the claim-rights that make its exercise meaningfully possible.

A similar point can be made with respect to the power. When powers elicit the designation of a rights claim, it is not because they are protected from unacceptable interference by claim-rights. It is because powers are related to the autonomy of the power holder (similar to the privilege holder). Privileges relate to the privilege holder’s autonomous discretion over action. Powers relate to the power holder’s autonomous discretion over the structure of first-order relations between entities. For example, let’s assume I own land and have property rights in that land. As part of my property rights, I have a claim-right that X stay off my land. I also have the power to remove X’s duty to stay off my land and thereby eliminate my claim-right. I may also have claim-rights against others that they not interfere with my exercise of this power, but this is hardly an important reason why my power is considered a (or part of my bundle of) property right(s). Such claim-rights are only protecting the conditions for the meaningful possibility of me exercising my power. However, the power, like the privilege, is meaningful beyond (or at least in addition to and independently of) merely protecting the conditions upon which its exercise is possible.

\textsuperscript{7} Recall that I argued in Chapter Two that animal privileges (to the extent animals possess them) are only meaningful if they are protected by claim-rights against humans from unacceptable interference. This kind of discretion over action, this kind of self-determination contained within the privilege (conceived of as bilateral, as an option) is unique to humans.
Limiting the scope of a theory of the function of rights only to claim-rights seems not to do justice to Hohfeld’s complex structure of relations that are captured by the relations individually and in their variety of combinations. If we interpret Kramer and Steiner’s argument to demonstrate that if a genuine right is parsed far enough, claim-rights and immunities will always show up, this is itself an interesting conclusion regarding the nature of rights, and it opens up a significant question about the proper parsing of rights claims into their constituent Hohfeldian relations (e.g. is it proper to parse my right to walk down the street to include my claim-right not to be murdered?).

Acknowledging this implication without addressing the parsing problem, however, I am led to believe that the interesting question that a theory of the function of rights might be able to answer is when and why powers and privileges are considered genuine rights claims or part of genuine rights claims. If claim-rights and immunities are always part of genuine rights, then perhaps a theory of a function of rights should aim to explain when and why privileges and powers are part of genuine rights claims.

In sum, I am suspicious that the proper scope of a theory of the function of rights is limited only to the claim-right relation. The alternative approach that understands the Hohfeldian relations as atomistic units that combine to create what we typically consider rights in ordinary discourse provides rich insights into the nature of rights that is otherwise unavailable if we take the narrow view of the scope of the function of rights debate. As will hopefully become clear, this debate over the scope of a theory of the function of rights does not affect where animal rights ultimately must fall among the competing theories.

III. CAPACIOUS VIEWS

Because I am inclined to believe rights claims are in fact complex combinations of Hohfeldian relations (rather than just or even primarily claim-right relations (accompanied by

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8 See Wellman (1985); Thomson (1990, 55).
immunities)), I will begin my substantive discussion of the function of rights with the capacious views. I will discuss the capacious will theory, the capacious interest theory, and two capacious alternatives, after which I will discuss the narrow views. As I work my way through this labyrinth, I advise the reader to note where trouble arises for marginal human cases in these different views. Where there is trouble for the rights of marginal human cases, there is often trouble for the rights of animals.

A. The Capacious Will Theory

The basic tenet of the will theory is that rights function to provide rights holders certain kinds of choices. This can be said with a little more precision: rights function to provide rights holders certain kinds of choices regarding their rights relations with others. For example, to own property, and therefore have property rights as the owner, means that, e.g., you can permit or forbid another from entering your land (i.e. choose whether another is allowed on your land). To see what this means in Hohfeldian terms: first, your property right means that others are (generally) under a duty to you to stay off of your land, and you have a claim-right against those others that s/he stay off your land. However, by itself, your claim-right does not constitute a right under the capacious will theory because there is nothing contained within the claim-right that pertains to your choice over this relation. However, combine your claim-right with a power to alter or remove this duty from the other (which we generally have with respect to our property), and you properly have a right under the capacious will theory. So, the kind of choice that rights function to promote in a capacious will theory is the claim-right holder’s discretion over the first-order relations of others. In Hohfeldian terms, this means that rights are only

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9 This version of the capacious will theory focuses on the question of which combinations of Hohfeldian relations make a right. As I discussed in Chapter Two, I do not think that rights claims can be just “bare” first-order Hohfeldian relations. However, there are other notions of “choice” and “control” that are discussed in the context of the will theory, such as the ability to choose to enforce a claim-right and the ability to demand or waive
those combinations of Hohfeldian relations which contain a power. So, combinations of Hohfeldian relations that fail to contain a power will fail to be a right under the capacious will theory.

The will theory views rights as the mechanism through which a certain kind of individual freedom and autonomy are realized. Rights carve out a space within which the rights holder is a “small scale sovereign.” In the capacious will theory, this sovereignty is captured by the claim-right holder also being a power holder over that claim-right relation. To have a right is to stand in a relation to another with the ability to legislate his/her Hohfeldian relations and statuses (often their duties). So, property rights are genuine rights claims under the capacious will theory because the property owner can freely legislate the duties of others with respect to, e.g., entering his land. Such a conception of rights builds into its structure a relationship between rights and individual autonomy. However, it also poses a theory of rights that may be too narrow in two distinct ways. First, it will restrict the class of rights holders to only fully functional competent human beings, excluding marginal human cases from being rights holders. Second, it will have to reject that there are nonwaivable rights, which will pose a problem in the context of fundamental/inalienable rights claims. I will discuss these two concerns for the capacious will theory one at a time.

To see how a capacious will theory may be too narrow because it restricts the class of possible rights holders, recall that the capacious will theory does not recognize a combination of Hohfeldian relations as a right if that combination lacks the power relation. One way for a combination of Hohfeldian relations to lack a power relation is for the “rights” holder to be compensated for the violation of a claim-right. See Hart (1982). Such choice and control will come up later during my discussion of the narrow will theory.

Wenar (2005, 239); Kramer (2000, 64).

incapable of being a power holder. If an individual cannot function as a small scale sovereign, able to legislate the Hohfeldian relations of others, then that individual is not capable of exercising any powers and does not appear capable of being a power holder (in any meaningful sense). Such an individual will not be a rights holder under the capacious will theory. So, this means that marginal human cases, such as babies, the cognitively deficient, the vegetative, the comatose, i.e. individuals who do not appear capable of exercising powers, will not be rights holders under the capacious will theory.

A possible response for the capacious will theorist to this concern might appeal to a similar strategy suggested by Korsgaard in her defense of the claim that marginal human cases are rational beings. For Korsgaard, rationality (a.k.a. possessing reason) is not something to be determined at a particular time in an individual’s natural life. Rationality is not something that comes and goes based on life stages. So, it is not the case that human beings are born irrational, and then, assuming they develop into normal human adults, become rational at some point in their life. Under Korsgaard’s view, human beings are just the kind of being that is rational, has reason, and at different life stages, reasons better or worse. Infants are not irrational, but they reason poorly. Those who suffer traumatic brain injuries do not lack reason but reason very poorly. They fail to exemplify their kind, but they do not fail to be of the kind they are, namely a rational kind.

In essence, the view treats the possession of reason as a dichotomous property grounded in an entity’s functional unity and the exercise of reason as a scalar property. The advantage of treating the exercise of reason as a scalar property is that it does seem true that humans exercise

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12 See Chapter Two, Section III.C.; Steiner (2000, 248).
14 See Cohen (1986) for a “kinds” argument against animal rights and McMahan (2005) for a summary of and arguments against three additional “kinds” arguments against animal moral considerability.
their rationality better and worse at different times in their lives. Most children are not as good at reasoning as most adults. Normal adults can experience periods of injury and even stress which can negatively affect their otherwise full ability to reason well in a particular instance. Old age often diminishes a human being’s ability to reason with the same speed, clarity, and accuracy that they had when they were younger. Certain diseases of the mind can erode reason even faster and further. Might such individuals be rightly considered to possess reason in some sense to indicate that they are still deserving of being treated as autonomous ends-in-themselves?

Applying this kind of strategy to address the concern that the capacious will theory excludes marginal human cases from the class of possible rights holders, it could be argued that marginal human cases do not exercise their powers very well, but they possess those powers nonetheless. Exercise of powers is scalar, whereas the possession of powers is dichotomous, based perhaps on whether it is the “species norm” to possess powers. For Nussbaum, the species norm is not a matter of just natural facts regarding a species. It is also a matter of political fact: what life is worthy of the dignity of a human (or other species)? Regardless of the apparent capabilities of an individual, it possesses “the dignity relevant to that species.” Nussbaum uses the idea of species norm to develop a political account of what is just behavior in our relationships with others (marginal human cases and other animals) who fail to live up to the capabilities typical of their species. Under her view, justice would require that we help marginal human cases realize their ability to exercise powers to the highest extent they can (individually or through guardianship).

Under such approaches, marginal human cases would not be excluded as possible rights holders by a capacious will theory. These responses have a certain appeal when we recall why

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16 Ibid, 347.
17 Ibid.
the capacious will theory considers as rights only those combinations of Hohfeldian relations that contain a power. The will theory requires that a right contain a power because powers are the way in which the right holder effectuates or realizes his/her small sphere of sovereignty. But it is not necessary that the right holder actually exercise that sovereignty for the right to be considered a right under the will theory. It is only necessary that the rights holder be able to exercise her power for the right to be properly a right under the will theory. One can be able to do something even if one is not very good at it. I, for example, am able to write a novel, but I am not very good at writing novels. Perhaps marginal human cases are able to exercise their powers in that same way, and therefore remain possible rights holders under the will theory. For example, say an infant inherits her parents’ land. The will theory requires that for the infant to have property rights, the infant must have powers over the Hohfeldian relations of others with respect to her land and be able to exercise those powers. A Korsgaardian approach might maintain that the infant does possess those powers: she does in fact have the ability to alter the Hohfeldian relations of others with respect to her land, but she is not very good at exercising her powers due to her infancy. A Nussbaumian approach might maintain that the infant possesses those powers and has them exercised on her behalf by a guardian.

Such attempts at rehabilitating the will theory depend on to what extent one has to be proficient at exercising an ability to be considered to possess that ability. Korsgaard’s approach with respect to reason requires no proficiency at using reason to be considered to be able to reason. An individual possesses reason in virtue of being of a particular kind of functional unity (i.e. human). Reason does not come and go in an individual’s natural life. The real trouble with a Korsgaardian approach to reason is not so much within the scalar human cases, but in the human cases where there is nothing that looks like reason at all, e.g. newborn infants, severe
cognitive disability, a human with total brain death, the comatose. It does not sit well to say that these individuals reason, they just “reason poorly.” Under Korsgaard’s view, it seems like we might have to say that corpses also reason, they just “reason poorly.” It is hard to see how such a view ultimately amounts to anything but speciesism in disguise: Human beings are normally of the reasoning kind, and for that reason, all human beings ought to be thought of as possessing reason, regardless of their ability to exercise it. A similar challenge can be made against Nussbaum’s view. It is certainly part of the human species norm to reason and to exercise Hohfeldian powers. The Hohfeldian relations capture unique normative relations among humans based on the capabilities that are typical of our species and conducive to our individual flourishing.¹⁸ But the same marginal cases that challenge Korsgaard also challenge Nussbaum. I do not see how, even if justice requires that we expend extensive limited resources to address deficiencies in the most deficient (e.g. the vegetative, the brain dead) to facilitate their exercise of capabilities they clearly do not possess, results in them possessing such capabilities. Many incapacities cannot be rectified no matter what we do.

I conclude that while possessing an ability does not require an individual exemplify a high level of proficiency of that ability, it requires more than just being of a kind or species whose instantiations normally possess and exercise that ability to varying degrees of proficiency. Human beings normally can walk on two legs and can see in color. This does not mean that a paraplegic has the ability to walk on two legs and just walks poorly on two legs. Nor does not mean that a color blind person can see in color and just sees in color poorly. A human being who does not recognize any letters on a piece of paper does not simply read poorly; that human being lacks the ability to read at all. The newborn infant and comatose human being do not

¹⁸ There is nothing in our history of the natural world comparable to the level of cooperation that humans have achieved, primarily through extensively being able to hold each other to act or refrain from acting in certain ways.
reason poorly; they lack the ability to reason at all. Someone who has had parts of their brain destroyed, causing physical and mental limitations, cannot get those back. This is the case with all abilities: part of having an ability is being able to use it to some minimal degree. So, it is not that marginal human cases exercise powers poorly; they lack the ability to exercise powers at all and therefore do not possess powers at all. This results in marginal human cases being unable to be rights holders under a capacious will theory.

If we reject something like a Korsgaardian/Nussbaumian view of what it means to possess powers, powers, and therefore rights under the capacious will theory, will come in and out of existence based on how an individual’s abilities change over time. For example, a tragic accident that leaves a formerly normal and competent human being in a state of severely decreased mental capacity (to the point where, say, guardianship is required) would operate to eliminate any rights that individual formerly had because he is no longer capable of altering any first-order Hohfeldian relations. Infants would never be considered to have rights, but upon some line of maturation towards a normally functioning adult, the capacious will theory would imply that all of a sudden that individual possesses rights. Because the capacious will theory makes rights depend entirely on the right holder being a power holder, the content of the right, i.e. $\varphi$, does not play a role in whether an entity is a right holder. All that matters is whether the

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19 A great example of this kind of real-life tragedy is the story of professional snowboarder, Kevin Pearce, who suffered a traumatic brain injury training for the 2010 Winter Olympics and has permanent physical, emotional, and mental deficits due to permanent scarring in certain areas of his brain. He was very lucky to even survive, but he will never be who he was before the injury. See The Crash Reel (2013).
20 I have rightly treated the two views separately for the purposes of my discussion, but they are actually closely related with respect to how they view animals. See Nussbaum (2011, 237–42). Korsgaard’s view is more Kantian with Aristotelian elements, while Nussbaum’s view is more Neo-Aristotelian with Kantian elements. Ibid, 230. Because Korsgaard’s view purports to be a complete moral theory, as opposed to Nussbaum’s view which is only a political theory, I focus on Korsgaard’s argument for animal rights in Chapter Four.
21 Arguably, the guardian could possess this power on behalf of the now-disabled individual. See MacCormick (1976, 307) for a discussion of guardianship as the will theory’s solution to this concern in the case of the narrow will theory.
22 This could occur along the lines that the law currently draws, such as the ages that the law considers legally relevant, but it could also be drawn along other non-legal lines such as the development of certain mental capacities.
entity possesses the power over the relevant first-order relation. What \( \varphi \) is in that first-order relation has no bearing on whether the entity possesses the power over the first-order relation. While the coming in and out of existence concern seems less problematic for rights like property rights (e.g. the power to transfer ownership), it goes against intuitions we might have with respect to the preeminent and most important rights, such as the rights to life and liberty. Those are not rights that seem to come in and out of existence except as we ourselves come in and out of existence.

Consideration of such preeminent rights leads to the second concern over the narrowness of the capacious will theory. Many of our fundamental rights, being inalienable and nonwaivable, do not contain powers.\(^{23}\) Those rights are usually (if not always) combinations of immunity relations with first-order relations, and immunities are the lack of powers. Of course, that does not settle the issue because the lack of power is not necessarily ascribed to the immunity holder, but rather to others who would seek to alter the immunity holder’s first-order relation (whichever one happens to be combined with the immunity relations to make the rights claim), and the capacious will theory is about the holder of the first-order beneficial status also possessing a power to alter that status (and therefore, its correlative detrimental status). However, in at least some fundamental rights, the immunity holder is also the disability bearer, i.e. the immunity is reflexive and therefore the rights holder lacks a power over the first-order relation.\(^{24}\) For example, the right to liberty means at least that you have a right not to be

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\(^{23}\) See MacCormick (1977, 195–99).\(^{24}\) The important distinction here is that the immunity can provide two kinds of protection for the first-order relation. Recall, that all first-order relations have two (not necessarily, but usually) distinct entities to which they refer: (1) \( A \), the beneficial status holder and (2) \( B \), the detrimental status bearer. The immunity relation usually is understood as providing protection of the first-order relation from alteration by others (i.e. everyone capable of holding and exercising a power who is not identical to \( A \)). But the immunity relation can also protect the first-order relation from \( A \) him/her/itself. That is when the immunity is what I call “reflexive:” the immunity holder and the disability bearer are identical to each other \( and \) identical to the beneficial status holder of the first-order relation being scoped over by the immunity relation. Sreenivasan calls this a “protective disability.” Sreenivasan (2005, 260). It may
enslaved. This rights claim will contain a claim-right, i.e. you have a claim-right that I (and everyone else) not enslave you. That means I (and everyone else) have a duty to not enslave you. This rights claim will also contain an immunity relation, and interestingly, it is the immunity relation that signals the importance of the underlying first-order relation. Others have a disability with respect to your claim-right not to be enslaved; we cannot alter our duties not to enslave you. So far, this is not problematic for the capacious will theory. However, this fundamental right also contains a reflexive immunity, meaning you have an immunity with respect to your claim-right not to be enslaved \textit{as to yourself}. This means that you, yourself, are a disability bearer with respect to your claim-right not to be enslaved. You lack the power to alter your claim-right not to be enslaved (and therefore our duties not to enslave you).

In essence, this is a way to conceptualize the structure of a nonwaivable right. Because we generally do not believe that individuals can consent to be enslaved, we do not think that individuals are able to waive their claim-right not to be enslaved by others.\textsuperscript{25} In Hohfeldian terms, we do not think that individuals have the power to eliminate others’ duties to not enslave them and we do not think that individuals have the power to put themselves under a duty to be enslaved to others. So, here we have an example of what is generally considered a fundamental rights claim that lacks a power relation. Under the capacious will theory, it would not be considered to be a right at all.

This result will follow for any rights claim that contains a reflexive immunity. Consider your right to life. You have a claim-right that you not be killed (unjustly), which means others

\footnotesize{\textsuperscript{25} Mill did not believe that freedom allowed men to choose to eliminate their freedom by consenting to be enslaved. Mill (2015, 99–100). See also Barnett (1998, 77–82) who discusses inalienability and its relationship to lack of consent and notes that not all rights theorists agree that we cannot consent to be enslaved. In particular, Nozick (1974, 331) believes that we can sell ourselves into slavery.}
have a duty not to kill you (unjustly).\textsuperscript{26} You also have an immunity against others which protects your claim-right, i.e. others are disabled from altering your claim-right/their duty not to kill you (unjustly). We do not think that, regardless of how free and knowing your consent is, you can just eliminate others’ duties not to kill you by agreeing to be killed.\textsuperscript{27} I think this reflects generally what we take the right to life to be: a claim-right not to be killed (unjustly) coupled with an immunity that protects the claim-right relation from alteration by others and the claim-right holder himself.

Another way to approach the concept of reflexive immunities is to ask: which actions are we unable to consent to? Certain actions are prohibited (i.e. others are under a duty not to do them) and protected (i.e. others are disabled from altering their duties not to do them). The question the capacious will theory forces us to confront is whether the individual who holds the benefit of the prohibition and protection can remove the prohibition and protection through an exercise of their agency. Consider the right not to be tortured. Can I (the one who is benefited by the duty on others not to torture me and protected by the immunity against them altering their duty) nonetheless consent to be tortured?\textsuperscript{28} Perhaps we have fundamental rights of dignity, such as the right not to be in a dwarf throwing contest or the right not to be publically humiliated in unimaginably degrading ways. Can I consent to these actions and remove the duty on another not to inflict such actions on me? These examples create a dilemma for the capacious will theory. If consent is effective to alter the underlying first-order relation, then the rights claims

\textsuperscript{26} Borrowing from the criminal law, unjustly means without justification or excuse.
\textsuperscript{27} A nice, if gruesome, real-life example of this principle is seen in the case of the German cannibal, Armin Meiwes. Meiwes solicited a volunteer online to be eaten alive and killed. O’Connor (2016). Meiwes’ victim, Bernd Brandes, responded to the solicitation and offered himself to Meiwes to be eaten alive and killed. Meiwes acquiesced to Brandes’ request. Meiwes was originally found guilty of manslaughter for killing Brandes and sentenced to eight years’ incarceration. Upon retrial, Meiwes was determined to have committed the killing for sexual pleasure, found guilty of murder, and sentenced to life imprisonment. Regardless of Meiwes’ exact conviction, if Brandes had the power to eliminate Meiwes’ duty not to kill him, Meiwes’ actions would have breached no duty and violated no claim-right, so it would not have been possible to hold Meiwes guilty of any crime for what he did to Brandes.
\textsuperscript{28} Assuming, e.g., Hurd’s criteria for effective consent are met. Hurd (1996).
are not nonwaivable and therefore, not fundamental. If consent is not effective to alter the underlying first-order relation (i.e. there is no power to alter the underlying first-order relation), then the claims of fundamental “rights” are not rights claims at all.

To preserve as much of our common usage of the term “right” as possible, the capacious will theory may accept the former prong of the dilemma I just sketched and commit to the claim that there are no “fundamental” rights. Recall that one of the strengths of the will theory is that because all rights contain powers, the relationship between rights and freedom and autonomy is built in by definition. Under the capacious will theory, rights capture the sphere in which an individual is sovereign because they always contain a power, and powers are the capacity by which individuals legislate the Hohfeldian relations of themselves and others. Rights, therefore are the vehicle by which freedom and autonomy are realized. However, the problem of fundamental, nonwaivable rights indicates that sovereignty (as being a legislator/chooser) may not be the only thing that rights function to advance. The rights to life and liberty are widely considered fundamental rights, yet they do not appear to contain powers and do not appear to be capturing a sphere of sovereignty, understood as legislation through Hohfeldian powers, for the right holder.

In sum, the capacious will theory is too narrow in two respects. First, it will have to commit to an implausibly narrow class of possible rights holders. No human that is incapable of exercising a power will be capable of possessing a power. This means that many types of marginal human cases, such as the infant, the comatose, the vegetative, will not be power holders. Under the capacious will theory, they will not be rights holders. Second, the capacious will theory will have to deny that there are any rights that are fundamental or deny that any fundamental “rights” are rights at all. This is a troublingly narrow view of our common
conception of what rights there are and what rights we have. Its inability to accommodate rights for marginal human cases also makes the view quite unpromising for animal rights. The contending view which traditionally has opposed the will theory, by addressing these objections, is the interest theory, which I will consider in its capacious version next.

B. THE CAPACIOUS INTEREST THEORY

According to the interest theory, the function of rights is to promote the right holder’s interests. This means that rights promote the well-being of the rights holder.29 So, to be a rights holder under the interest theory only requires that an individual have interests or a well-being. This is substantially broader than the requirement under the capacious will theory that the individual be able to exercise powers. Many powerless individuals can rightly be considered to have a well-being, in particular marginal human cases. This is one of the strengths of the interest theory: it expands the class of possible rights holders to include many human individuals that we generally consider to have rights. The interest theory also avoids the dilemma of fundamental rights because it can easily accommodate fundamental rights as functioning to promote the right holder’s interests. Finally, the interest theory will not be susceptible to the possibility that rights come in and out of existence based on an entity’s abilities changing over the course of that entity’s existence. Despite being able to solve those problems with the will theory, the interest theory will be faced with other concerns that it is both too broad and too narrow. I will begin with the concern over the capacious interest theory being too narrow by undergenerating30 rights claims.

This concern takes on a unique form in the context of the capacious view. The capacious interest theory is better equipped to make sense of many of our common rights claims than the

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29 Kramer (2000); Raz (1984b, 210–11)
30 For a theory of the function of rights to undergenerate rights means that the view entails that there are fewer rights claims than we typically understand there to be in our common understanding of what rights claims there are.
narrow interest theory (i.e. the narrow interest theory is more vulnerable to undergenerating rights claims). For the narrow interest theory, which focuses only on the relationship between the claim-right and the duty, there is a substantial concern that there are many interests that are not promoted and/or protected by a claim-right relation. For example, suppose my favorite pastime is attending the opera, so I have an interest in being able to attend the opera. I do not have a claim-right that promotes my interest in attending the opera (outside the claim-right relations that constitute the perimeter of general obligation). No one has a duty to let me attend the opera or affirmatively assist me in attending the opera, even though attending the opera would promote my interests. So, how does the narrow interest theory avoid having to be committed to saying that I have a claim-right to attend the opera in order to conclude I have a right to attend the opera? I will address the narrow interest theory’s solution to this later in the chapter.

My main point here is that this kind of undergeneration of rights concern does not occur for a capacious interest theory. In the capacious interest theory, I do have a right to attend the opera, namely the privilege to attend the opera (protected only by the perimeter of general obligation). And in fact, we make a lot of these kinds of rights claims: I have the right to attend the opera; I have the right to go out with friends; I have the right to Netflix and chill. All of these rights claims are really privilege relations promoting our interests in doing particular activities (i.e. not having duties not to do these activities). So, the capacious interest theory makes sense of rights claims that the narrow interest theory does not, and it acknowledges that many of our interests are in fact promoted by rights through privilege relations.

Where the capacious interest theory will struggle is with a problem of overgeneration of rights claims in cases where an individual has a personal desire to do something which he has an
obligation not to do. For example, A has a claim-right against B that B not murder A. A has this claim-right because it promotes A’s interests in continuing to be alive. Suppose B has a deep, life encompassing desire to murder A. We might be tempted to say that B has an interest in murdering A, and the capacious interest theory appears like it has to accept that B has such a right, namely a privilege to murder A based on my discussion above. Only once we get to a conflict of interests is the capacious interest theory forced to take a stance on what interests are worthy of being promoted by a rights claim. The tools available for the capacious interest theory (adopting a “politically thin” view of what counts as an interest) will be the same for the narrow interest theory, and I will discuss them in detail in Section IV.B. The take away here is that, without such a conflict of interests, the capacious interest theory can avoid many worries about undergeneration of rights claims and make sense of many of our commonly understood rights claims better than a narrow interest theory.

Moving to concerns that the capacious interest theory may undergenerate rights claims in a certain set of circumstances (discussed here), the view must reject the implausible thesis that rights always promote the rights holder’s interests. If the interest theory were committed to such a thesis, many commonly understood rights claims would fail to be rights claims. For example, I could own some parcel of real property and have property rights in virtue of that ownership. However, owning that property could be more trouble than it is worth to me. Perhaps the property is often frequented by trespassers and vandals, and I have to expend significant effort and expense to enforce my claim-rights against such trespassers and vandals and keep the property up. If rights claims always must promote the rights holder’s interests, it would seem I do not have any property rights regarding this land. Consider another example: my historically flaky friend promises to meet me for dinner. In virtue of my friend’s promise, I now

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31 Wenar (2005, 241); MacCormick (1976, 311, 315).
have a claim-right against my friend that she meet for dinner at 7 p.m., but her history of not following through on her promises may make that claim-right more of a nuisance to me than a promoter of my well-being. After all, once she makes her promise, I also have to be prepared to meet my friend for dinner at 7 p.m., thereby forgoing other activities at that time, and my friend may not show up or may cancel last minute, thereby wasting my time and preventing me from engaging in other plans for the evening. If rights must *always* promote the right holder’s interests, I would not seem to have a right against my friend that she meet me for dinner at 7 p.m.

To accommodate the concern that rights claims may not *always* promote the right holder’s interests, the interest theory can take the position that rights promote the right holder’s interests in the general or usual case. Defining the general or usual case will allow the capacious interest theory to generate rights even though some rights claims do not seem to promote the right holder’s interests in a particular instance.

However, there is yet another issue that raises the concern that the capacious interest theory may be too narrow a theory of rights. That issue arises in the context of individuals who occupy specific social/occupational roles and have the power to alter the Hohfeldian statuses and relations of two other entities. I will call this “the role bearer objection,” and the general form of the objection is that there are cases where an individual, functioning in some social/occupational role, appears to be exercising a right (usually a Hohfeldian power) in a way that has nothing to do with promoting that individual’s interests. So, the interest theory would seem to be too narrow because it fails to generate a right where we typically think there is a right.

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32 MacCormick (1976, 311) phrases the idea this way: “[T]o ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C . . . .” (emphasis added). Kramer (2000, 93) phrases the idea this way: “A right, by contrast, is normally advantageous. From the fact that a right is *normally* beneficial, however, we should not conclude that it is *invariably* so.” See also Kramer and Steiner (2007, 290).

Wenar provides a couple of examples of the role bearer objection, and I will start with the judge who has the right (in virtue of possessing the power) to sentence a convicted criminal. Critics of the interest theory will argue that such a right does nothing to promote the interests/well-being of the judge, so it cannot be considered a right under the capacious interest theory. Defenders of the interest theory may accept this conclusion that the judge does not have a right in this situation, or they may try to expand the notion of the right holder’s interest to conclude that the right to sentence a criminal is in fact in the judge’s interest as the interest theory understands it. I want to posit a third solution to this concern for the capacious interest theorist that highlights the role that collectivities may play in finding a theory of rights that matches our common understanding of rights more closely.

I will start by precisely parsing out what exactly is going on in these kinds of social/occupational role cases. Using the example above and parsing it into Hohfeld’s scheme, a judge’s right to sentence a convicted criminal contains at least a power relation. This is so because when a judge sentences a criminal, he is altering certain underlying normative relations.

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34 Ibid.
35 Notably, this would not be considered a right under the narrow interest theory simply because the Hohfeldian relation at issue is a power, not a claim-right. The judge will have claim-rights to non-inference in exercising his power in this situation. But, those claim-rights are not that in virtue of which the judge has a right to sentence the criminal.
36 Raz (1994, 274-75). We might be inclined to think that such an approach “warp[s] usage gradually enough to avoid rupture.” Quine (1960, 3).
37 There seems to be some tension among rights theorists about how much the philosophical discussion on the nature of rights should concern itself with our common or lay usages of the term “rights.” Wenar (2005, 243 n. 36); Kramer (2000, 9-13, 93); Kramer and Steiner (2007, 296). I acknowledge Kramer and Steiner’s position that philosophy has a role in devising a precise vocabulary of rights within which philosophical discourse can occur. However, the length to which they take such a position is both disingenuous and ignorant of the broader scope and implications of rights claims in human existence. It is disingenuous because even the philosophical literature on rights often fails to carefully parse rights claims into their relevant Hohfeldian relations, which failures obscure interesting metaphysical observations about the nature of rights claims. It is ignorant because the philosophy of rights should aim to elucidate what actually goes on in practice, to some degree. Rights are an extremely important political tool for effecting political and social change. The philosophy of rights can and should assist us in analyzing these claims. We should be looking to the consistencies and inconsistencies between the competing metaphysics and the common usage, as each has the ability to illuminate the other. Sometimes the metaphysics may demonstrate that common usage is wrong and imprecise. Sometimes common usage may indicate that the metaphysics is too broad or too narrow or missing something that we know is important about rights, but obscured by imprecision.
The question becomes: what underlying normative relations, in Hohfeldian terms, does the judge’s power act on and who are the status holders? Powers are by definition referential to first-order relations. There cannot be a power without some first-order relation upon which the power operates.\textsuperscript{38} So, the judge’s power must be combined with a first-order relation. Furthermore, first-order relations define a relation between two (usually, but not necessarily) different entities. So, what first-order relation does the judge’s power operate on, and who are the individuals whose relation is altered by the judge’s exercise of his sentencing power? As it will turn out, the judge has multiple distinct powers within the power to sentence a criminal, each of which operates on a distinct first-order relation.

First, we have to ask whether the judge is altering any of his own first-order relations when he exercises his sentencing power or if he is actually just altering the first-order relations as between two other entities. If the judge is doing the latter, this looks like a slightly different kind of power relation than I have examined before. In earlier examples of the power relation, the power holder is altering a first-order relation between the power holder and the liability bearer. However, the power relation does not require this by definition. While the power relation is indexed to the liability holder’s first-order relation, it is silent as to who is subject to the first-order status correlative to the liability holder’s first-order status. So, a power holder can, consistent with Hohfeld’s scheme, exercise his power on a first-order relation in which the power holder himself does not participate.\textsuperscript{39}

\textsuperscript{38} In many respects, this is what is so brilliant about Hohfeld’s system. It carves up a logically complete space. When it comes to actions, i.e. the first-order relations, you can be under a duty to perform φ or not to perform φ, or neither. That is it. You either must act/refrain from acting, or you may act/refrain from acting. There is nothing left in the space of action. So, the privilege and the claim-right carve up a complete space of action into two different possibilities. Similarly, every first-order relation is either alterable (subject to a power) or not alterable (subject to an immunity). So, the second-order relations carve up the entire possible space of what we can do with respect to the first-order relations.

\textsuperscript{39} Possessing a power to alter first-order relations in which one does not participate is not uncommon. For example, anyone who possesses a power of appointment will be altering the first-order relations between the appointee and
To make this clearer in my example, it is helpful to consider what a criminal sentence actually looks like. In the federal system, a criminal sentence contains up to four distinct parts: incarceration, restitution, fine, and supervised release. I say “up to four” because, in lieu of incarceration and supervised release, a criminal may be sentenced to a period of probation. However, I will assume for the sake of this example that the criminal has is being sentenced to a period of incarceration.

When thinking about the incarceration part of a criminal sentence, it is helpful for my purposes to consider the less common, but not rare, case where a criminal defendant is permitted to self-report to prison to serve his sentence. Prior to the judge announcing the sentence, the criminal has no duty to report to prison to serve his sentence. After the sentence is imposed to contain a period of incarceration, the criminal does have a duty to report to prison to serve his sentence. So, it would seem that the judge’s power at least creates a duty on the criminal to report to prison to serve the sentence, where before there was no such duty on the criminal. In Hohfeld’s scheme, where there is a duty, there is a correlative claim-right, so who might hold the correlative claim-right to the criminal’s duty to report to serve his sentence?

It seems to me that there are three possibilities: the judge, the state, or the victim (assuming the crime for which the criminal is sentenced is a crime against a particular individual (“the victim”) rather than a “victimless” crime). Part of the role bearer objection to the interest theory is that it does not seem true that the criminal has a duty to the judge, personally, to serve

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the entity to whom the appointee owes a duty (e.g. the appointment of a guardian over a child creates duties in the guardian and claim-rights in the child).

40 I add this factual detail simply because it is hard to elicit intuitions about what duties or privileges an individual has when s/he is involuntarily in police custody.

41 Some theorists may claim that this duty is undirected, and therefore, there is no correlative claim-right. To conclude that, such a theorist would have to reject that the judge is exercising a Hohfeldian power, and then the example should cause no concern for the interest theory because the judge is not exercising a right, as understood in Hohfeld’s scheme.

42 Understood as the metaphysically mysterious collectivity that is not reducible to the mere aggregation of its individual constituents. See Chapter Two.
his sentence. None of the judge’s interests are promoted by the criminal satisfying his duty to report to serve his sentence, so I rule out the judge. While it may be tempting to think that the duty to serve one’s sentence is owed to the victim, the reality of criminal prosecution is that the victim plays only a secondary role in a conviction and sentence. The criminal case is brought in the name of the state against an individual for violating the state’s laws (which function to provide coercive penalties for certain violations of the claim-right and duty as among the victim and criminal). Additionally, the state enforces the incarceration part of the criminal judgment, not the victim. For example, if the criminal does not report to serve his sentence, an arrest warrant may be issued and the criminal may be subject to additional criminal penalties. This leads me to conclude that a criminal’s duty to report to serve his prison term, created by the judge at sentencing, is really owed to the state.43 So, it is the state that holds the correlative claim-right. This means that the judge is altering the underlying normative relations between the criminal and the state when he exercises his power to sentence the criminal.

Fines are clearly monetary penalties that are owed to the state, so it is reasonable to conclude that if a judge sentences a criminal to include a fine, the judge has exercised his power to create a duty in the criminal to pay the fine and claim-right in the state to have the fine paid by the criminal. Fines are like incarceration in that they are part of the purely punitive portions of a criminal sentence. In determining to whom a criminal owes his punishment, it seems correct that punishment is owed to the state. A criminal conviction is secured as the result of violating the state’s laws. The state’s laws place the criminal under duties to act or refrain from acting in a certain way. And, while a victim crime will be a case where the criminal has violated his duty to

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43 A further option I do not explore here is that the criminal has a duty to himself to suffer his punishment. Hegel, for one, thought that we have a right to be punished when we act immorally. See Hegel (1991, § 99–100); McTaggart (1896, 483); see also Stillman (1976, 174 n. 11) (concluding that “the right to punishment is a duty to punishment”).
the victim herself, the victim has no authority or power to claim punishment for the violation of her claim-right unless the state agrees to prosecute the violation. So, the punishment for violating one’s duty to the state, as captured by the state’s laws, seems to be owed directly to the state.

Unlike incarceration and fines, which are punitive parts of a sentence, restitution is not punitive, but restorative. Restitution is supposed to make a victim whole. If the criminal were subject to restitution as part of his criminal sentence, to whom that duty is owed will depend on who can enforce it. To the extent that the state is exclusively able to compel the criminal to pay, the duty is really owed to the state and the victim ends up being a third-party beneficiary. To the extent that the victim can compel the criminal to pay, that creates a stronger argument that the victim holds the correlative claim-right to the criminal’s duty to pay restitution. So, in creating a sentence that contains restitution, the judge uses his power to alter the underlying normative relation between the criminal and the state (and/or his victim).

Finally, the supervised release is the rehabilitative part of a criminal sentence, and it is not meant to be punitive. It is meant to be a period of supervision during which the criminal is provided strict rules to assist him in reintegrating into society as a productive member of society. Of the four parts of the criminal sentence, it seems least intuitive to whom the criminal owes his duty to comply with his supervised release terms. Because the victim is not involved in the rehabilitation of the criminal and there seems to be no reason to think the criminal owes this duty to the judge, I conclude that this too is owed to the state. It may sound strange to claim that there is ever a duty of rehabilitation (it sounds almost like a duty to improve oneself), but in supervised

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44 I see no reason to reject the possibility that a single action can violate multiple duties. See Hurd and Moore (2018, 317).
45 Judges can order community restitution for victimless crimes (mostly drug offenses). In that case, restitution operates more like a fine, and the duty to pay owed by the criminal is owed to the state, and there is no possibility it is owed to a specific victim.
release, the state sets out a set of rules which the criminal is duty-bound to follow (under threat of further punitive sanction) which rules ought to function to help the criminal readjust to being a productive member of society. So, supervised release is not quite a duty to improve oneself but more of a duty to the state to follow certain rules which should result in the criminal not returning to crime.

Clearly, this attempt to rescue the capacious interest theory from the role bearer objection requires that the somewhat mysterious collective entity, the state, be capable of possessing or bearing Hohfeldian statuses as well as possessing interests that are furthered by the criminal’s suffering his criminal punishment. For that cost, it simultaneously rescues Hohfeld’s correlativity thesis from at least some alleged counterexamples of duties without claim-rights. I have not yet explained, however, the relation between the judge and the state and how that is generalizable to other role bearer cases. Collectivities exercise their Hohfeldian powers and claim/enforce their claim-rights through individual representatives who are authorized to act on the collectivity’s behalf. That is what a judge is doing when he sentences a criminal. The criminal’s duty to report to serve his sentence is correlative to the state’s claim-right that the criminal report to serve his sentence. The judge, through the exercise of “his” power, has created a duty on the criminal and claim-rights in the state, on behalf of the state. The state cannot do that (or anything else really) without acting through an individual representative. This means that a judge’s power to sentence a criminal is not rightfully considered the judge’s power in the same way that promising or consenting is an exercise of the promisor’s/consenter’s power. The “judge’s” power in sentencing a criminal is more properly considered a power of the state, which necessarily is exercised through authorized, individual representatives of the state because collectivities can only act through authorized agents. When we say the judge has the right to

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sentence the criminal, we do not mean that it is his personal right, but rather that it is his right in an official capacity as an authorized agent of the state that has the right to sentence to the criminal.

This analysis is generalizable to save the interest theory from the role bearer objection more generally. That objection could be leveled at all kinds of collectivities or organizations, such as corporations, LLCs, trusts, franchises, teams, branches of the military, etc. The rights exercised by authorized individuals of these organizations will, most of the time, not be in the individual’s interest/well-being, except maybe in some attenuated way, such as job security (if the company survives, the individual’s job survives). But the rights being exercised are not rights of the individual, personally. They are rights of the collectivity. And collectivities themselves are unable to exercise any of their rights. Collectivities can only act through authorized individuals and therefore, they can only exercise their rights through authorized individuals. That is what is going on in these role bearer cases: the authorized individual has a right in his/her official capacity and is exercising the right of a collectivity on behalf of the collectivity. As long as that right, in the general case, promotes the welfare/interests of the collectivity, it is a right under the interest theory. It is no objection that the right does not promote the interests/welfare of the authorized individual, as it is not the authorized individual’s personal right to begin with.

A concern with this solution is that collectivities do not have interests or do not have interests of the kind relevant for possessing rights under the interest theory. I will not delve into the depths of the issues that such an objection presents here. However, I do think that our common understanding is that collectivities, especially entities like business organizations, have
Their substantive interests may be narrower in scope than those of a human individual. For example, a human individual has an interest in bodily integrity and the continuance of her life, whereas a corporation has no body to worry about and has no natural end to its life. But corporations certainly have financial interests that affect their long-term well-being (i.e. “survival” of the company). Human organizations also have reputational interests (so do human individuals), e.g. maintaining a brand name or maintaining the integrity of the organization. For example, human sports leagues often exercise their powers to sanction their players who perform acts unbecoming to the league (through the appropriate authorized individual, usually the commissioner of the league, exercising a right in his official capacity). Such exercises of rights are generally done to protect a reputational interest of the sports league.

A slightly trickier case may be the example of the military, as an organization, and a military captain who has the authorized power to order troops to do certain actions. In that case, it is less obvious what the organization is and what its interests are. Is it the entire military, or one branch of the military (e.g. land troops or sea troops), or even just the individual company or regiment that the captain is in charge of? Regardless of the answer to that question, it seems that the captain, in exercising his authorized power, is creating duties for the soldiers under his command, and it would not seem appropriate to say that those duties are owed to the captain himself. It would seem more appropriate to conclude that the soldiers’ duties, newly created via the captain’s exercise of an authorized power, are at least owed to some collectivity, to the company or the regiment or the branch of the military or the military as a whole, all of which the

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47 See Raz (1984, 20) (conceding that corporations have interests); see also French (1979) (arguing that corporations are moral persons). Winkler (2018) provides a fascinating history of the legal rights of corporations. Throughout the history of corporate legal rights in America, there has been a long debate on whether corporations are nothing more than their individual members (and therefore, deserving of those rights possessed by their individual members) or whether corporations are distinct legal persons not reducible to their members (and therefore, not deserving of certain rights possessed by their individual members).
soldier is a member. Furthermore, such duties are in the interest of the collectivity: military branches function better if their soldiers follow orders pursuant to the chain of command. In fact, following orders is so important to the well-functioning of a military that failure to obey orders is often heavily sanctioned.

In sum, the capacious interest theory will have strengths where the capacious will theory has weaknesses. It will accommodate the rights of marginal human cases and nonwaivable rights quite easily, as both can be understood as promoting interests of the rights holders. However, the capacious interest theory will come up against some other difficulties. It will have to adopt some minimally “politically thin” view of what counts as an interest to solve conflicts of interests and avoid undergenerating rights. I will discuss this notion of “politically thin” interests in depth in Section IV.B. Additionally, the capacious interest theory can avoid being too narrow by acknowledging that rights promote interests in the general case (something the narrow interest theory will also adopt), and by allowing collectivities to possess or bear Hohfeldian statuses which they exercise through authorized individuals exercising rights in their official capacity. This solution to the role bearer objection also rehabilitates the correlativity of claim-rights and duties from some alleged counterexamples at the cost of a mysterious metaphysical entity: the collectivity.

C. ATTEMPTS TO OVERCOME CAPACIOUS WILL/INTEREST THEORY DIVIDE

Having sketched the capacious will and interest theories, I will now explore two attempts to overcome the capacious will/interest theory divide. This exploration is necessary because it would be too quick to saddle the animal rights theorist with an interest theory of the function of animal rights without examining options beyond the will/interest theory divide. As between the capacious will and interest theories, it seems clear that animal rights must function to promote
animals’ interests (in the general case) because animals, like marginal human cases, fail to be power holders as required by the capacious will theory. However, such reasoning assumes that the will and interest theory are the only two options for a rights theorist regarding the function of rights. This is simply not the case, but especially not the case in the narrow function of rights debate where the hybrid and role theories are substantive alternatives to the will and interest theories. Before moving to the narrow theories of the function of rights, however, there are additional unique insights that capacious attempts to overcome the will/interest theory divide bring to a theory of rights. While these insights are not specific to the issue of the rights of marginal human cases and animals, they are quite relevant to my more general theory of rights claims as combinations of Hohfeldian relations that operates in the background throughout this project.

1. The Any-Relation Theory

Recall that the capacious views of the function of rights aim to delineate which Hohfeldian relations, or more importantly, which combinations thereof, are properly considered rights claims in our common understanding of what rights there are. To see why we might be interested in identifying which combination of Hohfeldian relations make rights, we can consider the any-relation theory of the function of rights.48 The any-relation theory holds that any Hohfeldian relation, or combination thereof, constitutes a rights claim. So, as opposed to the capacious will and interest theories, there is no restriction on what relation, or combination of relations, constitutes a rights claim. It does not take much to produce examples of Hohfeldian relations, or combinations thereof, which we do not take to be rights in our ordinary understanding of what rights claims there are. For example, whenever a power relation is

48 Wenar (2005, 243–46). Wenar uses the term “incident” to refer to both the Hohfeldian statuses and the Hohfeldian relations. I will stick to my terminology that distinguishes between the relation and the statuses within the relation.
lacking, there is an immunity relation, but we do not consider every immunity relation to be a right. So, the any-relation theory would appear to be too broad.

Let us consider Wenar’s example that demonstrates this problem: I have an immunity against my city council granting me a pension. This does not appear to be a right in our common understanding of rights; however, parsing it more precisely into Hohfeld’s scheme will help us understand why it is not a right. First, recall that immunity relations, like power relations, do not stand alone but are necessarily referential to a particular first-order relation. So, to say that I have an immunity against the city council is to say that the city council lacks the power (i.e. bears a disability) to alter some first-order relation of mine. Which first-order relation? I take it that it would be my no-claim-right against the city council that it provide me a pension, which is to say the city council’s privilege not to provide me a pension (which is to say the city council’s no duty to provide me a pension). I am not wholly convinced that the city council is without the power to put itself under a duty to provide me a pension, and thereby alter my no-claim-right into a claim-right. But, if we grant that the city council does lack such a power, I can more fully explain why we do not ordinarily consider this a rights claim by looking to the structure of the first- and second-order relations at play here.

To do so, I will rely on the concepts of the beneficial statuses and detrimental statuses of the Hohfeldian relations. Recall from Chapter Two that I listed the beneficial statuses as the claim-right, the privilege, the power, and the immunity, and the detrimental statuses as the duty, the no-claim-right, the liability, and the disability. With this in mind, we can see why my immunity against my city council granting me a pension is not part of our common understanding of what rights claims there are and what they do. Such an immunity relation protects a detrimental status holder (me) and her detrimental status (my no-claim-right) from

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49 Ibid, 245.
alteration by making the detrimental status holder of the first-order relation the beneficial status holder of the second-order relation. This inverts the structure required for a combination of Hohfeldian relations to constitute a rights claim. A rights claim has an identified right holder, A. The relations contained within the rights claim must be relations where A, and only A, is the beneficial status holder. Because the second-order relations are relative to a first-order relation, this means that the first-order relation contained within the second-order relation must have the same entity, namely A, as the beneficial status holder for both the first- and second-order relations. My immunity against my city council granting me a pension fails to make me the beneficial status holder in the first-order relation, so it fails to be part of a proper rights claim.

This exposition does not demonstrate a sufficient condition for what it takes for certain Hohfeldian relations to constitute a right. Rather, it provides a necessary condition for what it takes for Hohfeldian relations to constitute a right as commonly understood, namely the right holder must be the beneficial status holder in all the relations. Consider a right holder, C, who has a claim-right against B that B $\varphi$. Let us assume that B has the power as to C to alter C’s claim-right relation against B that B $\varphi$. There is something amiss here. If B truly has the power to eliminate C’s claim-right (and therefore B’s duty) at will, then C does not really have a right. If C really does have a right, namely the claim-right that B $\varphi$, then B cannot have a right in the sense of having a power to eliminate C’s claim-right at will.$^{50}$ Something has to give. B and C do not both have rights as we commonly understand the term.

This necessary condition provides insight into why we typically think “rights” like the privilege not to assault someone are not really part of rights claims as we commonly understand

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$^{50}$ MacCormick provides an example of this in the case of a child’s claim-right against his parent, and the parent lacks the power to alter that claim-right. MacCormick (1976, 307).
them. If I have the privilege to not assault X, that means I have no duty to assault X. However, I do not have the freedom to assault X because I am (generally) under a duty to X not to assault X. I am a detrimental status holder with respect to X and assaulting X, i.e. a duty bearer. That I am technically also a beneficial status holder with respect to X and assaulting X, i.e. a privilege holder, does not transform that relation into a right. What is needed for me to have a right is for me to be the only beneficial, first-order status holder with respect to X and φ. This means that if my right properly contains me as a claim-right holder, with respect to X and φ, I cannot simultaneously be the detrimental status bearer in the privilege relation with respect to X and φ, i.e. I cannot also be the no-claim-right bearer. If my right properly contains me as a privilege holder, with respect to X and φ, I cannot simultaneously be the detrimental status bearer in the claim-right relations with respect to X and φ, i.e. I cannot also be the duty bearer. This means that rights that contain privilege relations contain bilateral privilege relations only. Rights will never be made up of unilateral privilege relations (although unilateral privilege relations certainly exist within Hohfeld’s scheme).

This conclusion says something about the nature of rights and the privilege relation, namely that having discretion for action (i.e. bilateralness of the privilege relation), not merely permission for action, is fundamental to something being a rights claim. A bilateral privilege holder possesses discretion to act or not act in a certain way with respect to the no-claim-right holder. Whenever one is under a duty to act or refrain from acting with respect to X, necessarily one does not have discretion with respect to that action and X. One will always have a unilateral privilege (i.e. permission) to perform one’s duty, but that is not enough to produce a rights

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51 Also suggested by Wenar (2005, 246) as a counterexample to the any-relation theory.
52 Hohfeld’s definition of the privilege discussed in Chapter Two clearly defines the privilege as unilateral, i.e. as a deontic permission. See Hurd and Moore (2018).
claim. This is not so much a shortcoming of the any-relation theory, but an interesting result from the exploration that the any-relation theory prompted. While the any-relation theory clearly comes up short in providing a workable theory of the function of rights because it is simply too broad, the exploration of the any-relation theory revealed one important structural necessity of rights claims: the right holder, A, must be the beneficial status holder of all the Hohfeldian relations that make up the right.

Recall my discussion of Wise’s emphasis on the immunity relation in the context of animal rights from Chapter Two. I argued there that if animal rights did not contain the immunity relation, they would amount to “bare” claim-rights and we would possess “bare” powers to alter them. Such a situation would be troubling because we would have powers to freely alter our duties to animals. My arguments here provide another, and stronger, position regarding such a situation: namely, such “bare” claim-rights would not be properly considered rights claims if animals possess neither the power nor the immunity within their rights claims. Just because we can combine Hohfeldian relations in a variety of ways does not imply that every such combination is properly considered a rights claim, as I have discussed here. So, while the possibility space for the second-order statuses over an animal’s claim-right (indexed to an action and person) is: animals possess a power, animals possess an immunity, the person possesses a power, the person possesses an immunity, the only options that would plausibly combine with the claim-right relation, where the animal is the beneficial status holder, are the animal as power holder and animal as immunity holder. Rights claims parse into Hohfeldian relations where the rights claim holder is the beneficial status holder across the first- and second-order relations.

The any-relation theory ends up blurring the lines between the form of rights and function of rights debate because it invites this kind of analysis into the structure of combinations of

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Hohfeldian relations contained in proper rights claims. Funnily, the view does not even nominally suggest that rights do anything for the right holder, leaving the function of rights question largely unaddressed. However, it provides a launching point for the several functions theory, which is an attempt to answer the question of what do rights do for the right holder without simply taking a side in the will/interest theory debate and which I now move to discuss.

2. THE SEVERAL FUNCTIONS THEORY

In an attempt to eliminate the above “rights” from the any-relation theory, and without simply concatenating the will and interest theories together, Wenar proposes what he calls a several functions theory.⁵⁴ According to the several functions theory, any-relation, or combination thereof, constitutes a rights claim if and only if it performs at least one of the following six functions: marking exemption, discretion, or authorization of the right holder, or entitling its holder to protection, provision, or performance. The individual Hohfeldian relations can be considered to be performing one or more of these functions individually. The privilege relation functions as exemption and discretion.⁵⁵ Powers function as discretion and authorization. Claim-rights function as protection, provision, and performance. Immunities function as protection.

As an initial matter, the several functions theory is not a version of the capacious or narrow will theory. The will theory requires that powers (or some kind of sovereignty) exist in any relation, or combination of relations, that purport to be a rights claim. The several functions theory rejects this possibility as both the claim-right and immunity relations do not perform such a function (not surprisingly, as they are considered the passive relations). So, the inquiry with

⁵⁵ I suspect Wenar needs these two functions for the privilege because he does not see that we need not rescue some examples, such as the privilege not to assault someone, as rights claims. Once we recognize that unilateral privileges run afoul of the necessary condition for constituting a proper rights claim that I discussed in the prior section, we need not concern ourselves with whether or how they constitute rights. They do not.
respect to the several functions theory is whether it proposes a solution to the will/interest theory divide that is not some version of the interest theory.

I am inclined to agree with Kramer and Steiner that the several functions theory is just a more fine-grained restatement of the interest theory. Wenar’s six functions are more specific ways in which an entity may have its interests advanced. When it comes to protection, we usually think of protection as protection from harm or detriment, which is a concept that implicitly contains a notion of good for and bad for an entity. Provision is similar to protection, although it is normatively opposite. Rather than protecting an entity from harm, we typically think of provision as providing to an entity some good or benefit, which also contains an implicit understanding of what is good for and bad for an entity. Performance can be both protection and/or provision except that it refers to actions that lack tangible goods/benefits and harms.

While I think it is fairly intuitive that protection, provision, and performance promote the interests of the rights holder in the general case, the other three functions of the several functions theory are not so clearly more fine-grained restatements of promoting a right holder’s interest. I will start with discretion. Is a rights claim that provides the rights holder discretion generally in the right holder’s interest? I would wager the answer to such a question is yes. Discretion is a particular kind of freedom and autonomy in that the agent ultimately has a choice over something, to do or not do something. We typically think that freedom and autonomy are in an entity’s interest (to the extent the entity is of a kind that can realize freedom through the exercise of his/her/its discretion).

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57 See, e.g., Rawls (1982, 162, 165–66) (treating freedom of thought, association, and movement as primary goods in developing an account of justice); Rawls (1971, 54) (defining primary goods as things that every rational man is presumed to want).
There may be concerns that an entity that can exercise discretion may be pressured into exercising its discretion in a way that goes (or seems to go) against its interests, and so a right functioning to provide its holder discretion is distinct from a right functioning to promote its holder’s interests. As an initial matter, we must distinguish between possessing discretion as such and exercising discretion to produce/result in some outcome. Possessing discretion as such is a channel through which entities capable of being free are free. So, possessing discretion is in an entity’s interest if such freedom is in an entity’s interest (and if the entity is of a kind that can possess discretion). Exercising discretion is wholly different than possessing discretion as discretion can only be exercised in a particular set of factual circumstances, some of which may make an actual exercise of discretion not in the entity’s interests. For example, simply investing one’s money in one place rather than another is an exercise of discretion (facilitated by the property rights the investor has in his money) that may turn out to be in the investor’s financial interests (if the investment does well) or not in the investor’s financial interest (if the investment does poorly). Regardless of the outcome, it promotes the investor’s interest in being (at least in some sense) free that he has the discretion to choose the investment.

The next question is whether exemption is contained in the interest theory’s general statement of what rights do for the rights holder. Exemption for Wenar is the way in which he handles the concern over what the function is of the unpaired (i.e. unilateral) privilege relation. I have previously argued above that the unpaired privilege relation will not generate a rights claim as we commonly understand them. So, rather than advocate for exemption being a function of rights contained within the interest theory, I stand by my earlier analysis and conclude that unpaired/unilateral privileges are not rights at all, and a theory of the function of

58 Kramer and Steiner (2007, 293) provide an example of family pressuring a terminally ill family member to end his/her life where physician-assisted suicide is legal.

rights does not need to account for them. The cases of rights claims that seem to reject this conclusion are not being carefully parsed into their appropriate Hohfeldian relations.

Finally, I must consider whether authorization is contained in the interest theory’s general statement of what rights do for the rights holder. Wenar adds authorization to the set of functions that rights perform for their holders to handle concerns that arise in rights claims that contain unpaired power relations. An example of an unpaired power relation occurs when a judge sentences a criminal to a mandatory sentence. In such a case, the judge does not appear to possess the discretion that is seen in the case of a paired power relation. Often, a judge has substantial discretion in fashioning a sentence to a particular criminal’s culpability (viewed as the nature and circumstances of the offense combined with the criminal’s personal and criminal history). In the case of a mandatory sentence, the judge does not have discretion to fashion the sentence to match the criminal’s culpability. Wenar introduces the notion of authorization to account for examples of rights of these kinds: the judge’s power to sentence the criminal to a mandatory sentence functions as an authorization. As I discussed earlier, I characterized the judge’s exercise of his power, in his official capacity, to sentence a criminal as the exercise of a right held by the state by its authorized agent which furthers the state’s interests. So, the interest theory is capable of accommodating this case.

There is, however, a more general concern with the notion of a mandatory power being a right beyond this case, namely: if it is required that an agent exercise a power (or exercise a power in a particular way), is it appropriate to conclude that such a right functions to further the

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60 I will note, all cases of sentencing are actually mandatory in one sense: namely, the judge must pass a sentence. The discretion is usually contained in the nature, length, and terms of the sentence.

61 In practice, mandatory sentences usually contain a minimum term of imprisonment, beyond which the judge has discretion to sentence the defendant for a longer or shorter term. It is possible, however, that the judge is required to sentence the defendant to a fixed term of imprisonment and has literally no discretion at all, such as in binding plea agreements.
agent’s interests, in the general case? If a power holder is required to exercise his power, that is to say that he is under a duty to exercise his power. Notably, this is a new kind of right compared to what I have discussed up to this point. The claim-right and duty are indexed to an action, and in this kind of case, the “action” of the claim-right and duty is another Hohfeldian relation, namely the power. However, the power itself is supposed to be indexed to first-order relations. So, it appears there is the possibility of some kind of circularity between the first- and second-order relations, or perhaps there are higher-order relations than the second-order relations. This structure also appears in the role bearer context where the authorized agent is exercising a mandatory power on behalf of the collective entity. In such cases, it is possible that the authorized agent actually owes a duty to the collective entity to exercise the power in some fashion (e.g. fiduciary agents may have such duties). So, in the mandatory sentencing example, the state really has two Hohfeldian relations, the first being the power to sentence the criminal (carried out by the judge, in his official capacity) and the second being the claim-right against the judge that he sentence the criminal according to the state’s requirements.

In sum, the several functions of the several functions are either contained in the interest theory (protection, provision, performance, discretion, and authorization) or their motivating counterexamples to the interest theory can be accommodated by the interest theory using the novel approaches I have argued for here (exemption). So, the several functions theory does not produce much of an alternative to the capacious will and interest theories.

IV. Narrow Views

In order to move to the narrow function of rights theories, I must limit the scope of the function of rights debate to only the claim-right and its correlative, the duty. The narrow theories

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62 Perhaps such a duty would be undirected, tout court, and therefore, there would be no correlative claim-right.
are focused on “the puzzle of the directionality of duties,” rather than on the broader question of which Hohfeldian relations, individually or in combination, make rights claims. I interpret the narrow theories of the function of rights to be engaged in an effort to identify the claim-right holder given a duty and explain why that entity (and not some other entity) is properly considered to be the claim-right holder given the duty. Because animal rights contain the claim-right relation, an exploration of the narrow function of rights theories bears directly on the nature of animal rights. I will discuss the narrow will theory and the narrow interest theory before turning to two alternatives that claim to transcend the will/interest theory divide (in the narrow sense of the debate).

A. The Narrow Will Theory

One way to conceptualize the narrow will theory is this: Y’s duty to φ (or not φ) is owed to X (and, accordingly, X possesses a claim-right that Y φ (or not φ)) because X (and not some other entity) has “some measure of control” over Y’s duty to X to φ (or not to φ). What this means is that to determine to which entity the duty is owed, Y has to determine what entity has “some measure of control” over her duty. Whatever entity has that “measure of control” is the entity to whom Y owes her duty to φ (or not φ) and who holds the claim-right correlative to Y’s duty to φ (or not φ). The narrow will theory explains why it is X, and not Z, who holds the claim-right that is correlative to Y’s duty to φ (or not φ): X has control over Y’s duty. The narrow will theory can also identify the duty bearer given the claim-right on the same grounds. Suppose X has a claim-right that some entity φ (or not φ). Which entity has the duty to φ (or not

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63 Kramer and Steiner (2007, 298).
64 The narrow theories rely on an implicit assumption about the relationship between the function of rights and the directedness of duties, namely that a theory about the function of rights explains or grounds the directedness of duties. I do not address this idea in depth in this project, but I do suggest in Chapter Four that in the case of moral duties, it is the ground of the duty itself that produces the directedness of the duty, and therefore the moral claim-right.
φ) to X? The entity whose duty to φ (or not φ) is subject to “some measure of control” by X, in this case, Y. In a sense, this version of the will theory provides guidance as to the identification of claim-right holders and duty bearers given the identification of the other based on who has “some measure of control” over the duty to φ (or not φ).66

“Some measure of control” will be distinct from the notion of “small scale sovereign” that I discussed in the context of the capacious will theory. For Hart, “some measure of control” includes at least the power to alter Y’s duty to φ (or not φ), the power to enforce the duty or not (given it has been breached), and the power to waive compensation (consequent to the original breach of the duty). Steiner generalizes the idea from Hart when he says, “[t]he Will Theory standardly contends that all powers pertaining to a duty must lie with the claim-right holder, if he or she is to be a right-holder.”67 So, the narrow will theory is only focused on who holds powers over certain duties of Y (or Z, or A, or B, etc.) in an effort to identify the claim-right holder and explain why he, and no one else, is the claim-right holder. The narrow will theory uses powers over a duty as a way to explain the directionality of the duty and its correlative claim-right. The capacious will theory looks at powers on their own as necessary components of a rights claim. Powers are not necessarily relative to a duty; they can also be relative to a no-duty-not (i.e. the privilege relation). These kinds of powers play a role in the capacious will theory, but they play no role in the narrow will theory.68 The narrow will theory is focused solely on the claim-right relation, so any powers relevant to the narrow will theory will be indexed to a claim-right relation.

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66 To the extent there is no measure of control by anyone over the duty, I suppose the duty would be undirected and there would be no Hohfeldian claim-right relation.
67 Steiner (2000, 245).
68 It is not clear whether Hart is best conceived of as a capacious will theorist or a narrow will theorist. Kramer and Steiner categorize Hart as a capacious will theorist. Kramer and Steiner (2007, 295 n. 20). Sreenivasan, on the other hand, clearly treats Hart as a narrow will theorist. Sreenivasan (2005, 259). Regardless of this issue, Hart was a staunch defender of the will theory of the function of rights.
Despite this difference between the capacious and narrow versions of the will theory, they will face similar challenges. For example, the narrow will theory is vulnerable to the marginal human cases challenge I discussed above because marginal human cases exercise “no measure of control” (i.e. powers) over the duties of others (owed to them) and therefore, will not be claim-right holders.69 The narrow will theory will also face a challenge when there appear to be nonwaivable duties in the context of fundamental rights.70 In such a case, the narrow will theory will be unable to conclude that there is a (claim-)right holder for such duties.

B. THE NARROW INTEREST THEORY

I turn now to the narrow version of the interest theory. There are several variations of the narrow interest theory. For example, Raz’s version of the narrow interest theory asserts that having a claim-right is just to say that some interest of the claim-right holder is “sufficient ground for holding another to be subject to a duty.”71 A more recent version of the narrow interest theory, adapted from Bentham (via Hart), has been defended by Kramer.72 Kramer’s interest theory contains two distinct conditions, one of necessity and one of sufficiency. His necessary condition states that claim-rights protect some aspect of the right holder’s situation that is normally in that entity’s interests.73 So, while all claim-rights promote the right holder’s interests generally, it is not necessarily the case that all interests are promoted by the existence of a claim-right. To conclude otherwise would result in an overgeneration of claim-rights by the narrow interest theory. The only entities entirely precluded from being claim-right holders under

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69 Steiner (2000, 248).
70 See Ibid, 251. Steiner discusses the case of not being able to waive criminal duties (e.g. X is unable to alter Y’s duty not to kill X).
71 Raz (1984, 5).
73 Ibid, 303. This is something that the capacious interest theory must also accept to avoid overgenerating rights claims.
such a view would be entities with no interests (e.g. rocks).\textsuperscript{74} So, this condition eliminates the concern that marginal human cases, and animals, are conceptually precluded from being rights holders. But it does not entail that animals (or marginal human cases) have interests that generate claim-rights. I will say more on this in Section V.

Turning to Kramer’s sufficiency condition, the sufficiency condition is actually a two-layered sufficiency condition. First, we must ask whether there has been some detriment to an entity’s interests such that the detriment is, by itself, sufficient for finding that someone else had breached a duty. If so, that is sufficient for finding that the entity is a claim-right holder. The latter sufficiency is what we typically understand with respect to necessary and sufficient conditions. The former sufficiency is a normative/political constraint: what detriments can one inflict on another entity without being held to have violated a duty? While this is somewhat convoluted, the idea is fairly straightforward: if an entity’s interests are affected negatively in a way that we typically take to be detrimental for that entity, is that enough to conclude that someone had breached a duty? If so, there is a claim-right.

This kind of “politically thin” interest theory allows the underlying normative commitments to drive what claim-rights there are because it is the underlying normative framework that must answer the first sufficiency question. What interests generate duties and claim-rights, ultimately, is reserved for a full moral theory and/or political theory of the distribution of entitlements. So, that first sufficiency condition is what will define the scope of what claim-rights and duties there actually are. What is important from the metaphysics of rights standpoint is a narrow version of the interest theory is that the duty is for the claim-right holder’s benefit.\textsuperscript{75} That is why, when $X$ has a claim-right against $Y$ that $Y \varphi$, $Y$’s duty to $\varphi$ is to $X$

\textsuperscript{74} See Feinberg (1974, 57).

\textsuperscript{75} Sreenivasan (2005, 261).
because that duty to φ is for X’s benefit. Y could do many φ’s that are to X’s benefit, but not all of those φ’s will generate a duty on Y to φ (for X’s benefit), which is why a full political theory of which φ’s generate duties for Y to X is needed to know what claim-rights there actually are.

An important challenge for the narrow interest theory is the third-party beneficiary problem. That problem is as follows: Suppose Y has a claim-right that X pay $100 to Z. X’s duty is to Y, but the detriment of non-performance of the duty by X is borne very differently as between Y and Z. It is Z who is the one who is made worse off by X’s breaching his duty, not Y. Y’s interests do not seem affected by X breaching (or even satisfying) his duty. Here, we have an example where the duty advances the interests not of the claim-right holder, Y, but of a third-party beneficiary, Z. Yet, we are reluctant to say that Z has a claim-right, as at the beginning of the example it was Y who was specifically identified as the claim-right holder. On that same ground, we should be equally reluctant to conclude that Y does not have a claim-right against X either. Yet, applying Kramer’s sufficiency condition, our analysis of the detriment in the event of the breach of duty by X would appear to produce the exact opposite result. The third party-beneficiary problem will be partly what motivates Sreenivasan’s hybrid theory, as I will discuss in the next section.

C. ATTEMPTS TO OVERCOME NARROW WILL/INTEREST THEORY DIVIDE

At the end of the narrow will/interest theory debate, animal rights theorists are in approximately the same spot in the function of rights debate they were at the end of the capacious will/interest theory debate. Clearly, the narrow interest theory conceptually allows

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76 I.e. when Y fails in her duty to φ, Y has caused a detriment to X that is sufficient for us to conclude that Y violated her duty to X.
78 Sreenivasan argues that Raz’s narrow interest theory avoids the third-party beneficiary problem inadvertently. Ibid, 265.
marginal human cases and animals to be possible right holders, whereas the narrow will theory conceptually precludes them from being right holders. However, in keeping with my earlier position that I cannot saddle the animal rights theorist with a narrow interest theory of animal rights solely based on the rejection of a narrow will theory of animal rights, I will explore two recent attempts that propose alternatives to the narrow will and interest theories: Sreenivasan’s hybrid theory and Wenar’s role theory. The hybrid theory and the role theory are both narrow theories of the function of rights and are concerned only with the puzzle of the directionality of duties. To conclude that animal rights theorists are best off adopting a narrow interest theory of rights, I must show that in addition to rejecting the narrow will theory, they should also reject the hybrid and role theories.

1. The Hybrid Theory

Sreenivasan works through several variations of the hybrid theory before proposing what he calls the complex hybrid theory. In those variations, it is clear that Sreenivasan is starting from a version of the narrow will theory and increasing the complexity of the hybrid theory to expand the theory to include certain rights claims that the will theory struggles to accommodate (e.g. fundamental rights). As a result of this iterative process, Sreenivasan ends up with his complex hybrid theory of the function of rights stated thus:

Suppose X is duty-bound to φ. Y has a claim-right against X that X φ just in case:

Y’s measure (and, if Y has a surrogate Z, Z’s measure) of control over a duty of X’s to φ \(^{79}\) matches (by design) the measure of control that advances Y’s interests on balance.

\(^{79}\) I note here that Sreenivasan draws a distinction between “X’s duty to φ” and “a duty of X’s to φ.” Ibid, 269. He thinks that “X’s duty to φ” might imply that X only has one duty to one claim-right holder to φ, something that is clearly false as an agent may have multiple of the same duty to φ directed to different claim-right holders. Sreenivasan believes that using “a duty of X’s to φ” prevents such a misconception. Frankly, I do not see the difference between the linguistic formulations along the lines of Sreenivasan’s worry here.
As an initial matter, the complex hybrid theory clearly admits of the possibility that Y has no measure of control over X’s duty to φ. So, it overcomes the objection to the will theory that marginal human cases (and animals) cannot be claim-rights holders. The complex hybrid theory will also allow the possibility of claim-right holders who are disabled from altering their own claim-rights (i.e., who have reflexive immunities protecting their claim-rights). Recall, in the case of reflexive immunities, Y is disabled from altering her own claim-right (and therefore X’s underlying duty to φ) and therefore has no measure of control over X’s duty to φ. The complex hybrid theory accommodates this by saying that Y’s interests (on balance) are advanced by Y not being able to alter this relation. So far, the complex hybrid theory accommodates two of the primary objections to the will theory while maintaining at least one desirable feature of the will theory, i.e., being able to exercise some measure of control over X’s duty to φ as an expression of freedom and autonomy.

Sreenivasan’s concern with the narrow interest theory focused primarily on the third-party beneficiary problem. So how is the complex hybrid theory supposed to resolve the third-party beneficiary problem? The gist of the solution is that the complex hybrid theory allows Y’s interests and Z’s interests to come out of “alignment” with one another, and the measure of control will track Y’s interests but not Z’s interests. For this to work, the justification for a duty must be kept entirely separate from the justification of correlation of that duty with a claim-right. The complex hybrid theory tracks the latter and is silent as to the former. So, recalling our earlier example: Assume Y has a claim-right that X pay Z $100. Here, while Z certainly has interests that are benefited if X performs his duty, Z has no measure of control over that duty because Z cannot waive the duty, enforce the duty, or waive compensation in the event X

80 See Kramer and Steiner (2007, 308).
81 Recall my discussion and notes on this issue from Chapter Two, as expounded upon by Halpin (2019), Halpin (2019b).
breaches his duty. So, the complex hybrid theory does not produce Z as a claim-right holder to X’s duty to pay Z $100. On the other hand, Y does have some measure of control over X’s duty to pay Z $100 because Y is the one to whom X’s duty is owed. This measure of control matches Y’s interests, namely being justifiably empowered to waive, enforce, or waive compensation (in the event of breach) of X’s duty.

2. THE ROLE THEORY

Moving beyond his capacious several functions theory, Wenar proposes a narrow function of rights view, which he calls the role theory, in another attempt to overcome the will/interest theory divide. The role theory is also focused exclusively on the problem of the directedness of duties to specific claim-right holders, and is, therefore, only concerned with the claim-right relation. One puzzle the role theory is supposed to solve is “the duties without rights” cases, which resemble the role bearer objection that I discussed earlier in my discussion of the capacious interest theory.

To avoid objections regarding the notion of the term role, especially as applied to human classes or statuses, Wenar’s formal and most capacious version of the role theory is laid out in terms of “kinds.” Formalized, the role theory of claim-rights states:

Formalization: Consider a system of norms S that refers to entities under descriptions that are kinds, D and R. If and only if, in circumstances C, a norm of S supports statements of the form:

1. Some D (qua D) has a duty to φ some R (qua R) (where φ is a verb phrase specifying an action, such as “pay benefits to,” “refrain from touching” “shoot,” and so on),
2. Rs (qua Rs) want such duties to be fulfilled; and
3. Enforcement of this duty is appropriate, ceteris paribus;

then: the R has a claim-right in S that the D fulfill this duty in circumstances C.

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82 Wenar (2013).
83 Section III.B.
First, because the role theory is indexed to a system of norms, \( S \), upon which there is no restriction other than that it be a system of norms, the role theory provides a comprehensive view for identifying claim-right holders for all kinds of duties, e.g. legal, moral, even duties within the structure of a game.

Second, “\( R_s \) (qua \( R_s \)) want such duties to be fulfilled” is not to be interpreted as a psychological state. Rather is to be interpreted as “\( R_s \) (qua \( R_s \)) have reason to want such duties to be fulfilled.”\(^{84}\) This allows the role theory to accommodate (at least conceptually) marginal human cases and animals as claim-right holders. How the role theory handles animals depends entirely on what kind those animals are seen as. For example, farmers may have a duty not to abuse their animals under two different conceptions: animals as commodities for generating profit and animals as live creatures capable of feeling pain and suffering. On the one hand, if the animals are seen as commodities, livestock raised for commercial profit, resources being put to the most efficient use for human desire satisfaction, such a classification would result in no ascription of claim-rights to the animals because they do not “have reasons to want” anything. On the other hand, if animals are seen as sensate individuals, capable of feeling pain and suffering, they clearly do have reasons to want the farmers’ duties, e.g., to not abuse them to be fulfilled, and therefore are claim-right holders to those farmers’ duties not to abuse the animals.

Third, in understanding “kinds” and expanding beyond human beings, the role theory draws on the notion of the Aristotelian categorical, which depends on knowing what the boundaries of the “kinds” are.\(^{85}\) In games, the boundaries of kinds are quite sharply drawn because games consist of specialized roles that individuals assume by playing the game. For example, in basketball, an offensive player has a claim-right not to be physically impeded

\(^{84}\) Wenar (2013, 219).

\(^{85}\) Ibid, 221–22.
through physical contact in attempting to place the ball in the hoop because the defensive player both has a duty not to so physically impede the offensive player and the offensive player has reason to want to not be so physically impeded (such impediment makes the offensive player’s role of scoring points either much more difficult or even impossible). However, we run into different concerns with natural kinds because there are no such sharp boundaries of what the ideal of that kind ought to be. We can posit a list of necessary and sufficient conditions, and fight over what is missing and what should not be included, but this is very much unlike sports and other games where the rules are exhaustively codified.

This concern over the boundaries of what natural kinds “have reason to want” will plague both human and animal rights. Let us think about this in a simple example: Let D and R be humans. Suppose D “may have a duty” to stay off of R’s land. For R to have a claim-right pursuant to the role theory, R (qua human beings) must want that duty to be fulfilled. Therefore, the corresponding Aristotelian categorical that must be true in order to conclude that R has a claim-right against D is: Human beings want to exclude non-owners from their real property (regardless of R’s actual desire in this case). In lieu of ascribing to the Aristotelian categorical, one may instead take the approach that the content of the want follows necessarily from (take your pick) action, reason, personhood, agency, etc. Given the problems of conceptually analyzing action, personhood, agency, etc., I am more inclined to work within the natural kinds/Aristotelian categorical view. Under that view, even though the boundaries of natural kinds may not be sharp and we may debate over the edge cases, there are vast spheres away from the boundaries that are quite clear. Humans want not to be killed. Humans want to be largely free to exercise their powers of self-determination. Humans do not want to be insecure in their

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86 See ibid, 224–25 n. 45, 46.
physical person (physically unsafe, whether by nature’s elements, threats of human beings, or otherwise).

The role theory highlights an important feature of the claim-right relation. Wenar thinks of this relation as a role-based (or the more expansive kind-based) relation. Entities stand in relation as individuals, and those individuals occupy particular social, normative roles and natural kinds. If it is in the nature of that role and/or kind to desire that the duty be fulfilled, then there is a claim-right. The role/kind-based desire is the critical element that appears to distinguish the role theory from the interest theory. The interest theory typically takes some objective concept of well-being or welfare to define an entity’s interests. Clearly, a hedonist view of interests will produce an inferior interest theory of claim-rights than the role theory of claim-rights. This is simply because the hedonist’s definition of interests is too narrow. Entities have other interests besides pure pleasure satisfaction, and indeed, sometimes it is in one’s interests to reject desire satisfaction (such as when one politely declines a second or third slice of cake for the sake of one’s health).

The role theory appears to contain three discrete normative spheres: games (e.g. sports or board games, cooperative activities among humans that have explicit, finite, and sharp rules and roles for each player), social roles (e.g. employment or citizen, cooperative activities among humans that have rules and roles, but many times the rules and roles are not as sharp and definite as in games), and natural kinds (e.g. humans or lions or dogs). However, the first two cases are in many ways expressions of human self-determination, which we may be inclined to think of as part of the natural kind of being a human being. So, it is not so clear to me that the role theory is not just a version of the interest theory with a natural kinds understanding of what constitutes
interests and natural kind desires selecting the relevant interests to be protected by claim-rights and duties.

V. THE FUNCTION OF RIGHTS AND ANIMAL RIGHTS

I started this chapter with a goal of discussing what a theory of the function of rights should look like for animal rights theorists to move one step closer to a complete view of the nature of animal rights. From the nature of rights perspective, animal rights will be a subset of human rights. Recall from Chapter Two, I argued that the form of animal rights claims are restricted to claim-right and immunity relations, i.e. passive rights. I argued that because animals cannot be said to be under duties, the privilege is essentially a vacuous Hohfeldian status to ascribe to them and any animal rights claims that (purport or appear to) contain an animal as a privilege holder are similarly vacuous. Such rights claims, such as the right to walk down the sidewalk or fly from here to there, are not typically “rights” as understood by animal rights theory. Further, I argued that animal rights claims do not contain powers simply because animals do not possess powers: they do not have the ability to alter first-order Hohfeldian relations. Any alteration of first-order Hohfeldian relations that occurs because of an animal’s action is accidental and not the exercise of a power.

With this recap of the form of animal rights in mind, I will now turn to my argument that animal claims are best understood as functioning to protect and/or further the interests of the right holder. Regardless of whether we commit to the capacious or narrow view on the metadebate regarding the scope of a function of rights theory, the interest theory will be the best view for understanding the function of animal rights claims. I will start with the capacious views of the theories of functions of rights before discussing the narrow views.
Recall, the four capacious theories of the function of rights are the will theory, the interest theory, the any-relation theory, and the several functions theory. The capacious theory of the function of rights is primarily focused on understanding what combinations of Hohfeldian relations are possible in a rights claim and why. I will start with the capacious will theory and then turn to the any-relation theory, before discussing the several functions and capacious interest theories in tandem.

In the case of animal rights claims, a capacious will theory is wholly inadequate to understand what the function of animal rights claims are. This is simply because a capacious will theory requires that the power be contained in the combination of Hohfeldian relations that constitute the rights claim. The power relation produces a sphere of freedom and autonomy over the first-order relation that the rights claim holder has in virtue of possessing the rights claim. For animal rights claims, as a matter of form, as I argued in Chapter Two, and as a matter of function, as I argued here, those rights claims will never contain a power and will never represent the freedom and autonomy that is designated by the idea of “small scale sovereignty,” which is the function of rights under the capacious will theory. So, with little surprise, because the capacious will theory simply cannot accommodate animal rights claims as a conceptual matter, it should be rejected by animal rights theorists.

The any-relation theory seems like it could be an option for a capacious theory of the functions of animal rights. Conceivably, animal rights theorists could adhere to the any-relation theory as claim-right relations combined with immunity relations are a combination of Hohfeldian relations, which the any-relation theory would accept as a right. Additionally, I made two arguments to resuscitate the any-relation theory from Wenar’s objections. Namely, I argued that the primary refinement needed for the any-relation theory is to restrict combinations
of relations such that the rights claims holder is the beneficial Hohfeldian status holder in each relation constituting the rights claim. This would mean that there is no such thing as a unilateral privilege relation which constitutes a right under the any-relation theory (making it more like a “most” relation theory than a truly “any” relation theory).

However, I did not discuss the fact that the any-relation theory, even so resuscitated, provides no real metric for judging what combinations of Hohfeldian relations properly constitute rights claims. Therein lies the ultimate weakness of an any-relation theory as a capacious theory of the function of rights: even resuscitated with a very minimal restriction, the any-relation theory does not provide any hint of an answer as to what the function of rights claims actually are. So, the any-relation theory fails to explain (1) why some claim-right relations are combined with power relations and not immunity relations (such as property rights) and why others are combined with immunity relations and not power relations (such as animal rights) and (2) what the function of rights is even supposed to be. As such, it is a wholly inadequate theory of the function of rights, even though it provides previously unseen insight into the structure of rights claims.

The discussion of animal rights in the context of the capacious interest and several functions theories can go hand in hand simply because, as I argued above, the several functions theory is a version of the interest theory. Additionally, to the extent that argument fails, the several functions theory does not add anything distinctive or additional to the interest theory in the context of animal rights. Any debate between the capacious interest and several functions theories would depend on distinctively human rights claims and therefore, distinctively human capabilities and relations. For example, the first three functions (protection, provision, and performance) of the several functions theory are simply refinements of ways in which a rights
claim may protect and/or advance the right holder’s well-being/interests. The second three functions (exemption, discretion, and authorization) relate to capacities that are held only by humans, which the interest theory will claim are in the interest of the human rights holder. Animals are not exempt from obligations because they are never subject to obligations. Animals do not authorize; authorization is a normative activity that animals do not participate in. Animals do not exercise discretion, understood in the several functions theory (as I have argued) as the bilateral privilege. An animal may make a choice, to eat the left-hand treat before the right-hand treat, but such choices are not exercises of discretion like we see from humans who possess bilateral privileges.

Moving to the narrow theories of the function of rights, the interest theory will still be the best view for understanding the function of animal rights claims. A narrow will theory does no better than the capacious will theory in providing a viable theory for the function of animal rights claims. The narrow will theory, which is solely focused on identifying the claim-right holder given a duty, uses as the criterion for identifying that claim-right holder who or what holds “some measure of control” over the duty. This means that the claim-right holder will be that entity which has the ability to alter the duty (and, according to Hart, the power to seek compensation or waive compensation, given that the duty has been breached). Animals have no measure of control over any duties that we would potentially have to them because they do not possess powers, so the narrow interest theory cannot conceptually accommodate animal rights claims.

While the hybrid theory clearly allows the possibility of animal claim-rights, it is going to struggle to provide a full theory of claim-rights in the context of animals. The primary feature of the hybrid theory is that it strictly separates (1) the justification of the duty from (2) the
justification of the correlation of the duty to a claim-right. The hybrid theory is only concerned
with the latter enterprise (as perhaps all narrow function of rights theories should be) and within
that task, the hybrid theory tries to weld the idea of “measure of control” to the interests of the
claim-right holder. We identify the claim-right holder, given a duty, by looking at who has a
measure of control over that duty and asking whether that measure of control “matches (by
design)” that entity’s interests (on balance). However, animals pose a peculiar situation for such
a theory because they will never have any measure of control over the duty owed to them
because the measure of control for the hybrid theory is still conceived of as powers. When there
is no measure of control, all that is left under the hybrid theory is to ask whether the possession
of no measure of control matches (by design) the (purported) claim-right holder’s interests (on
balance). To consider an example of this in the human context, recall that the hybrid theory
accommodates those cases where a claim-right is combined with a reflexive immunity (i.e. cases
where the claim-right holder has no measure of control over the duty because s/he is disabled
from altering the duty). In those cases, the reflexive immunity disables the claim-right holder
from altering the duty because the interest advanced by the duty (e.g. not being enslaved, not
being compelling to respond to custodial interrogation) is so important that it is appropriate that
there be no control over altering the first-order relation.

However, in the case of animals, there will likewise be no measure of control over the
first-order relation, but not because the interests being protected are so important that it is
appropriate that there be no control over the duty. There is no measure of control over the duty
simply because animals are incapable of exercising control over first-order relations at all. So,
while I had previously mentioned that the hybrid theory at least conceivably accommodates
animal claim-right holders because it allows for zero measure of control over the duty, it is at
least unclear how the hybrid theory actually works in the context of entities that never have any measure of control over any duties. The hybrid theory does contain a parenthetical clause discussing surrogates of the claim-right holder, and this might be crucial in understanding how the hybrid theory handles cases where the claim-right holder has no measure of control, such as marginal human cases. However, many, if not most, animals do not have designated surrogates whose measure of control could be used to perform the measure of control-to-interest matching function that the hybrid theory demands. Even presuming that all such entities have, in theory, a surrogate, what is the measure of control that that surrogate would have in the case of animal rights? Would it follow the measure of control that we typically take surrogates to have in marginal human cases? At the very least, the hybrid theory is underdefined for animal claim-rights.

Another concern that is more easily seen in the case of trying to apply the hybrid theory to animal rights is that the interests at stake appear to determine the measure of control that exists over the duty (and not the other way around). If we were to actually try to formulate an understanding of what the surrogate’s measure of control is over a range of duties owed to, say, a chimpanzee, we would look to the importance of the interest to determine the measure of control. Say that there are duties, as many animal rights theorists would defend, not to kill the chimpanzee, not to experiment on the chimpanzee, and not to keep the chimpanzee in captivity. What measure of control would a surrogate have over these duties? I think the principle behind animal rights as a movement is that a surrogate should have no control over any of these duties (except maybe seeking compensation for their violation, if the legal system recognized such rights). All of these duties advance very fundamental interests of the chimpanzee that are to be respected. But this dialogue reveals that the interests precede the issue of control over the duty
in the case of animals. So, there is an arguable case that the hybrid theory, at least for those who possess no measure of control over any duties (i.e. marginal human cases and animals), collapses into some version of an interest theory because it will be the interests of the claim-right holder that are determinative of the measure of control. There is not a robust understanding of measure of control independent of interests in such cases, whereas there is a robust understanding of interests independent of measure of control. I take this to be a good reason to reject the hybrid theory as a strong candidate for understanding the function of animal claim-rights.

The final alternative that I have explored in this chapter to the narrow will and interest theories is the role theory. Recall that the role theory’s main strength is expanding our theory of the function of rights to better accommodate role-based claim-rights (e.g. the claim-rights of athletes to certain locations on the court/field or lack of interference in certain ways during a game) where the interest theory would have to stretch the concept of interest to accommodate such claim-rights (e.g. the goalie has an interest in being unimpeded to the ball, as a goalie, but not as an individual per se). The role theory recognized as well that roles are really just a specific type of kind and that the theory could become more generalized to accommodate marginal human cases and animals by such an expansion from roles to kinds. Combined with the role/kind notion is also the desire normally ascribed to that role/kind which together appropriately select the claim-right holder, given a particular duty. In my view, this kind-desire theory is not distinct from a narrow interest theory in the case of animal claim-rights.

What concept does the heavy lifting in the role theory? The kind that a potential claim-right holder is categorized into and the “desires” categorically (in an Aristotelian sense) ascribed to that kind. Recall Wenar’s animal example of livestock cattle. Those cattle could be categorized in kind as livestock (i.e. property to be exploited for the economic gain of the
property owner) or as sensate living beings. If cattle are categorized as the former kind, they have no desires relevant to the claim-right inquiry: “they are just commodities with hooves.”

So, any “duty” not to abuse the cattle is no duty at all and there is no claim-right holder under the role theory. If the cattle are categorized as the latter kind, then they certainly have the desire not to be abused (indeed, such a desire is attributable to all sensate living creatures capable of feeling pain and enduring the suffering caused by abuse). So, the duty not to abuse the cattle is a real duty, and the correlative claim-right holders are the cattle (each having a claim-right and the farmhands, owners, etc., each having a duty to each cow not to abuse it). But all it means to say the cattle have a desire not to be abused is that it is in their interest not to be abused because it is fairly standard for abuse to be considered detrimental to the abusee’s interests. Indeed, the only desires that animals would appear to have on such a kind-desire analysis are desires to have their interests satisfied (assuming the animals are not categorized as the kind “property to be exploited for the property owner’s profit”).

Let me consider another example based on Regan’s claims about animal rights. Regan concludes that, e.g., chimpanzees have a right not to be experimented on. So, to apply the role theory, we start with the assumption there is a duty that we humans not experiment on chimpanzees. Assuming we categorized chimpanzees as of a kind of living sensate creature (rather than petri dishes for the development of medical knowledge), we must ask whether

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87 Wenar (2013, 220).
88 I discuss Regan’s view in detail in Chapter Four.
89 Again, why they would be categorized as one kind over another is left unsaid by the role theory. In my discussion with Lcif at Stanford’s Moral Philosophy Reading Group in March 2020 on this paper, he claimed that this is a desirable feature of the role theory. The response goes something like this. As a metaphysical view, the function of rights should not be committed to any particular normative system. It is the normative system in which the duty and claim-right are being examined that will determine the desire-kind analysis. I think the trouble with this response is that we simultaneously inhabit multiple normative systems at a time. A farmhand is both a moral agent and an employee of a farm business that needs to make profit, at the same time. The role theory produces claim-rights in the cattle against the farmhand in the former normative system, but not the latter. Which one ought to matter as to how the farmhand acts towards the cattle? The role theory does not say.
chimpanzees, qua chimpanzees, want such duties to be fulfilled. The answer to this is the Aristotelian categorical claim that, yes, chimpanzees as living sensate creatures do not want to be experimented on. Why? The answer to the Aristotelian categorical depends solely on the interests of the kind chimpanzee. They are living creatures with complex social lives that have interests in being free to live those lives. Their interests are harmed by not only being caged and prevented from living those lives but also by having their physical bodies invaded with unpredictable and many times harmful substances for the sake of the advancement of human knowledge (usually only to better the lives of humans).

Now, in the case of humans, such an interest theory would still be distinct from the interest theory suggested by Kramer, which has been my primary model for a narrow interest theory of the function of rights. This is so because the fundamental question for identifying a claim-right holder in the presence of a duty is truly distinct between a role-interest theory and Kramer’s interest theory. The role-interest theory looks to the potential claim-right holder’s kind and desires to ascribe the claim-right to that entity in the face of the duty. Kramer’s interest theory looks to the detriment suffered by the potential claim-right holder and asks whether that detriment is sufficient for concluding that another had breached a duty owed to that entity. Desires and interests come apart more readily in the case of human beings because we can take on roles that have specific goals that are distinct from our interests qua humans. But animals do not have desires and interests that come apart in this way. Detriment to an entity that is sufficient to find a breach of duty, per Kramer, will translate into a desire to have the duty be fulfilled for animals, per Wenar. Animals do not have any desires that duties be fulfilled except for those duties which, when fulfilled, promote their interests as the kind that they are. So, the

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90 In particular, the desires of athletes in sports and of competitors in games are not really a reflection of the interests of humans qua humans. Being able to create such games might be in the interests of humans qua humans because we are a self-determining species. Our full telos is not given to us by our animal natures.
role theory is ultimately just a version of an interest theory in the context of animals as claim-right holders.

So far, I have argued that the will (capacious and narrow versions), any-relation, several functions, hybrid, and role theories are not suitable for animal rights theory because they either cannot conceptually accommodate animal rights or they add nothing to a function of animal rights theory that is not already contained in the interest theory. However, none of this is to say that an interest theory of the function of rights is itself suitable for animal rights. Perhaps none of our traditional and more recent function of rights theories is suitable for animal rights. I do not think we need to go that far. It is a strength of the interest theory, as a general theory of rights, that it clearly conceptually accommodates hard cases such as marginal human cases and animals. It is also a strength of the interest theory, for marginal human cases and animals, that it does not contain a normatively-laden view of what counts as an interest and what does not. All that is needed for an entity to be a rights holder under the interest theory is to have a well-being or welfare. Animals clearly have a well-being or welfare. Things can be good for or bad for animals, and they experience pain and suffering.

Older versions of the interest theory have read additional normative restrictions into the concept of interest to exclude animals from being possible right holders. For example, McCloskey reads a “prescriptive-evaluative overtone” into the concept of interest based on the idea that right holders “enjoy” their rights. Rights not only have to be conducive to the right holder’s welfare (the evaluative overtone), they also have to be “of concern” to the right holder.

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92 Ibid, 50.
93 See, e.g., Korsgaard (2018, Ch. 2).
94 Singer (2002, 7–8); see also Regan (1983, Ch. 1–3).
95 McCloskey (1965, 126); see Feinberg (1974) and Regan (1976) for responses to McCloskey.
(the prescriptive overtone).\textsuperscript{96} This prescriptive (conative) condition on being a possessor of interests is clearly not required by the interest theory. It is a product of sneaking normative constraints into the concept of interest even though the interest theory is not meant to be a moral or political theory.\textsuperscript{97}

Indeed, the weakness of the interest theory properly understood as minimally normative is that the concept of interest is too minimally normative and the view admits of too many possible right holders. Frey makes this point when he notes that inanimate objects can have things happen to them that are good for or bad for them, i.e. things that make them good or exemplary of their kind.\textsuperscript{98} For example, regular oil changes are good for gasoline vehicles. Regular sharpening is good for a knife. Introducing the concept of “need” to “interest” likewise does not solve the problem because gasoline cars need regular oil changes and knives need to be sharpened.\textsuperscript{99} Ultimately, Frey draws the line for interest holding at the level of possessing desires and denies that animals possess desires (because desires require beliefs, i.e. linguistic content, and animals do not have language).\textsuperscript{100} Such an argument sneaks language into what it means to have an interest, something which the interest theory should not do.

A better solution to Frey’s concern that interest as welfare leads to inanimate objects possessing interests (and therefore possibly being right holders under the interest theory) is to recognize that welfare is typically understood to be related to life processes. Gasoline cars and knives do not have wares. They can be better and worse instantiations of their ideal form, but

\textsuperscript{96} McCloskey (1965, 126).
\textsuperscript{97} See, e.g., Kramer (2000, 79). The fact that Regan is involved in these debates indicates the conceptual error being made. Regan’s argument is a substantive moral argument that animals have rights. The interest theory of rights is not a substantive moral theory.
\textsuperscript{98} Frey (1980, 79–82); see also Korsgaard (2018, 19–20).
\textsuperscript{100} Ibid, 83–100.
they do not “tend[] to their own well-functioning.”\textsuperscript{101} Such tending to one’s own well-functioning is a characteristic of living organisms, and it reveals a self-referential notion that is contained within the concept of welfare. All living things strive (not to be understood as a mental state) to obtain that which is good for them and avoid that which is bad for them. They strive to achieve their welfare. So, if interests as welfare is too broad, it is too broad because the interest theory allows for the possibility that all living things could be right holders. However, there is a saying philosophy: one man’s reductio ad absurdum is another man’s valid inference. Because the interest theory is not a full moral or political theory of which interests are deserving of protection via rights, I see no major problem with animal rights theory adopting a theory of the function of rights which admits of the possibility of rights for plants, fungi, and other living organisms.\textsuperscript{102}

VI. CONCLUSION

In Chapter Two, I began my discussion of the nature of animal rights by arguing that the form of animal rights consists only of the Hohfeldian claim-right and immunity relations. In this chapter, I concluded my discussion of the nature of animal rights by examining the function of rights debate and arguing that animal rights ought to be understood as functioning to promote the interests of animals. To defend that claim in this chapter, I examined the traditional function of rights debate between the will and interest theories, both in their capacious and narrow forms, and argued that the will theory cannot conceptually accommodate animal rights. I also examined attempts to transcend the traditional will/interest theory divide in the any-relation, several functions, hybrid, and role theories. I concluded that these views either cannot conceptually accommodate animal rights or simply collapse into an interest theory of rights in the case of

\textsuperscript{101} Korsgaard (2018, 20).

\textsuperscript{102} For an in-depth view differentiating between objects, plants (and non-sentient organisms), and sentient animals, see ibid, Ch. 2.
animal rights. Finally, I argued that interests, as understood by the interest theory, are best understood as welfare, something that is shared across all living entities. Although such a conception of interests is broader than what animal rights theory needs, I emphasized that the interest theory is not meant to provide a full normative accounting of what rights there are. Such a task is the job of a full moral (or political) theory, and such is the task I take up in the next chapter where I will discuss the substantive moral arguments for animal rights.
CHAPTER FOUR: ANIMAL RIGHTS

I. INTRODUCTION

In the preceding two chapters, I have explored the form and function of rights debates and what those metaphysical explorations of the nature of rights can tell us about the nature of animal rights. I concluded that animal rights claims are limited in their form to the passive Hohfeldian relations (i.e. the claim-right and the immunity). I also concluded that the function of animal rights claims is limited to an interest theory of the function of rights. In this chapter, I take up the question of whether animals have moral rights. To answer this question, I will first identify which of our moral theories readily admits of rights in its moral machinery. Because the existence of rights claims (i.e. all of the Hohfeldian relations) ultimately depends on the existence of directed duties, only deontological moral theories will be able to accommodate rights. Following this general discussion, I will examine four prominent arguments for the moral considerability of animals, three of which are specifically arguments for animal rights. All of the big three moral theories can argue for the moral considerability of animals; however, this chapter will show the value of considering animals to be rights holders and how our deontological moral theories might defend that assertion.

II. MORAL THEORY AND RIGHTS

Before I can turn to the moral arguments for animal rights, I must first provide a brief overview of the three big moral theories (i.e. consequentialism, deontology, and virtue ethics) and where rights fit (or do not fit) within those views. In addition to capturing a special kind of moral relation, rights claims also convey a kind of moral reason,¹ and they may or may not have a role in a particular moral theory depending on the kinds of moral relations and reasons the theory allows. My discussion here will be kept at a general level compared to the depth of

¹ See, e.g., Thomson (1990, 120); Raz (1984b, 197 n. 1).
nuance that can and has been drawn among competing versions of the big three moral theories in their respective literatures. The simple reason for this is that many of those nuances are not germane to my later discussion of animal rights. The nuances that are germane to the discussion of animal rights will be made more specific in the context of the arguments for animal rights in Section III.

Before discussing the big three moral theories individually, at the highest level of generalization, they can be grouped into two categories: the deontic and the aretaic. Deontic moral theories are typically described as action-guiding moral theories, where the primary moral concept is the notion of obligation (to act or not act) and permission (to act or not act). Aretaic moral theory is typically described as a character-based moral theory, where the primary moral concept is virtue. Virtue is ascribed to an agent’s character, which is constituted by more than just an agent’s actions. Aretaic moral theory is arguably a richer moral theory because it incorporates a variety of thicker ethical notions (e.g. coward, gratitude, brutality) than the morally thin notion of the obligatory (i.e. right and wrong) into what constitutes the moral.² Although the aretaic pre-dates the deontic in the history of philosophy, I will begin with the two major deontic moral theories that have dominated western moral philosophy from the Enlightenment through the mid-twentieth century: consequentialism and deontology. Dissatisfaction with these two deontic theories is what spurred a resurgence of philosophical interest in aretaic moral theory,³ and so I will conclude this section with a brief discussion of the aretaic, as opposed to the deontic. Inside of each theory, I will specifically explore the role of rights in that moral theory and conclude that rights, conceived of as combinations of Hohfeldian

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³ See Anscombe (1958).
relations, are conceptually available only in deontological moral theories. This discussion will also reveal some reasons why we find rights to be valuable in our morality.

A. CONSEQUENTIALISM

I begin my discussion of the deontic moral theories with consequentialism. The basic tenant of all consequentialist moral theories is that the goal of morality is to promote the best overall state of affairs (a.k.a. outcomes, consequences, the Good). All consequentialist moral theories have three constitutive principles: (1) a theory of value, i.e. what constitutes the Good, (2) an egalitarian principle, and (3) an aggregation/maximization principle. I will start here with a discussion of the first principle to narrow my discussion to utilitarianism. I will address the remaining two principles as interpreted in a utilitarian moral theory.

As the dominant kind of consequentialism, utilitarianism, takes some concept related to well-being or welfare, such as pleasure or preference satisfaction, as constituting the Good. The two founding fathers of utilitarianism, Jeremy Bentham and John Stuart Mill, were both hedonist utilitarians that took the sensation of pleasure (and the absence of the sensation of pain) as constituting the Good. While the feeling of pleasure and the absence of the feeling of pain seem to be good much of time, the sensation of pleasure and the absence of pain do not seem to capture all and only what is good. For example, the sadist receives the sensation of pleasure by inflicting pain, harm, and/or humiliation on his victim. It is hard to conclude that such an act contributes to the Good, rather than detracts from the Good. Alternatively, many actions are good for us without producing sensations of pleasure. For example, eating nutritious food of

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4 Some consequentialist views maintain that the Good includes non-welfare states of affairs, such as justice, fairness, and equality. See Hooker (2003, Sec. 3); Griffin (1992). Such views are non-utilitarian, and I do not consider them in this project.

5 Mill’s hedonic utilitarianism rejected Bentham’s view that all sensations of pleasure are equal and the only thing that matters is the quantity of pleasure. Mill suggested that some pleasures, e.g. pleasures of the intellect and moral sentiments, are better than others, and therefore, the type or quality of pleasure could affect how much Good an action produces. Mill (2015, 122). This distinction is not germane to my discussion here.
which one does not like the taste and/or texture will produce minimal (if any) sensations of pleasure, but it is certainly good for our physical health to eat such food. Furthermore, if only sensations of pleasure constituted the Good, we should all desire to be hooked up to an experience machine\(^6\) (much like the Matrix) that provides us a constant stimulation of pleasure-inducing experiences, even though no such events occur in reality. Many have moderate to strong reactions against being hooked up to such an experience machine, providing further reason to conclude that pleasure (and absence of pain) is not (entirely) constitutive of the Good.

The common solution to these problems with hedonic utilitarianism is to equate the Good with something like preference (or informed desire)\(^7\) satisfaction, where the Good is a state of affairs in the world of having one’s preferences satisfied. In this way, what happens in reality is fundamental to the Good. Preferences have to be satisfied in reality, not just felt to be satisfied in the experience machine, to add to the Good. One substantial problem with preference utilitarianism is how to compare preferences across individuals.\(^8\) Some individuals may have extremely strong preferences to, e.g., humiliate someone that are perhaps stronger than that person’s preference not to be humiliated. It seems troubling to conclude that such an act of humiliation is an addition to the Good just because a particular actor has a bizarrely strong preference to humiliate people. Nozick calls these kinds of individuals utility “monsters” and “devourers.”\(^9\) The excessive satisfaction that they obtain by having their preferences satisfied would appear to require that we all be sacrificed to that end, since no amount of satisfaction of our preferences exceeds the amount of Good produced by satisfying the preferences of the utility

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\(^6\) Nozick (1974, 42–45).
\(^7\) See Griffin (1986, Part One, I, 4 and Part One, II).
\(^8\) See Coakley (2016).
I will come back to this problem of comparing preferences across individuals in more detail in Section III.A., where I discuss Singer’s preference utilitarian account of the moral considerability of animals. For now, I must turn to the two remaining, constitutive principles of utilitarianism.

The egalitarian principle requires equal consideration for equal interests. This means equal interests get the same amount of weight or value in determining their contribution to the Good. The egalitarian principle plays a relatively inert role in hedonic utilitarianism because for the hedonic utilitarian, just one thing constitutes the Good: pleasure. All pleasure is the same, and all that matters is the quantity of pleasure in determining what contributes more or less to the Good. In preference utilitarianism, not all interests have the same weight, value, or contribution to the Good. I have an interest in clean drinking water; I also have an interest in practicing yoga. These two interests are clearly not equal. My interest in clean drinking water is much stronger than my interest in practicing yoga. Accordingly, my interest in clean drinking water should receive more moral consideration in how it is considered to contribute to the Good than my interest in practicing yoga. And, perhaps more importantly, another human’s interest in clean drinking water should receive more moral consideration than my interest in practicing yoga.

The aggregation/maximization principle (what I will call the aggregation principle) holds that states of affairs are essentially aggregative, and therefore, the Good is essentially

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10 I often wonder if humanity (understood as the aggregate of all humans, not a collectivity distinct from individual humans) is not itself the quintessential example of the utility monster. Not only do many/most think our relatively trivial preferences (e.g. what food we eat) outweigh the unbelievable suffering of others for us to have them (e.g. the agricultural animals that we torture in concentrated animal feed operations), we also constantly create new and unsatisfied preferences as soon as we satisfy other preferences (e.g. seasonal clothing fashion, yearly technology releases).

11 I move here from the term “preference” to the term “interest” in anticipation of discussing Singer’s utilitarian view of the moral considerability of animals. Singer uses the terms preference, interest, and desire with less than absolute precision, Singer (1979), and it is possible that Singer’s view evolved over time from a more hedonic utilitarian view to a more preference utilitarian view. See Lockwood (1979, 158). In this chapter, I treat Singer as a preference utilitarian and interests as synonymous with preferences, although such synonymy is not strictly true. See Griffin (1986, 37) (discussing “interest” and “informed desire” as not synonymous).
maximizable. At first glance, the aggregation principle may appear to be inconsistent with the possibility of unequal interests because it is unclear how unequal interests are to be made commensurable to determine which contributes more or less to the Good. Some consequentialists will deny that the pluralistic values captured by interests can be made commensurable, and therefore the Good cannot be aggregated or maximized.\(^\text{12}\) Maximization may be savable through adopting something like a lexical priority of values that produces a rank ordering of what contributes more and less to the Good.\(^\text{13}\) However, saving aggregation (and therefore saving maximization through aggregation rather than as a function of a lexical priority) needs something more like a weighting function that transforms seemingly pluralistic values into a monistic value (e.g. utiles) that is then summed. The problem of the plurality of values captured by interests will come up later in Singer’s utilitarian account of the moral considerability of animals. But now I must turn to an important distinction inside utilitarianism that is relevant to the role of rights in a utilitarian moral theory: act versus rule utilitarianism.

1. **Act Utilitarianism**

The quintessential feature of act utilitarianism is that every action must be evaluated for how it will contribute to the Good when the moral agent is deciding whether or not to do the action. Only those actions which produce the most Good should be done. As an initial matter, it would appear that this means there are no shortcuts for performing the utilitarian calculus (per the aggregation principle) for each and every action the moral agent makes. Something as simple as coming up to a four-way stop sign where the driver can see that there are no other drivers approaching requires a calculation of the Good: whether (and how fast) the driver should roll the stop sign. If there is no traffic, certainly the driver’s interests are better satisfied if he can

\(^{12}\) See, e.g., Chang (2017); Finnis (1997); Wiggins (1997); Stocker (1997).

\(^{13}\) See Rawls (1982) for an example of a lexical priority of values. Mill’s higher and lower pleasure distinction may also be a kind of rank ordering of pluralistic values.
save gas, wear and tear on his car, and time by blowing through the stop sign. The act utilitarian may adopt “guides” (that look like rules) on how to act in certain circumstances to reduce the burden of having to constantly perform the utilitarian calculus.\textsuperscript{14} However, every action should be an action which produces the most Good regardless of any such guides.

Two major problems arise for act utilitarianism, largely because its commands are agent-neutral.\textsuperscript{15} First, act utilitarianism demands abhorrent individual sacrifices inside the world of inevitable and unavoidable tradeoffs. For example, we live in a world where many humans need organ transplants all the time to survive. There are many healthy humans whose organs could be harvested to save those who die waiting for an organ to become available. Each healthy human is capable of having his organs harvested and saving at least five lives (heart, lungs, liver, and two kidneys). Applying the egalitarian and aggregation principles in determining what action would produce the most Good, act utilitarianism demands that we harvest organs from healthy individuals, even against their will.

Second, because the egalitarian principle is so radically egalitarian, it makes act utilitarianism a highly impersonal morality and quite alienating to the moral agent. For example, my interest in clean drinking water is to be weighted exactly the same as every other human’s interest in clean drinking water when I am determining how I should act. In deciding which act I should do to produce the most Good, my interest gets no additional consideration just because it is mine. To take a more extreme example, assume I am in rightful possession of a life-saving drug, and I am tasked with determining to whom I ought to give it among three people (myself included), all who will die without it. Pursuant to the egalitarian principle, I cannot take into consideration the fairly universal fact that I (rightly) prefer my life over others’ lives in

\textsuperscript{14} See Rawls’ (1955, 28) “summary conception” of rules.
\textsuperscript{15} I leave aside for this project the third major problem for act utilitarianism: the distribution of the Good. See Rawls (1971, 23).
determining who gets the life-saving drug. Consider the same life-saving drug example except the three people are my child and two children who are strangers to me. I cannot take into consideration any special obligation or sentiment I may have to my own child in determining who gets the life-saving drug according to the egalitarian principle.

The solution to these challenges lies in adopting agent-relative permissions possessing some kind of categorical force that is not overridden simply because more Good can be produced otherwise. So, in the transplant case, agents have an obligation to the victim not to harvest the victim’s organs even though less Good is produced as a result of not doing so. In the life-saving drug case, I have the discretion to prefer myself (or my child) over others, regardless of the Good saving those others might cause (perhaps one of the others is the next Einstein). What this means is that the solution to these challenges is to incorporate rights into the moral theory. The transplant victim has a claim-right against other agents that his organs not be harvested involuntarily. I have the right (i.e. the bilateral privilege) as to each of the others, who could be saved, to administer the life-saving drug to myself (or my child).

Act utilitarianism does not have these rights in its moral machinery. While it is properly categorized as a deontic, or an action-guiding, moral theory, none of the agent’s obligations are directed to anyone or anything. The moral maxim of act utilitarianism produces an obligation to act, not an obligation to someone to act. Without directed obligations, claim-rights just do not exist for the act utilitarian. Additionally, it is not clear that act utilitarianism allows for any discretion as captured by the bilateral privilege. This kind of discretion would depend on the

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16 Scheffler (1988, 5).
17 Notably, the agent has a permission only, i.e. a unilateral privilege, not to harvest the victim’s organs. The agent is not the right holder in the transplant case.
utilitarian calculus resulting in the same, maximum amount of Good for more than one action.\textsuperscript{18} It is insufficient, however, to solve the issue of an agent preferring herself by relying on ties in the utilitarian calculus, not least of all because it is hard to determine how frequently they occur.\textsuperscript{19} Let me assume that in the drug case, saving any life would produce the same amount of Good, except if I do not prefer to save my life (or my child’s life), some child somewhere in the world also gets a chocolate chip cookie. Act utilitarianism again requires that I not prefer my life (or my child’s life). In lacking the claim-right and privilege relations, act utilitarianism simply has no real sense of rights in its moral machinery to solve these problems. Before turning to deontology, there are some theorists who have attempted to find a third way between categorical, directed obligations and pure act utilitarianism by adopting a two-tiered, rule utilitarian approach. I will briefly discuss rule utilitarianism and the role rights play in it before turning to the deontological moral theories.

2. Rule Utilitarianism

To begin, rule utilitarianism rejects the act utilitarianism principle that each action must produce the most Good. The rule utilitarian recognizes that there are some actions which typically produce more Good on balance and some actions which typically produce less Good on balance. For example, killing innocent persons generally detracts greatly from the Good, whereas not killing innocent persons generally contributes to the Good. It is an unusual situation where killing an innocent person would contribute to the Good on balance. So, the rule utilitarian concludes that it is appropriate to adopt a rule regarding the act of killing innocent persons, namely, do not kill innocent persons.

\textsuperscript{18} It also lacks the directedness of the privilege that is required in Hohfeld’s privilege relation, but I need not focus on that concern here.

To address the transplant case, the rule utilitarian adopts a rule: do not harvest organs from involuntary victims. This rule can be framed in terms of the “rights” of the victims: humans have a right not to have their organs harvested involuntarily. This “right” is justified on the grounds that the Good is much greater if individuals, generally, did not have their organs involuntarily harvested to save others. Absent such a “right,” every healthy individual would at all times have to be concerned with whether s/he is soon be cut up and divvied out to others. Society would look much different (perhaps close to a Hobbesian state of nature\textsuperscript{20}) because nobody could be secure in the physical safety of their person. Everyone would be liable to be snatched up by organ harvesting crews. It is possible that society would simply not function without the general observance of this “right” of individuals, even though there are many specific violations of the “right” that would produce more Good in the world.\textsuperscript{21}

The problem of not being able to prefer oneself is solved in a similar way. I have a “right” to prefer my own life (or the life of my child). These “rights” are justified on the grounds that society benefits greatly if parents are especially invested in their children, rather than others’ children. Society also benefits greatly if individuals demonstrate a slight preference in their own interests over others’ equal interests. The Good is much greater if individuals are generally able to prefer themselves, especially in close cases such as the life-saving drug cases. The Good is much greater if parents generally put special attention into their children. More Good is produced if we have these “rights” than if we followed a pure act utilitarianism. The precise arguments for establishing these rules that promote the greatest Good I leave to the rule utilitarian.\textsuperscript{22}

\textsuperscript{20} See Section II.B.2.
\textsuperscript{21} For example, consider five dying children, all beloved by their parents, and one lone, blood-type-matching orphan, whom no one cares about and who could be sacrificed to save the five beloved children.
\textsuperscript{22} For an example of a general theory for establishing “rights” on consequentialist grounds, see Scanlon (1977, 89).
The real struggle for the rule utilitarian is in how to deal with cases where following the rule (or according the “right”) clearly produces significantly less Good than breaking the rule (or violating the “right”). To see how troubling this can be for the rule utilitarian, consider the following example. Suppose that property rights, in particular the right to exclude others from one’s property, can be justified on rule utilitarian grounds. Suppose that a family of four is traveling in winter when their car breaks down, through no misjudgment or fault of their own. Suppose further that the only place for the family to survive the winter night before they can get help in the morning is in another’s, currently-unoccupied cabin. Clearly, the correct thing for the family to do is to break into the cabin and violate the cabin owner’s property “right.” It would be an enormous detraction from the Good for the family to accord the cabin owner’s “right” because it would be four lives lost instead of four trespasses to land (plus any minor property damage the family must inflict to gain access to the cabin). In these kinds of cases, the point of the “right” is lost because the decision to act in violation of the “right” is so clearly and strongly the correct thing to do because the act produces significantly more Good than according the “right.” To accord the “right” at such an enormous cost to the Good amounts to “superstitious rule-worship,” but to violate the “right” is just to be a thorough-going act utilitarian.

The difficulty comes from the issue surrounding the force of rights in our moral theory. The rule utilitarian has to determine where according “rights” sits in competition with maximizing the Good. For the rule utilitarian, “rights” are more like defeasible or prima facie routes for getting to the most Good (and avoiding major, major evils). But they lack true categorical force because they ultimately yield at some point if the Good is large enough (or,

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23 I think free-market economists would generally agree that privatization of resources leads to their efficient use. Such a rationale could justify private property rights on consequentialist grounds.

24 Smart (1956, 349).
more often, the evil to be avoided is great enough). Some may take the position that rights violations themselves detract enormously from the Good, so enormously so that it takes a large amount of Good saved to violate a “right.” Under such a view, “rights” amount to just another value, one among many that may be balanced, against other “rights” and against great evils. Such a “utilitarianism of rights” view incorporates “rights” into the hierarchy of interests which represent a plurality of values that constitute the Good. It does not affect the way that the rule utilitarian must conceive of “rights,” namely defeasible or prima facie reasons but not categorical reasons, and it does not solve the problem that rule utilitarianism will require the violation of one “right” to accord two.

When rights are justified on utilitarian grounds, although rights may in effect protect and promote some amount of individualism, they do not reflect anything important about individuals as such. That the transplant victim has a “right” not to have his organs harvested involuntarily, that I have a “right” to prefer to give the life-saving drug to myself (or my child), does not say anything about the transplant victim or me. We have these “rights” not because we are important but because that treatment of us produces the most Good (generally). Our rights are instruments for achieving the Good. Although the rule utilitarian is obligated to accord our “rights,” she is not obligated to us to accord our “rights.” That we even have these “rights” is contingent upon certain natural facts about the world and the Good and where we stand in relation to the agent’s action to produce the Good in the world.

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25 Deontology will face similar challenges to the force of rights in threshold cases and where rights themselves conflict. For a discussion of threshold deontology, see Moore (1997, Ch. 17) and Alexander (2000). For a discussion of conflicts of rights, see Hurd (1999, Ch. 11), Thomson (1990, PART I), Waldron (1989), Hurd and Moore (2018, Part III).


28 Nozick (1974, 28) calls this “derivative status.”
Part of the problem stems from utilitarianism’s lack of directed duties. Without directed duties, the rule utilitarian fares no better than the act utilitarian in truly incorporating Hohfeldian relations into her moral theory. None of the rule utilitarian’s duties to follow the rules and accord the “rights” are directed to the beneficiaries of the rules/“rights.” Even if the duties appear directed because, e.g., the beneficiaries have control over the duties (i.e. the beneficiaries can enforce, waive, or waive compensation for violations), such control would also be justified on utilitarian grounds. Who the beneficiary is of any particular duty to act for the rule utilitarian is a contingent fact. It has nothing to do with that individual in particular. This is because utilitarianism necessarily makes the individual subordinate to the Good. Adding rules, even disguised as “rights,” does not change this fundamental fact about utilitarianism. So, the rule utilitarian has no space for Hohfeldian claim-right relations in her moral theory.

Furthermore, to whatever extent rule utilitarianism provides moral agents spheres of discretion (bilateral privileges), the rule utilitarian runs into the same dilemma he encountered when faced with the question of the force of rights requiring “rule worship” or collapsing into act utilitarianism.29 Even if a bilateral privilege for some action, such as eating an egg sandwich for breakfast, could be justified on utilitarian grounds as generally producing the most Good, whether I ought to eat an egg sandwich for breakfast today either will or will not produce the most Good. If it does not produce the most Good, to eat the egg sandwich amounts to “rule worship.” If it does produce the most Good, I could have concluded I ought to eat the egg sandwich just by being an act utilitarian.

In sum, the moral machinery for the rule utilitarian does not contain appropriately grounded or forceful rights, either claim-rights or bilateral privileges, to solve the problems that arise with act utilitarianism. The only moral machinery within act or rule utilitarianism are

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undirected duties and unilateral (and undirected) “privileges” (i.e. undirected permissions to do what the moral agent is obligated to do). With this background on the role of rights in utilitarianism, I will now move to explore deontology and the role of rights in deontological moral theories.

B. DEONTOLOGY

In many ways, deontology is just the stark opponent of consequentialism. For example, unlike consequentialism that requires a theory of the Good apart from the moral command to maximize the Good, deontology has no such theory of the Good apart from conforming to the moral law.\footnote{See Hurd (1994, 162).} So, unlike the consequentialist who has a single moral maxim, the deontologist has a variety of moral maxims which are not reducible to a single value external to the moral law itself. Furthermore, for the deontologist, the moral law is not concerned with producing the best (or even better) states of affairs. All that it takes for an action to be moral is for the moral agent to intend and act in accordance with the moral law. Deontology is about doing what is right; consequentialism is about doing what is best.\footnote{Ibid, 161.}

This means that deontology can solve the transplant case that plagued both the act and rule utilitarian with relative ease. The obligation not to involuntarily harvest organs from victims is simply categorical. Nothing justifies or permits failing in that obligation; the obligation just is what the agent should do to act morally.\footnote{This is a strong way to characterize deontological moral theories, but it is the starting point for deontology. From here, deontologists debate among themselves how to resolve conflicts of rights and threshold cases. See supra n. 25. Because this project will not address how rights are to retain their categorical force in the face of conflicts and threshold cases, I will not go into the details of those debates here.} Furthermore, the agent owes her obligation to the victim specifically, i.e. he has a claim-right to not to have his organs harvested involuntarily against every moral agent. Considering the life-saving drug example, I am permitted to prefer

\footnote{This is a strong way to characterize deontological moral theories, but it is the starting point for deontology. From here, deontologists debate among themselves how to resolve conflicts of rights and threshold cases. See supra n. 25. Because this project will not address how rights are to retain their categorical force in the face of conflicts and threshold cases, I will not go into the details of those debates here.}
my life (or my child’s life) over someone else’s life (or someone else’s child’s life). I have a bilateral privilege to prefer my own (or my child’s) life in choosing to whom I give the lifesaving drug, not because that rule generally produces the most Good, but because it is my (or my child’s) life. A moral agent’s unique relationships affect the contours of her categorical duties. Who others are to a moral agent can affect what the moral agent owes them. This is not so for the consequentialist. Agent-neutrality is demanded by the egalitarian principle, and it just cannot accommodate our intuitions that individuals have a variety of relationships with others that are not all identical. So, deontology solves the two challenges to act utilitarianism by adopting an agent-relative system of obligations and permissions rather than the agent-neutral system of obligation seen in consequentialism.

Deontology also readily accepts Hohfeldian claim-right and privilege relations into its system of obligations. With respect to the claim-right in particular, deontologists fall into two camps depending on whether emphasis is placed on the claim-right holder or the duty bearer. These factions within deontology are called patient-centered and agent-centered deontological views, respectfully. Patient-centered views emphasize the right of the right holder while agent-centered views emphasize the agency of the moral agent herself. For example, consider again the transplant case. A patient-centered deontologist will emphasize the victim’s right not to be

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34 See ibid.
35 One might argue that Hohfeldian moral claim-rights and deontological moral claim-rights are logically independent of each other. A Hohfeldian moral claim-right is correlative to a directed moral duty but the deontological moral claim-right might depend on the “all-things-considered” ought, rather than the directed moral duty. See Sreenivasan (2010, 476); Thomson (1990, PART I) (regarding the “all-things-considered” ought). This issue appears to be generated from a concern about conflicts of duties, namely, one could have a Hohfeldian claim-right even though the directed duty is not what the duty bearer “all-things-considered” ought to do, deontologically speaking. I am not convinced this is a serious problem, if it is even a problem at all. Accordingly, I treat the Hohfeldian claim-right and the deontological claim-right as synonymous.
36 More precisely, the patient- and agent-centered factions of deontology have arisen to explain certain intuitions regarding hard deontological cases. See Moore and Alexander (2007, Sec. 2.1 and 2.2); Kamm (2007, 20, 251–52, 388). In Sections III.B. and III.C., the patient-centered and agent-centered distinction will be helpful in distinguishing between two different Kantian arguments for animal rights.
used as a mere means to an end by having his organs harvested (and life ended), even if that end is substantially more Good. The victim deserves a certain amount of respect, including not having his life ended merely for the benefit of others. The patient-centered approach is focused on the moral worth of the victim. An agent-centered deontologist will emphasize that the organ harvester soils his own agency by involuntarily harvesting the organs of the victim. Deciding to violate the categorical prohibition on involuntarily harvesting organs, the agent chooses to put his agency towards an action that he is morally forbidden from doing. The agent-centered approach is therefore focused on the agent’s own choices and actions, being the intentional causer of harms.37

Both patient- and agent-centered deontological views will face challenges. Patient-centered views will struggle to explain the prohibition on tradeoffs. If rights really must be accorded because of the moral worth of the individual whose right it is, then why is it okay to allow many other such rights, and the equal moral worth of the individuals who hold them, to be violated so that the one is accorded? For example, in the transplant case, the reason we do not harvest the organs of the victim is because his life has some absolute moral worth that must be respected. Yet, all the organ recipients have each the same moral worth to their lives. The rationale that is supposed to explain the right is easily adopted to justify violating the right. In this way, patient-centered views lose some of the agent-relativeness of the deontological obligation because their emphasis is on external and agent-neutral value.38

37 See Moore (2009, Ch. 3).
38 See Kamm (2007, 251–52). One solution to this problem for the patient-centered deontologist is to understand that rights represent a status of inviolability that is unrelated to what happens to the victim or recipient of the organ harvesting. See Nagel (1995, 89–90).
Agent-centered views run the risk of reducing into some kind of egoism or moral narcissism, where the only moral concern is the purity of an agent’s moral ledger regardless of what effects the agent’s actions have upon the world. An action-guiding morality that has no concern with the state of affairs of the world that it produces runs the risk of being mere rule worship. Additionally, the motivational component for the agent-centered deontologists may be lacking. To the extent a moral agent takes no concern in his moral ledger, it would be difficult to convince him to do so. The patient-centered deontologist can at least point outwards, beyond the moral agent, to try to give reasons why the right holder has the moral worth accorded by the right. For the agent-centered deontologist, no such appeal is available: a moral agent either recognizes the importance of keeping his moral ledger clean or he does not.

How the patient- and agent-centered distinction affects deontological arguments for animal rights will be made clearer in Sections III.B. and III.C. Before moving to those arguments, I must briefly discuss what the deontological moral maxims in fact are. Because deontology does not have a theory of value that determines the contents of its moral maxims, unlike consequentialism, the moral maxims must be derived in some other way. The two prominent methodologies for grounding deontological duties as such and determining the contents of those duties are Kantianism and contractarianism. In what follows, I will also touch upon the issue of why deontological duties are directed. I will argue that directedness comes from the notion of reciprocity as it is contained in Kantian and contractarian deontological theories.

1. KANTIANISM

Perhaps no other philosopher is more associated with deontological morality than Immanuel Kant. Unlike consequentialists who must look to something external to morality for

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its theory of the Good, Kant famously held that the Good was internal to morality itself when he concluded that only thing that is unconditionally good is a good will, and a good will is one that wills in accordance with the moral law.\textsuperscript{40} Indeed, Kant did not believe any further motivation for rational agents was required to justify acting in accordance with the moral law. This is just to say that Kantian morality is a strictly deontological morality. Furthermore, Kant argued that our deontological duties are grounded in pure reason.\textsuperscript{41} In being capable of acting from reason, rational agents are not only able to reflect on the means to achieve their ends, but they are also able to reflect on the ends themselves. This means that when a rational agent chooses to act in a particular way, he not only wills the means to his ends, he also wills the end itself. Additionally, when a rational agent acts on reason, he is acting upon laws that he has selected to govern his conduct, i.e. he is acting autonomously.\textsuperscript{42} Such laws are not arbitrary; they are constrained by the boundary of reason. That boundary is categorical and expressed in universal terms: act only in accordance with that maxim through which you can at the same time will that it become a universal law.\textsuperscript{43}

This Formula of Universal Law is one of three formulations of Kant’s categorical imperative. It not only grounds morality but also constitutes a test (of sorts) for evaluating

\textsuperscript{40} Kant (G 4:393, 4:399–4:400). Notice how a commitment to this claim immediately resolves the paradox of deontology (i.e. how is it sometimes morally permissible and sometimes morally required to bring about a worse state of affairs in the world?). The good that morality is supposed to produce is not states of affairs of the world, but compliance with the moral law.

\textsuperscript{41} My discussion that follows is influenced by Korsgaard’s constructivist interpretation of Kant’s moral philosophy. See Korsgaard (1996); Korsgaard (2018). The reasons for this are several. First, Kant interpretation may be one of, if not the most, difficult areas in the history of philosophy, and most of those debates are not germane to my goals in this project. Second, and quite germane to my goals in this project, Korsgaard is the most Kantian moral philosopher to argue for animal rights. I will discuss her argument in Section III.C. Third, I am quite drawn to Korsgaard’s constructivism as I find metaethical realism more troubling than its antirealist alternatives (constructivism included). I do not believe such a preference affects the points I am trying to make, but it will slightly alter the framing of the discussion at certain times. This problem is unavoidable and would occur whichever metaethical position I prefer.

\textsuperscript{42} Korsgaard (2018, 119).

\textsuperscript{43} Kant (G 4:421).
whether a proposed action complies with the moral law. For example, suppose you are considering lying on a loan application about your income, your assets, or the value of the collateral. To determine if such an action complies with the moral law, you must ask yourself whether you could will lying about income, assets, or collateral value on a loan application universally. That is: Can you will that everyone lie on their loan applications? The answer to this is no because if you did so will, no lenders would loan anyone money, including yourself. You would directly undermine and contradict the very end you seek to accomplish, obtaining a loan, by willing lying on the loan application as a universal law. Therefore, lying on your loan application is not in accordance with the moral law and the moral maxim derived is do not lie on loan applications about income, assets, or collateral value.

Consider another example: suppose you wish to kill your neighbor. Perhaps he is more successful than you or mows his lawn at 6:30 a.m. on Sunday morning. Whatever it is about your neighbor that bothers you, it has risen to the level where you wish to kill him. To test whether such an action would be in accordance with the moral law, you must ask whether you can will that everyone kill their neighbors when they desire to because of jealousy or annoyance. If you were to so will, one of the results would be that you, as a neighbor of

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44 This second statement is not considered true among all Kant scholars. See Wood (2016, 102) (“It is controversial what Kant means us to do with these formulas. Some think the first formula provides a general test of permissibility for maxims, or even a so-called ‘Cl-procedure’ for constructing the content of all morality. I think those interpretations are wrong, but clearly Kant does think that his three formulas taken together provide some substantive moral guidance and ground the system of ethical duties he presents in the Metaphysics of Morals.”). Because the Kantian animal rights theorists ultimately aim to end up at substantive moral guidance regarding the moral rights of animals, I will treat Kant’s formulas as providing at least a kind of procedure for evaluating the content of proposed moral maxims.

45 This example is adapted from Kant (G 4:422).

46 One criticism of the Formula of Universal Law that can be traced back at least to Fichte, see Wood (2016, 151–52, 244), is how the description of the act-type is to be fixed to test whether it can be universalized. Even within my example, what constitutes jealousy? What constitutes annoyance? Perhaps the only act-type that constitutes an annoyance is mowing one’s lawn at 6:30 a.m. on a Sunday morning. In that case, I should have no concern about universalizing “killing my neighbor because he annoys me” resulting in myself being liable to be killed because I annoy my neighbor. I am not such a morally bankrupt individual to even consider mowing my lawn at 6:30 a.m. on a Sunday morning. I offer no solution to this problem here.
 somebody, would be subject to being killed at that neighbor’s jealousy or annoyance with you. But this is clearly not something you rationally assent to. It is not a strict logical contradiction (i.e. contradiction of your will), but it reveals an inconsistency in the treatment of those who are neighbors of others, namely you get to kill your neighbor while being immune from being killed by a neighbor for the very same “reasons” that support your killing of your neighbor. This contradiction reveals that your choice to kill your neighbor because of jealousy or annoyance is not in accordance with the moral law.

This kind of universalization thought experiment puts the moral agent in the shoes of the moral patient and asks whether the moral agent would accept the same treatment he proposes to give the moral patient. The answer is not contingent on the moral agent’s subjective desires regarding how he wants to be treated (e.g. some moral agents may welcome death at the hands of a jealous or annoyed neighbor), but determined by reason as such, independent of any actual desires or preferences of the moral agent. Moral reasons must be acceptable from the point of view of every moral agent,\(^\text{47}\) which entails hypothesizing the moral agent as the moral patient of the proposed action. Because universalization results in this kind of perspective-taking, universalization has built into it a notion of reciprocity. I contend that this is where the directedness for Kantian duties comes from.\(^\text{48}\) When a rational agent acts autonomously, which occurs when he acts on reasons, he legislates laws for himself that universalize to all rational agents. That means that because he owes other rational agents a duty not to kill them because of jealousy or annoyance, they owe to him the same duty. And so reciprocity underlies the emergence of the directedness of their respective duties not to kill one another because of jealousy or annoyance.

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\(^{47}\) This point of view just is the point of view from reason. Kant (G 4:424).

\(^{48}\) Korsgaard (2018, 122 n. 11) notes that Kant cannot make sense of undirected duties.
Kant’s second formulation of the categorical imperative is the Formula of Humanity: act so that you always treat humanity, whether in your own person or in the person of another, always at the same time as an end, never merely as a means.\textsuperscript{49} Rather than looking inwards towards the moral agent, like the Formula of Universal Law requires, the Formula of Humanity looks outward towards the moral patient. The Formula of Universal Law represents the consistency within the moral agent’s will that is demanded by reason. The Formula of Humanity captures the importance of how moral patients are to be treated on the basis of their status as a moral patient, i.e. they are never to be used as a mere means.\textsuperscript{50} For example, when you are contemplating lying on the loan application, the Formula of Humanity would forbid such an action because to lie about material facts to the lender is to use the lender as a mere means to your end, namely obtaining the loan. Lying prevents the lender from realizing his autonomy through a fully-informed decision about whether or not to lend you the money you seek. Your act of lying does not treat the lender as if he is an end-in-himself. Similarly with the individual who wants to kill his neighbor out of jealousy or annoyance. To act that way towards one’s neighbor is to fail to respect that one’s neighbor is an end-in-himself. Killing one’s neighbor out of jealousy or annoyance uses\textsuperscript{51} him as a mere means to one’s goal of ending one’s jealousy or annoyance with one’s neighbor.

Deontologists who emphasize rights and the value of moral patients often will appeal to the language of the Formula of Humanity. The Formula of Universal Law, on the other hand, is more agent-centered in that it demands consistency within the moral agent’s will and focuses on

\textsuperscript{49} Kant (G 4:429). I will not discuss Kant’s third formulation of the categorical imperative, the Autonomy Formula, Kant (G 4:440), because it is not germane to my discussions later in this chapter. For the sake of this project, I will treat the variations on the categorical imperative as representative of the same constraint on the moral maxims grounded in reason. The precise relationship between the three formulations of the categorical imperative is debated among Kant scholars. See, e.g., Korsgaard (1986).

\textsuperscript{50} See Kamm (2007, 12); Alexander (2016).

\textsuperscript{51} The challenge for the patient-centered deontologist is to fix the concept of “using” so that it is not under- or over-inclusive and we get the right results in the right cases. See ibid; Moore (2016, 399–400).
the agent’s use of his agency on the external world, regardless of anything related to the value of moral patients (although that value is understood implicitly through reciprocity). This contrast in Kantian deontologies will be what distinguishes Regan’s animal rights view and Korsgaard’s animal rights view in Sections III.B. and III.C. Before moving on to the arguments for the moral considerability of animals, however, I must briefly examine contractarianism as a deontological moral theory and wrap up this section with a brief comment regarding aretaic moral theory and rights.

2. CONTRACTARIANISM

Contractarianism can be seen as early as Plato;\(^52\) however, its modern origins are usually attributed to Hobbes and start with the notion of the state of nature.\(^53\) The state of nature is best conceived of as a thought experiment\(^54\) where there are no laws or rules, legal or moral, governing individual action. It is, in essence, a world in which for every action that a human could do, he possesses a bilateral privilege with respect to that action and every other possible moral patient.\(^55\) Nobody has any claim-rights against anyone else. No actions are required or forbidden. Within the state of nature, all rational agents will deduce that it is in each of their own interests to take advantage of each other as much as possible, e.g. lying, stealing others’ resources, killing others if they do not keep a watchful eye. Agents will also deduce that they are each vulnerable to being taken advantage of by everyone else at any time. The state of nature produces a war of all against all where life is “nasty, brutish, and short.”\(^56\)

Rational reflection, however, reveals that it might be desirable and achievable for moral agents to exit the state of nature. Because the state of nature produces a situation where all

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\(^52\) Plato (Crito, 50c–54d; Republic, 358e–359b).
\(^53\) Hobbes (1839).
\(^54\) It is not best thought of as being an actual, or even potential, representation of how humans work in reality.
\(^55\) Thomson (1990, 49–50).
\(^56\) Hobbes (1839, 113).
rational beings have to be entirely focused on self-preservation and protection against the purely self-interested actions of other rational agents, many of one’s bilateral privileges in the state nature are not pragmatically exercisable. To achieve the availability of one’s exercise of discretion regarding, e.g., the creation of art, one must have certain safeguards in place for one’s physical person and one’s ownership of certain resources, i.e. private property. So, to exit the state of nature, individuals must convince others to accept boundaries on their purely self-interested actions. However, for each individual, there is no reason to bind yourself and restrict your freedom to pursue your pure self-interest against others, unless those others also bind themselves and restrict their freedoms to pursue their pure self-interest against you. The idea is that it is not in your self-interest to give up your bilateral privileges and take on duties to others if you do not receive claim-rights against others in return. So, the solution is to exchange reciprocal promises that give up the discretion that causes the lack of security over one’s person and property in return for promises for one’s security. In this way, reciprocity grounds the directedness of the duties that arise upon leaving the state of nature and adopting the social contract. Because the reciprocal promises create the directed duties, they also create the claim-rights within the social contract. The social contract just is the moral law, and these reciprocal promises and duties just are the moral maxims.

What I have described is a crude form of contractarianism, but it underlies the general principle of all contractarian moral theories: the moral law is just what we would rationally agree to. This crude version of contractarianism depends on assuming the contractors possess roughly equal physical power to threaten each other because it is the reciprocal threats, the equality of vulnerability, that is supposed to motivate self-interested rational agents to cede discretion.

57 These minimum safeguards certainly include Hart’s “perimeter of general obligations” discussed in Chapter Three.
Additionally, the contractors must all be rational in that they can reason for their self-interest. Only with reason can the contractors understand that in the state of nature, they live under reciprocal threat and that they can self-consciously choose to eliminate such threats through the exchange of reciprocal promises to not act in those ways.

Because of the power and rationality requirements in a crude contractarianism, no individual that lacks either power or rationality will be involved in the reciprocal promise-making. This is just to say that no individual that lacks power to threaten or rationality to oblige itself not to threaten will be a contractor of the social contract. For example, infants lack both the power and rationality requirements that it takes to be a contractor. They cannot physically threaten adult human beings and even if they could, they cannot stop so threatening adult human beings by making a promise to do so. Because infants are not contractors, they are not engaged in the reciprocal promise-making, and so they are not owed obligations by any of the contractors. Only those engaged in the reciprocal promise-making elicit obligations owed directly to them because those obligations are what they receive for having given up their discretion.

With so much emphasis on individual physical power to threaten others, crude contractarianism runs into the problem of “might makes right.” For example, even among rational agents, if I am holding the gun and you are not, I have no reason to cede any of my discretion to you. You clearly have every reason, i.e. pure survival, to cede all of your discretion to me. It is possible that I will not exercise my discretion to pull the trigger against you, but that is contingent upon my desires. I have no obligation to you not to. Scaling this idea to the level of society in general, if the majority has physical control over the minority, the majority has no reason to cede to the wishes of the minority. The minority has every reason to cede to the wishes
of the majority, namely their physical safety. It is possible that the majority would adopt rules that the minority could live under; however, whatever rules are so adopted are contingent and not owed to those in the minority themselves. With such emphasis on power, crude contractarianism fails to incorporate ideas of justice, as some kind of fair or equal treatment in spite of certain differences, such as physical power, gender, race, and socioeconomic status, into the social contract.

The most prominent solution to crude contractarianism was proposed by John Rawls in *A Theory of Justice*. Rawlsian contractarianism requires the contractors making the reciprocal promises to do so from the “original position” behind a “veil of ignorance,” where no individual knows his/her physical power, race, gender, or socioeconomic status in the proposed society. In this way, the original position strips the contractors of their morally arbitrary properties, such as race, gender, social, and economic status. Properties that are morally arbitrary are those which are considered undeserved (usually unearned in some sense). Race and gender are clearly matters of universal happenchance. Economic status is probably more likely a blend of luck and choice and action, but if we consider that where one is born in the socioeconomic ladder plays an important, if not quite a determinative role, in where one ends up in the socioeconomic ladder, it is not unfair to include such properties in the morally arbitrary category for the purposes of the original position. In the original position behind the veil of ignorance, the contractors are

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58 Rawls (1971). Rawls’ view is not a moral view, but a view about the “basic structure of society.” However, it has been fairly freely adopted as one of the more plausible versions of a contractarian moral theory.

59 See ibid, 16–17. Removing morally arbitrary properties from the contractors is supposed to result in rules that everyone, regardless of their actual situation, could agree to, i.e. a just set of rules. However, when we reflect on individual properties such as talent, inclination, ambition, strength, genes, it is clear that none of these properties is rightfully considered “deserved.” Ibid, 86–89; Nagel (1973, 226). And it is possible that because so many properties have to be removed from the contractors, there is no original position from which agreement could be had. Rawls addresses this concern by offering an Archimedean point from which we can reason based on the primary goods which Rawls claims is a weak normative assumption. Nagel, however, thoroughly disagrees and argues that the Archimedean point is actually a quite strong, and controversial, normative assumption. Nagel (1973, 227–28).
rationally compelled to construct the terms of the social contract so that it does not favor morally arbitrary classes of human beings based on their actual social situations (such as being in a high socioeconomic class or being part of the racial majority). In this way, the veil of ignorance is supposed to level morally arbitrary differences that result in power disparities that would negatively affect what the weaker individual/faction is owed in a crude contractarianism.

So, reconsidering the gun example from above, as a contractor, I could hold the gun or I could be in your position of not holding the gun when I am reasoning in the original position behind the veil of ignorance. Reasoning from an agnostic position about my power relation to you in this scenario, I conclude that it is in my interest that the gun holder (whether me or you) be under an obligation to the other not to shoot the gun at the other. Similarly, in the case of the majority versus the minority, when each individual is reasoning in the original position from behind the veil of ignorance, he does not know whether he will end up in the majority or in the minority in reality. So, each contractor should conclude that the majority should be obligated to the minority to act fairly (e.g. not prohibit the minority from practicing certain religious beliefs or not treat the minority worse because of the color of their skin).

Even though Rawlsian contractarianism appears to alleviate concerns regarding systematic injustice towards certain classes of people by dampening the disparities of power across differences through the veil of ignorance, it still contains the rationality requirement on an individual to be a contractor. Because it is the contractors who bargain the social contract’s maxims and only the contractors receive directed duties from the reciprocal nature of the maxims, those who lack rationality will be precluded from being the object of a directed duty. So, while contractarianism readily accommodates Hohfeldian claim-right and privilege relations,
it would seem that the question of whether animals (and marginal human cases) can be claim-right holders is off the table if rationality is necessary.

This conclusion has been a fairly standard conclusion (and critique) of contractarianism.\footnote{See, e.g., Regan (1983, Ch. 5); Carruthers (1992, Ch. 5); Rowlands (2009, 129–31).} In Section III.D., I will examine Rowlands’ more recent attempt to overcome this critique and establish the moral rights of animals on contractarian grounds. Before moving on to the arguments for animal rights, I must very briefly comment on the role of rights in virtue ethical views.

C. VIRTUE ETHICS

Despite ancient roots in Plato and Aristotle, virtue ethics received little attention in the Enlightenment debates among consequentialists and deontologists. It experienced a revival in the second half of the twentieth century through the work of Anscombe, MacIntyre, and Foot, to name a few.\footnote{See Anscombe (1958); MacIntyre (2007); Foot (1978); Foot (2001).} As opposed to the deontic moral theories just examined, virtue ethics does not focus solely on an agent’s choice and action, but on the agent developing his character, cultivating his virtue. Character is a holistic notion. It includes an agent’s emotions, desires, intentions, judgments, and actions. To possess a virtue is to say that one possesses a particular kind of good character trait, namely an appropriate set of dispositions (emotions, judgments, behaviors) around a particular event or situation. For example, a person who is charitable not only donates value (e.g. time, money) to those less fortunate than herself but also has the appropriate emotions and judgments around such giving. Her charity involves compassion and empathy for others. It involves having developed desires that are not wholly self-interested but reflect an emotional understanding that not all who are less fortunate are so simply because they deserve to be.
The command in a virtue ethics to the moral agent is to cultivate one’s virtue.\textsuperscript{62} Cultivation of one’s virtue is not a single action. It is closer to a commitment to a way of living appropriately (this is sometimes called flourishing) as a unified, rational animal. Additionally, there are many virtues to cultivate when cultivating one’s virtue (regardless of whether they are unified to create Virtue), such as honesty, courage, wisdom, charity, kindness, loyalty, etc. These are rich, holistic notions that are not properly ascribed to individual actions. Comparatively, the deontic views simply ascribe right or wrong to a particular action by a moral agent. In contrast, virtue ethics is intensely personal to the moral agent. The moral is not simply contained within reason itself; the emotions are not second class citizens. Virtue ethics recognizes humans as complex wholes who experience emotions, have desires, and can reason. These come together holistically to produce a way of being (i.e. feeling, desiring, intending, and acting) in a given situation. Because virtue ethics is not action-focused and contains no notion of duty, rights (as I have been conceiving of them throughout this project) have no role in a virtue ethics.\textsuperscript{63}

In sum, rights are only found in deontic moral theories. This is because deontic morality is action-focused. We learn from Hohfeld’s relations, that rights are fundamentally action-focused. Both the claim-right and privilege relation are indexed to particular actions, and the power and immunity relations only exist if there are claim-right or privilege relations over which the power and immunity relations can scope. So, a morality that makes actions of the moral

\textsuperscript{62} Whether this is a single command or several commands, e.g. one for each virtue, depends on whether one believes that the virtues unify into Virtue. For discussions on the unity of virtue, see, e.g., Penner (1973) and Cooper (1998).

\textsuperscript{63} This is not to say that aretaic moral theory cannot make sense of duties, oughts, or obligations. See Hurd (1998). Indeed, some duties may be better conceived of as aretaic oughts rather than deontic oughts. For example, in arguing against animal rights, Cohen claims that we might be obliged to put an animal out of its misery, even though the animal does not have a claim-right that someone put it out of its misery. Cohen (1986, 866). Compassionate euthanasia of animals is a good example of an ought that is not clearly a deontic (let alone directed) duty. It may be better conceived of as a kind of virtue theoretic ought (perhaps a quasi-supererogatory ought where we receive praise for euthanizing a suffering animal and blame for not euthanizing a suffering animal).
agent central is crucial for rights having a role in that morality. Within deontic morality, deontology better accommodates rights because claim-rights require directed duties. Consequentialism does not produce duties directed to individuals. Another way to say this is that consequentialism can define the φ of Hohfeld’s claim-right relation, but it cannot define the individual, A, to whom the duty bearer owes his action, φ. It will come as no surprise in the next section, therefore, that animal rights are grounded in deontological moral views.

III. MORAL ARGUMENTS FOR ANIMAL RIGHTS

Having shown in the previous section that rights are best conceived of in the deontic moral theories, it should come as no surprise that there have not been any virtue ethical arguments in favor of animal rights. This does not mean that there are no virtue ethical arguments in favor of the moral considerability of animals, only that such arguments will not be discussed further in this project. The focus of this section is to explore the contemporary moral arguments for animal rights. To understand how the question of the moral considerability of animals arrived at arguments for animal moral rights, it is necessary to begin with the consequentialist’s view on the moral considerability of animals before exploring several deontological arguments for animal rights.

A. ACT UTILITARIANISM AND ANIMALS: BENTHAM, SINGER, AND ANIMAL LIBERATION

Peter Singer is one of philosophy’s most well-known contemporary utilitarians, and his work on animal liberation has played a central role in the development of animal rights theory and the animal rights movement. In many respects, Singer’s view is simply a commitment to the egalitarian principle of act utilitarianism, i.e. equal consideration for equal interests, applied to our contemporary (mis)treatment of animals.

See, e.g., Hursthouse (2011). A virtue ethical account of man’s treatment of animals will express the moral considerability of animals in terms of human virtues and vices rather than in terms of animal rights/human actions and duties.
Singer’s view has its roots in Bentham’s observation:

The day may come when the rest of the animal creation may acquire those rights which never could have been with-held from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may one day come to be recognized that the number of legs, the villosity of the skin, or the termination of the os sacrum are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day or a week or even a month old. But suppose they were otherwise, what would it avail? The question is not, Can they reason? nor Can they talk? but, Can they suffer?65

At first glance, one can read Bentham as simply saying that the relevant property for moral considerability66 has been misidentified. That property is not rationality; it is not the ability to use language. The relevant property for moral considerability is whether one possesses the capacity to suffer.

However, Singer interprets Bentham to be making a more serious objection than the claim that we have simply misidentified the relevant property for moral considerability. Because the egalitarian principle of utilitarianism requires the equal consideration of equal interests, Singer interprets Bentham as making the claim that the capacity to suffer is a necessary and sufficient condition for possessing an interest at all. It is “a condition that must be satisfied before we can speak of interests in a meaningful way.”67 In other words, the capacity to suffer is the condition for the possibility of interests generally, whatever those interests may be, and once an entity is considered to have interests, the egalitarian principle of equal consideration for equal

65 Bentham (1948, 311 n).
66 While Bentham and Singer both use the language of rights, animal liberation is not a deontological view, but a utilitarian view. See Singer (2002, 8) (“The language of rights is a convenient political shorthand.”).
67 Ibid, 7.
interests means that the entity is morally considerable. Singer’s interpretation of Bentham, then, goes as follows: it is not that we have selected the incorrect interest as the relevant property for moral considerability; it is that having the capacity to suffer is necessary and sufficient for having interests, and having interests is necessary and sufficient for being morally considerable under a utilitarian moral theory because of the egalitarian principle.

In Singer’s view, what separates animals from the rest of life, as well as from non-living and non-sentient entities such as rocks, is the capacity to suffer. Possessing the capacity to suffer means that an entity will have a welfare, a well-being that can be satisfied or not satisfied. An entity’s welfare will be multifaceted depending on the variety and complexity of interests that the entity possesses. Humans have interests in not being tortured, freedom from physical restraint, and autonomous self-determination. Animals have interests in not being tortured and freedom from physical restraint, but not in autonomous self-determination because most (if not all) animals do not choose their ends, but are given their ends by their natures. So, human and animal welfare look different; they are not actually equal because humans and animals do not actually have the exact same interests, but they have some equal interests, namely the interests in not being tortured and freedom from physical restraint, that ought to be given equal moral consideration when moral agents decide how to act.

A thorough articulation of what this moral considerability demands of the moral agent might require that interests be more finely specified than I have just articulated. This concern arises from an issue surrounding just how we understand “equal” in the egalitarian principle of equal consideration for equal interests. For example, I can say that humans and animals have an interest in not being tortured. I might thereby appear to articulate an identity of interests from

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68 Ibid, 8.
69 See Korsgaard (2018, 42–44) describing autonomy as legislating laws for one’s own conduct through which the objects of those laws is judged as good.
which we might conclude that an identical consideration of those identical interests is warranted pursuant to the egalitarian principle. However, humans and animals have more than physical interests in not being tortured. They also have psychological interests in not being tortured that are considerably varied among humans and among animals. For example, some animals have short memories and live very much in the present. When their situations improve, they do not indicate any long term psychological harm from having been treated poorly in the past. Other animals (e.g. orcas, dolphins, elephants) have long memories and demonstrate long-term changed behaviors from torturous living situations. Because of the complexity of human socialization, some humans may suffer irreparable mental harm from being tortured. Humans also likely suffer from being able to anticipate the torture. While human and animal psychological interests in not being tortured vary greatly, even among animals psychological interests in not being tortured vary.

What this means is that the egalitarian principle cannot interpret “equal” as “identical” in determining whether interests are equal. To do so would leave the view vulnerable to emphasizing minor differences between humans and animals, framing them as interests, and justifying different treatment on those grounds, i.e. creating a fine-grained hierarchy of interests. For example, the interest in not being tortured would be broken up into (at least) the physical interests against torture and the psychological interests against torture. Since humans (and some higher animals) have significant psychological interests in not being tortured, they would receive more consideration against being tortured than lower animals who do not have significant psychological interests in not being tortured. The human consideration for the interest in not being tortured would be both the consideration of physical interests and psychological interests, whereas many animal considerations for the interest in not being tortured would be limited to
only physical interests. This opens up the very real possibility that humans get more consideration in whether they can be tortured than animals.  

This kind of hierarchy is certainly desirable to account for some differences in moral consideration. For example, it accounts for why only humans have the right to vote and animals do not. Humans have an interest in democratic participation in their societies, whereas animals do not. So, it is appropriate that our moral considerations are concerned with humans being able to vote, but not with animals being able to vote. For Singer, it also justifies experimenting on animals rather than normal adult humans, if such experiments must be done. The richness of normal human mental life makes kidnapping normal adult humans, caging them, and subjecting them to experimentation far worse than treating animals in the same way. While such a hierarchy of interests seems plausible, it becomes problematic when interests become too fine-grained, i.e. the more “equal” approaches “identical” in “equal interests.” If the interests are too fine-grained, then the egalitarian principle disappears and the hierarchy of interests determines what moral consideration is due.

Singer’s view is strongest in providing moral consideration for animals if it places great weight on the physical interests of sensate beings and does not finely specify these physical interests. For example, humans and animals have very similar physical interests in not being locked in a cage (a form of torture). As long as we do not further specify this interest (e.g. humans because they have an interest in painting or creating music, birds because they have an interest in flying) to create differences that could be exploited to place the human-specified interest higher than the animal-specified interest, the egalitarian principle requires equal consideration of the human and the animal with respect to locking them in a cage. As long as we

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70 Indeed, this is a feature of Singer’s view. Singer (2011, 51–53).
give great weight to not locking humans in cages, the egalitarian principle demands that we give animals that same consideration against locking them in cages. In understanding “equal” this way, Singer’s view is strongest in producing meaningful moral considerations for animals.

On the other hand, Singer’s view would be weakest in providing moral consideration for animals if it places great weight on the psychological interests of sensate beings and finely specifies physical interests. As I argued earlier, the fine-grained specification of interests turns the egalitarian principle into a hierarchy of interests, and so fine-grained physical interests simply will become a straight hierarchy of physical interests (e.g. painting and creating music are more important interests than flying). Furthermore, if the physical interest in not being locked in a cage has much less weight than the psychological interest in not being locked in a cage (e.g. humans have a psychological interest in socialization and self-determination), the egalitarian principle would provide weaker moral consideration to animals being locked in a cage than it would to humans being locked in a cage. This does not mean animals would receive no moral consideration, as humans still have physical interests in not being locked in a cage. But it does mean that humans would receive (significantly) more consideration than animals (perhaps just the right amount of consideration to justify our current practices).

Singer’s solution is to equate the mental lives of animals and marginal human cases and to adopt a coarse-grained approach to physical suffering. So, when physical suffering is equal, what determines whether we can treat animals a certain way is just whether we can treat marginal human cases in that same way. If we would not, e.g., test dermatological substances on the eyes of marginal human cases, we should not test dermatological substances on the eyes of animals. Generally, we need not be concerned with the question of whether humans feel more physical suffering than animals because what matters is that the animals’ interests in not being
treated in these pain-inducing ways are much, much greater than the human interests that are satisfied by such treatment of the animals. We do not need to decide whether a human suffers more than an animal in, e.g., being confined to a tiny, filthy cage for its entire life before being slaughtered in inhumane ways for food for others. All that matters is that the amount of suffering humans would experience in being denied their preferred food to eat is nowhere near the amount of suffering inflicted on animals to produce that meat in our industrial agriculture settings. This means killing animals for food, as such, is not the problem, but it is our agricultural practices around raising and killing animals for food that is the problem. Life and living processes as such play no role in being morally considerable.

The issue of life as such poses two distinct challenges to Singer’s view. First, if being a living creature only matters to the extent that the creature has the capacity to suffer, then the line of moral considerability is at the perimeter of sentient creatures. This means that plants are not morally considerable. Insects, fungi, and other forms of life would not be morally considerable. Vegetative, brain-dead human beings would not be morally considerable. Indeed, comatose humans would not be morally considerable unless being in the coma was considered transient, i.e. the capacity to suffer still exists in the individual even if it is not operable at the moment.72

A defender of Singer’s view may argue that these examples show that the view is an excellent account of the moral considerably of animals and that these are desirable features in an animal “rights” view. Perhaps we have long been mistaken to accord vegetative and brain-dead humans moral status and that preferring members of our species is just the result of some evolutionary advantage that is wired in us. To such a defender I would remind him that to be deserving of no moral considerability under Singer’s view is also to be subject to being abused, tortured, and

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72 Humans that are not and have never been conscious have no interests and therefore no moral considerability. Ibid, 48.
used as a mere resource by moral agents. This means that vegetative and brain-dead human beings could be subjects of abuse, torture, experimentation, etc. to satisfy the interests of others. In whatever way the view would attempt to proscribe such abuse, it would have to do so indirectly, i.e. on the grounds that such actions harm the interests of others who have an intact capacity to suffer, not because the actions harm the interests of the vegetative or brain-dead individual. Ultimately, not many are willing and ready to concede that rapists and murderers are morally allowed to take out their desires to rape and kill the Terry Schiavos of the world. Not many are willing to allow scientists to run experiments on such individuals either.

Second, the bigger concern with this view is articulating why the capacity to suffer entitles the individual to the moral consideration not to be killed. When all interests are grounded in a capacity to suffer, it is unclear how life as such is an interest worthy of moral consideration. Another way to frame this concern is grounding moral consideration on the capacity to suffer does not tell us when and why it is wrong to kill painlessly. Interests grounded in suffering, when left unsatisfied, result in some kind of suffering (whether physical or psychological, whether significant or minor). However, because life is a necessary condition for possessing the capacity to suffer (as far as we know), it is not the case that ending an entity’s life painlessly (and unknowingly for those entities that can anticipate future actions) causes suffering. When a sentient creature is killed, there is no longer any life to experience any suffering. So, in Singer’s view, where the goal is to avoid and minimize suffering, killing painlessly becomes a morally irrelevant action to the sentient creature who is killed because it does not create suffering in that creature. (Indeed, one could argue that it prevents suffering in

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73 Lest the reader forget, regardless of whether such actions create poor dispositions or undesirable propensities in the rapist or murderer, the act utilitarian does not have such tools for marking such actions “immoral.” In fact, the act utilitarian would ultimately come down on these acts as being morally required, as the rapist and murderer having their desires satisfied at no cost of suffering to the vegetative or brain-dead human would increase the total amount of Good.
that creature and therefore ought to be done on the basis of minimizing suffering!) The action might create suffering in others who were attached to the sentient creature who is killed, but that does not make the action morally relevant to the one to be killed. Perversely, it means that the one to be killed has no moral considerability against being killed, while those who care about the one to be killed do have moral considerability regarding the one being killed.

The utilitarian could appeal to the aggregation principle to push back against the concern of painless killings. Such a response shifts from focusing on minimizing suffering to maximizing the Good. Even if a killing does not produce any suffering, it prevents more net positive utility from being achieved in the world and therefore, reduces the total amount of the Good that could be realized. This is so because an interest bearer, whose interests could have been satisfied and thereby more positive utility created, no longer exists to have its interests satisfied if it is killed. So, because the Good is not maximized by an act of painless killing of a sentient creature, the act is prohibited.

Appealing to the aggregation principle, however, makes the view vulnerable to the repugnant conclusion.\textsuperscript{74} The repugnant conclusion is derived as follows. To take the aggregation principle seriously, it is morally required to increase the population of interest-bearing individuals to some absurd number as long as each additional individual will have a life worth living. In this way, the Good is maximized. This is so even if such an increase in population serves to significantly decrease the quality of life of all currently living and future individuals from a very high quality of life to a life just barely worth living. The reasoning behind the repugnant conclusion is that even though individual quality of life may decrease drastically during such an increase in population numbers, the total amount of the Good will still increase as long as each added individual has a life worth living. So, to solve the problem of

\textsuperscript{74} Parfit (1984, Ch. 17).
painless killing by appeal to the aggregation principle is to open up the view to the problem of the repugnant conclusion.\footnote{Singer’s solution to this concern is to appeal to the self-conscious animal’s desire/preference to keep living, concluding that it is worse to kill a being who has a desire/preference to keep living than to kill a being with no such desire/preference. Singer (1979, 151–52). For a response to Singer on this point, see Lockwood (1979).}

In sum, the aggregation principle will pose difficulties for all utilitarian moral theories, whether they are specifically concerned with the moral considerability of animals or not. What is most important regarding Singer’s utilitarian view and the moral considerability of animals is the strong egalitarianism that it proposes.\footnote{This has been argued to be a weakness of utilitarianism because such strong egalitarianism results in a strongly agent-neutral morality that can be alienating to moral agents who are each their own unique individual, experiencing their own unique lives. See Williams (1973).} The view proposes a kind of moral equality across species that has often been underemphasized by utilitarian moral theories and outright rejected by many deontological moral theories. Singer observed that the expansion of moral considerability through the egalitarian principle had been used to successfully expand our spheres of moral considerability along human racial and gender lines. In many respects, Singer is simply asking that we follow the natural inference from those cases and accept that the egalitarian principle also expands our sphere of moral considerability along species lines. To accept Singer’s view would drastically alter human behavior towards animals and prohibit much of the horrible treatment of animals that currently goes on in our current agricultural and scientific practices. But, does the view get to the right results for the right reasons? Animal rights theorists will certainly deny the latter, and the former is contingent on natural facts about the world. Perhaps some humans really do experience more pleasure eating, e.g., bacon than the pig suffers in being reared in a concentrated animal feed operation. Perhaps humans really are utility monsters: the satisfaction we get from dominating and subjecting the rest of the animal kingdom to our desires cannot be matched by any suffering they can experience. With this in
B. REGAN’S PATIENT-CENTERED DEONTOLOGICAL ARGUMENT FOR ANIMAL RIGHTS

Regan, writing at the same time that Singer was arguing for animal liberation on utilitarian grounds, articulated his highly influential argument that animals are bearers of rights and that they deserve a minimum of moral respect: not to be used as a mere means to an end by humans. Regan’s argument for animal rights puts almost as much work into rejecting alternative theories of moral considerability for animals as it does into defending an affirmative view. Because the reasons Regan rejects the alternative views motivate his affirmative animal rights view, I will briefly discuss the alternative views that Regan rejects before turning to his affirmative view.

First of the rejected contenders are the indirect duty views which deny that moral agents have any duties directed to animals. However, this is not to say that animals necessarily have no moral status. Indirect duty views allow for the possibility that moral agents have duties regarding animals. While we can do no wrong to an animal, we can still perform wrong acts involving animals. Suppose I shoot my neighbor’s cat. An indirect duty view of the moral considerability of animals will consider this a wrong act not because I have wronged my neighbor’s cat by shooting it. Rather the wrongness of the act is in virtue of my damaging the property of my neighbor. Thus, I have wronged my neighbor because I have violated his claim-right against me (and I have failed in my duty owed to him) not to damage his property.

An earlier writer to argue in favor of an animal rights view (as opposed to an animal welfare view as captured by utilitarianism) was a late-nineteenth-century writer by the name of Henry Salt. Salt (1894); Nash (1989, 27–32).

Indirect duty views can contain directed duties, but any directed duties would not be directed to animals but to other humans.

While my focus in this chapter is on the moral rights of animals, it is certainly true that the law treats animals (by and large) as the property of their owners. For a compelling argument that this property status of animals is inconsistent with taking animal welfare seriously, see Francione (2004).
Historically, such a cruel view could have been defended on the assertion that either (1) animals feel no pain or (2) that only human pain is morally relevant.\textsuperscript{80} A more sophisticated defense of an indirect duty view would be something like Rawls’ contractarianism. For Regan, the primary problem with a Rawlsian contractarianism is that it is an inadequate theory of the moral considerability of humans because it only allows of duties directed to those humans who meet the rationality condition. Only those humans with sufficient capacities to participate in the legislation of the social contract are objects of the directed duties of other moral agents. Any human being that lacks sufficient capacities to participate in the legislation of the social contract is wholly dependent on the contractors’ decision to provide them any moral status. So, those who cannot participate in the legislation of the social contract only ever have contingent moral considerability. If they are granted moral considerability in the social contract, it is only by the mercy of the legislators of the social contract. Whatever moral considerability may be granted, it is not driven by equality between the legislating and non-legislating individuals, but rather through compassion, empathy, love, or even blatant self-interest (e.g. to appear compassionate, empathetic, or loving). Should these motivations fail (and they often do when in conflict with an individual’s self-interest), so too then does the moral considerability for non-legislating individuals. So, an indirect duty view will not suffice.

Turning attention to direct duties views, for the sake of brevity, I will limit my discussion to utilitarianism.\textsuperscript{81} Regan’s main critique of utilitarianism is focused on the view’s locus of

\textsuperscript{80}Regan (2001, 41).

\textsuperscript{81}Regan suggests “cruelty-kindness” as a third contender in the direct duty views. Cruelty-kindness simply means that an act is right that is kind, and an act is wrong that is cruel. As an initial matter, cruelty-kindness does not seem to be a deontic view, but rather a virtue ethical view. So, it is not clear to what extent Regan expects rights and duties to emerge from the view. Indeed, Regan acknowledges that some versions of a cruelty-kindness view are not direct duty views at all. Regan (2003, 51–52). Considering cruelty-kindness as a virtue ethical view, it should come as no surprise that the view is focused on assessing the character of the actor rather than the morality of his actions. Ibid. 52. Furthermore, Regan’s primary objection to the cruelty-kindness view misunderstands how virtue ethics works as a holistic view. Regan’s complaint with cruelty-kindness is that one can be kind while doing the wrong
value. For the utilitarian, all that is morally relevant, and therefore possess moral value, is an individual’s interests/preferences-desires, not the individual himself. The individual merely acts as a receptacle for the satisfaction/frustration of his/her interests/preferences-desires. And so, the utilitarian view fails to place any value on individuals as such. This is where the problem of painless killings comes from.\textsuperscript{82} It also generates an unpalatable disregard for each individual’s unique experience of living his/her life. When all that matters is the avoidance of interest frustration and the promotion of interest satisfaction, it does not matter who is experiencing the frustration or satisfaction of the interest. However, interest frustration and satisfaction are also phenomenological experiences indexed to a particular subject. It matters to that subject whether her interests are frustrated or satisfied. For example, suppose I put food out for two stray cats that have been hanging out in my backyard. One day, I notice that two different stray cats are eating the food and the two original stray cats are nowhere to be found. It matters to the first pair of stray cats that they are not getting fed by me anymore in that they have to find another source of food, and it matters to the two new stray cats that they have found a free lunch and do not need to scavenge anymore. To the utilitarian, it only matters that my actions satisfy the same two interests: the hunger of two stray cats. It does not matter upon whom the frustrations or satisfactions of interests are laid or experienced.

From this, Regan derives his rights-based view of the moral considerability of animals in four steps. The first step is to reject all indirect duty views and maintain that humans have directed duties to “at least some animals.”\textsuperscript{83} Recall from Chapter Two that directed duties are

\textsuperscript{82} Section III.A.

\textsuperscript{83} Originally, Regan concluded that “at least some animals” included only fully mature mammals. Over time, this has been extended to include some birds. Regan (2003, 38).
correlative with claim-rights, so it would seem to follow that any direct duty view would have to be a rights view, understood as Hohfeldian relations. However, this observation may cause a pause and question as to why Regan treats utilitarianism as a direct duty view. I think the Hohfeldian framework just shows that Regan misclassified utilitarianism as a direct duty view. Utilitarianism is properly categorized as a deontic view (i.e. an action-based view), but it does not generate directed duties to entities. Utilitarianism generates duties to act, but these are not duties to anything in particular. Directed duties are directed to something or someone in particular. Direct duty views, as seen through the lens of Hohfeldian analysis, should always be rights-based views. A defender of Regan’s classification scheme might argue that the utilitarian egalitarian principle expresses a duty owed to animals to take their interests into consideration and treat them equally to similar interests.\(^8^4\) However, the egalitarian principle does not express a duty owed to individuals themselves whose interests are to be considered equally with other equal interests. It expresses a duty to give equal consideration to equal interests, but this duty is not owed to anyone in particular. It is simply a duty to abide by the egalitarian principle, i.e. when performing the utilitarian calculus, the moral agent is obligated to give equal consideration to equal interests.\(^8^5\)

The second step is to reject utilitarianism’s locus of value which places value only on an individual’s interests. We must take individuals as whole selves (human and animal alike) as the locus of value. Our duties are directed to those individuals because they possess inherent value. Inherent value contrasts with the utilitarian treatment of individuals as nothing more than aggregates of interests. In a sense, to possess inherent value is to be greater than the sum of

\(^8^4\) See ibid, 57.

\(^8^5\) This means that Regan’s categories of “direct” and “indirect” duty views are slightly misleading. Contractarianism is actually a direct duty view when scoping over full adult humans, but an indirect duty view when scoping over animals and marginal human cases. Utilitarianism is really an indirect duty view even though it scopes equally over humans and animals.
one’s interests, to deserve more respect than just the consideration of one’s interests. Regan appeals to Kant’s notion of being an “end-in-itself” to explain the notion of inherent value, but such an appeal brings into question how (or if) inherent value is different from what is standardly called “intrinsic value.”

Intrinsic value is best understood by being contrasted with instrumental value. When something is instrumentally valuable, it is good for some further end. For example, a spoon is instrumentally valuable when one is served soup for lunch because a spoon is good for moving liquid from a bowl to one’s mouth. If there were never a goal to move liquid to one’s mouth, it is hard to see the value in a spoon. The value of spoons as such is instrumental; that value depends on there being some further end that the spoon helps fulfill. In contrast, to be intrinsically valuable is to be valuable in and of oneself, without reference to or need of a further end that the individual helps accomplish. The quintessential example of entities that are considered intrinsically valuable are humans. Each and every human is valuable independent of and regardless of his/her use to any other’s end. On this conception of intrinsic value, I think that Regan’s inherent value is slightly narrower than the notion of intrinsic value, although the two terms are sometimes used synonymously. Inherent value has an additional component beyond non-instrumentality, and that is the rejection of the utilitarian’s locus of value in interests, rather than in whole individuals. Inherent value as mere non-instrumentality can accommodate the utilitarian’s locus of value in interests only. The utilitarian can posit and defend the view that the only thing that is intrinsically valuable is the satisfaction of interests (i.e. the Good). So, inherent value must be an enhanced kind of intrinsic value. It is a non-

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86 See, e.g., Frankena (1979, 17–18); Rolston (2005, 69–77) (discussing the relationship between human virtue and intrinsic value in nature); Callicott (1989, 151–52). The concept of intrinsic value is orthogonal to the metaethical debate between realist and anti-realist theories of value.


instrumental value that is supposed to contrast starkly against the utilitarian value of interests alone and emphasize the value of individuals as wholes.

The third step is to recognize that those who possess inherent value must possess it equally. If utilitarianism gets one thing right, it is its emphasis on equality. However, unlike the egalitarian principle that must define the scope of what it means for interests to count as “equal,” the equality among individuals who possess inherent value is quite dichotomous. An entity either possesses inherent value, or it does not. If it possesses inherent value, that means the same thing for all such entities, i.e. they “have an equal right to be treated with respect, to be treated in ways that do not reduce [them] to the status of things, as if they exist as resources for others.”89 These steps one through three establish Regan’s rights view, generally. The final step establishes the extension of rights to animals.

The fourth, and final, step must suggest and defend a criterion for determining which individuals possess inherent value and which do not. Regan suggests the criterion ‘being the experiencing “subject-of-a-life”’ as determining that an individual possesses inherent value, and he defends that criterion by appealing to marginal human cases.90 The argument starts with the premise that animals lack many of the mental capacities of fully and normally developed adult humans such as the capacity to read, do higher mathematics, or build a bookcase. Instead of focusing on such dissimilarity, we should emphasize that there are many humans, such as infants, children, and the mentally infirm who similarly lack such capacities. For those humans, we do not typically take such deficiencies to mean that they do not possess (or possess less)

89 Regan (2001, 44).
90 Regan (2001, 44); see Frey (1980, Ch. III) for a general characterization of the argument from marginal human cases.
inherent value. What is this similarity that is doing the work for marginal human cases in establishing their inherent value? That they are experiencing subjects-of-a-life.\footnote{Regan (1983, Ch. 7.5).}

Being the subject-of-a-life will involve possessing a minimum mental life that may include things like beliefs, desires, perception, memory, an emotional life, feelings of pleasure and pain, preferences, and the ability to act on one’s desires and goals.\footnote{Ibid, 243.} As Regan puts it, subjects-of-a-life have a biography, not merely a biology; they are a somebody, not just a something.\footnote{Regan (2003, 80–82).} Each subject-of-a-life possesses an experiential welfare regardless of its usefulness to others.\footnote{Ibid, 81–82.} It is this criterion that picks out individuals who possess inherent value, and it is this inherent value which requires such individuals to never be treated as a mere means (in Kantian terms) by moral agents. The subject-of-a-life is, therefore, akin to the Kantian “person” in that it performs a similar conceptual bridging between natural facts about individuals and their inherent value. However, instead of limiting the scope of moral considerability to the Kantian person, the subject-of-a-life criterion expands moral considerability beyond the scope of the Kantian person to include marginal human cases, and therefore, according to Regan, animals.\footnote{Ibid, 82.}

Given the critique of the utilitarian’s locus of value in interests, not individuals, and the bridging that being a subject-of-a-life does between individuals and their inherent value, being a subject-of-a-life must capture something fundamentally phenomenological, but not wholly phenomenological. There is something important about being the particular one to experience a particular life through a variety of mental states, and that importance is not reducible to just the mental states. If it was just the mental states that mattered morally, then there would be no moral difference between living in the real world and really experiencing a life, and living in Nozick’s
experience machine. I do not interpret Regan’s view as solving the problem of man’s treatment of animals by hooking animal brains into a simulation where they get to experience their lives without actually living their lives. Accepting this irreducibility of the subject-of-a-life to mental states, we are left to wonder to what extent the view might be committed to some kind of metaphysical dualism.

Another related concern is a conceptual question regarding the analyzability of the concept subject-of-a-life. Regan provides examples of mental capacities that are relevant to determining whether an individual is a subject-of-a-life, but we are left to guess whether any of them are necessary and which one(s) might be sufficient for concluding that an individual is a subject-of-a-life. The question of which capacities are necessary creates a bit of a dilemma in the context of the “higher” capacities such as beliefs and the ability to act on one’s goals. If any “higher” capacities are necessary, then Regan’s goal of extending moral considerability will fail because most (if not all) animals will lack those capacities, and therefore fail to be subjects-of-a-life. But if those “higher” capacities are not necessary, then we are left with the question of why they are relevant to the subject-of-a-life inquiry at all. An additional problem is the issue of what set (or a variety of sets) of mental capacities are sufficient to establish that an individual is a subject-of-a-life. If any of the suggested capacities are not included in the set of capacities that are jointly sufficient to be considered a subject-of-a-life, then those capacities should not be relevant to the inquiry at all. The problem of the analyzability of the subject-of-a-life is not surprising because Regan views the concept as filling a lexical gap between the concepts of human, animal, and person. He is trying to expand the concept of person to include all humans but not (necessarily) all animals. Given that there is much debate and division over the

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97 Regan (2003, 93).
necessary and sufficient conditions of what it is to be a person,\textsuperscript{98} it should come as no surprise that a concept aiming to expand on the concept of a person (without being synonymous with human or animal) will run into similar challenges.

Furthermore, for Regan, the concept of subject-of-a-life is determinative of the precise boundary of all those individuals that possess moral rights.\textsuperscript{99} However, Regan’s goal was never to determine the precise boundary of moral rights holders.\textsuperscript{100} His goal was to expand the boundary of moral rights holders beyond the boundary of persons, so we might be tempted to forgive the lack of precision in the analysis of the concept of subject-of-a-life. Indeed, to really press against Regan’s argument then is not to put pressure on the view for an answer as to where the boundary ends (i.e. the precise definition of subject-of-a-life), but to put pressure on moving the boundary of moral considerability beyond of the concept of person at all. The clear place where this move occurs is in the argument from marginal human cases. Regan’s view lives and dies by the success of the argument from marginal human cases. To the extent there are good

\textsuperscript{98} See, e.g., Warren (1997, Ch. 4).
\textsuperscript{99} One might wonder whether the possession of inherent value is truly dichotomous. Perhaps moral patients possess less inherent value than moral agents. This is an option that Regan explicitly considers and rejects. Regan (1983, 240). Such a view confuses the inherent value of individuals with (1) the comparative value of their experiences, (2) their possession of favored virtues, (3) their utility relative to others, and/or (4) their being the object of another’s interest. Ibid. It would also be vulnerable to being committed to a double standard where the reduction of inherent value for moral patients because of the deficits contained in (1)-(4) is not applied to reduce the inherent value of moral agents for the same deficits. Ibid. Warren argues that there is a “favored virtue” on which to ground “strong” human rights and “weak”(-er) animal rights, namely that humans are capable of acting from reasons. Warren (2001, 48). Because rationality makes humans more dangerous and unpredictable than animals, morality is a necessary tool to structure human interaction and to avoid endless, “chronic and bitter conflict.” Ibid. Rationality provides humans with “greater possibilities for cooperation and the nonviolent resolution of problems.” Ibid. Furthermore, Warren advocates scalarizing the strength of weak animal rights along the continuum of mental sophistication. Warren (1986, 166–67). So, it is worse to kill a cow than to kill a fish than to kill a spider, though the killing of all sentient creatures should not be done unless there is good reason to do so. Ibid. The concern over whether rights are possessed dichotomously or along a continuum of more and less important rights is a concern that is more properly restricted to a discussion of the conflicts of rights and the force of rights. It is clear that the anticipation of conflicts of rights between Regan’s animal rights and human rights motivates Warren’s weak animal rights view. See ibid, 167–68. Just to conclude that mammals have rights equal to humans immediately implicates some impact on (e.g. a curtailing or complete elimination of) human rights. Because this project will only just briefly touch on the conflict and force of rights concern, I do not take a stance here on how we should resolve the challenge of scalarizing rights to accommodate animals.

\textsuperscript{100} Regan (2001, 44–45); Regan (1983, 319).
arguments for denying that the marginal human cases possess inherent value, Regan’s argument for animal rights is grounded before it even takes off.101

The biggest weakness in Regan’s argument, therefore, is in deriving the implication: if X is a subject-of-a-life, then X is inherently valuable. The whole view relies on inherent value arising from, being grounded in, or supervening on some natural property possessed by individuals. Because of this, although Regan relies on Kant’s Formula of Humanity repeatedly in articulating his view, his animal rights view is not particularly true to Kant in how the scope of the Formula of Humanity is derived.102 Furthermore, this reliance on a natural property to establish the moral considerability of individuals makes Regan’s view a patient-centered deontology, where it is the nature of the rights holder that explains the deontological obligation. If the deontological obligation depends on a natural property, then there is no obvious reason why we should not sacrifice one individual for the sake of many other individuals with that same natural property. In other words, it is unclear, based on the nature of the deontology that Regan adopts, why his view would prohibit practices like culling the herd.103 If all members of, e.g., the deer herd have inherent value because they are subjects-of-a-life, it is not clear why we cannot cull a few individuals so that the remaining members of the herd thrive.

In response, a defender of Regan’s view would point to the fact that having inherent value means that one cannot be used as a mere means to promote the good of others. But given that inherent value is wholly based on the natural property possessed by each individual deer, why would we not want to promote more of that natural property (it is after all important enough

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101 See, e.g., Moore (1984, 62–66) defending the claim that only persons are part of the legal and moral community.
102 Perhaps Regan’s view is better conceived of as a natural rights view. See Rowlands (2009, 58).
103 Regan dubs practices like culling the herd a form of “environmental fascism.” Regan (1983, 362). Even when hunting is justified on the grounds that the prey species lacks natural predators and many individuals of the species will starve due to insufficient resources to maintain the species’ numbers, Regan’s view does not permit humans to hunt those animals. Regan (1983, 354–56).
to ground inherent value) by sacrificing just a few for the sake of the many? It is difficult to prevent the view from collapsing into some kind of utilitarianism. The problem is that there is no bridge between the thing of value and the agent’s reasons for according it value other than an implicit appeal to consistency in how the agent treats humans of similar natural properties to animals. But the derivation from that value for marginal human cases and animals to the obligation is left open by Regan. A traditional Kantian approach would have to rederive the Formula of Humanity to expand the scope of the imperative beyond “humanity.” What grounds Kant’s reasons for drawing the scope of morality at humanity does not establish reasons for Kant to conclude that marginal human cases have moral status. In fact, in traditional interpretations of Kant, marginal human cases do not have moral status. This problem may be solved by taking an agent-centered approach, which I will argue in the next section is how best to understand Korsgaard’s argument for animal rights.

C. KORSGAARD’S AGENT-CENTERED DEONTOLOGICAL ARGUMENT FOR ANIMAL RIGHTS

As a preliminary matter, Korsgaard’s argument regarding the moral status of animals is a continuation of her overall moral philosophy which has its roots in Kant and is well-known for being a metaethically constructivist interpretation of Kant’s moral theory. I do not aim to evaluate the constructivist components of the view here. The goal of this section is to explore Korsgaard’s argument for animal rights that grounds the moral considerability of animals on the commands of reason alone rather than on the recognition of the inherent value of natural properties, like we saw in Regan’s argument. In this way, Korsgaard’s approach is more traditionally Kantian than Regan’s. Additionally, Korsgaard rejects the appeal to marginal human cases, maintaining that marginal human beings are rational and therefore categorically
distinct from animals.\textsuperscript{104} So, in more traditional Kantian fashion, there is in fact a natural property that categorically separates humans from animals under Korsgaard’s view.

However, where Korsgaard first departs from more traditional Kantian interpretation is in denying that the possession of rationality is a necessary and sufficient property for being owed moral obligations. Rationality does not track some inherently valuable property in the world that demands moral respect. Rather, for Korsgaard, what matters is whether or not an individual possesses the “capacity to oblige.” Arguably, this is just to say that the relevant natural property for possessing moral considerability is possessing the capacity to oblige, and so the view is simply substituting one natural property for another natural property to ground moral considerability. For example, one could argue that animals do not have moral considerability, not because they lack rationality, but because they do not participate in the collective and universal legislative willing that creates morality, and therefore they lack the capacity to oblige.

To avoid this, Korsgaard equates the capacity to oblige, not with rationality and active participation in the legislative willing, but with “being an end-in-oneself.”\textsuperscript{105} Korsgaard distinguishes between two senses of “end-in-oneself.”\textsuperscript{106} In the first sense, an end-in-oneself is “the source of legitimate normative claims.” In the second sense, an end-in-oneself is “someone who can give the force of law to his claims, by participation in moral legislation,” i.e. through the exercise of his legislative will. Animals are not ends-in-themselves in the latter sense because lacking rationality, they do not participate in moral legislation. However, this does not

\textsuperscript{104} Korsgaard (2018, 79–93).

\textsuperscript{105} I think it is fair to interpret “capacity to oblige” as equivalent with end-in-oneself here. In fact, what Korsgaard’s two types of being an end-in-oneself show are the two ways in which an individual can obligate an agent.

\textsuperscript{106} Korsgaard (2018, 125); Korsgaard (2004, 21).
preclude the possibility that animals can be ends-in-themselves in the former sense, in that they are the sources of obligation.\textsuperscript{107}

So, the crux of Korsgaard’s argument depends on what it is for something to be an end-in-oneself as a source of obligation, without participating in moral legislation. To answer this, Korsgaard relies on her constructivist theory of value. In valuing ourselves as ends-in-ourselves,\textsuperscript{108} we do not merely confer value on being a chooser (i.e. possessing rational autonomy), but we also confer value on the content of those choices.\textsuperscript{109} It is not simply the choice to drink or play or have sex that we value, it is also the natural incentive to drink, play, have sex that underlies the choice which we value. So, the source of our obligations is not just our rationally autonomous nature, i.e. our autonomous will, but also our animal nature because when we value ourselves, as an ends-in-ourselves, we value both our animal and autonomous natures. For example, to the extent we value things like eating, drinking, sex, playing, we are valuing our animal nature. It then follows that, in so valuing our animal nature, we are rationally required to value the natural goods which matter to others who similarly experience and pursue their own good, whether or not we take those natural goods to have any value for us in particular. This is the principle of universalization of the legislative will in action. “In taking ourselves to be ends-in-ourselves we legislate that the natural good of a creature who matters to itself is the source of normative claims.”\textsuperscript{110} And therefore, we have moral obligations to animals (and they have moral claim-rights against us).

\textsuperscript{107}Here, Korsgaard appeals to Kant’s political philosophy where he discusses the notion of passive citizens (those who do not participate in the legislation of society yet to whom legislating members have obligations). The passive citizen is meant to show that Kant left open the possibility that an entity that cannot participate in the moral legislation may yet obligate those who do so participate. Korsgaard (2018, 126); Korsgaard (2004, 21–22).
\textsuperscript{108}This is to create value by taking our ends as valuable.
\textsuperscript{109}Korsgaard (2018, Ch. 8).
\textsuperscript{110}Korsgaard (2004, 33).
One of the obvious advantages that Korsgaard’s view has over Regan’s view is that value does not require grounds independent of the moral agent. Korsgaard’s argument fills the gap left open in Regan’s, namely: subject-of-a-life grounds inherent value because we take marginal human cases to be inherently valuable, but we may reject that marginal human cases are inherently valuable. The closing of the gap in Korsgaard’s view comes from a kind of reciprocity that is compelled by the universalization constraint on reason. So, the obligation the moral agent has towards animals is an obligation she legislates for herself on account of her being a rational animal. This view is not agent-centered in the way I had discussed earlier, i.e. in the context of keeping one’s moral agency unsoiled with immoral acts. But it is agent-centered in that the nature of the agent compels the content of the moral maxims to contain obligations to animals. Regan’s view is all about the nature of the animals compelling the moral maxims regarding their treatment. It is solidly patient-centered. But Korsgaard’s view is about the nature of the agent compelling the moral maxims regarding animals.

Additionally, the argument from marginal human cases relies entirely on an appeal to consistency, but appeals to consistency can backfire. Someone could just accept that marginal human cases are not moral patients (even though they might be subjects-of-a-life) and are not owed obligations by us. The treatment they in fact receive is a phenomenon related to emotional and sympathetic responses we have to seeing members of our species.\textsuperscript{111}

Instead of relying on an appeal to external consistency, Korsgaard’s argument relies on reciprocity and consistency internal to the agent’s will. It solves the challenge to Regan’s patient-centered view about sacrificing one inherently valuable individual to save many more inherently valuable individuals in this way. When faced with that option, under Korsgaard’s view, the moral agent is not looking at the situation as one unit of inherent value on the sacrifice

\textsuperscript{111} Warren suggests something like this. Warren (2001, 49).
side and multiple units of inherent value on the saved side. The agent is looking at the situation internally and reciprocally. The agent is looking at the situation as a product of her rational will: to sacrifice or not. To sacrifice the one is a product of the agent’s will in a way that to let many perish is not. Because the agent takes herself as an end-in-herself, not to be sacrificed as a mere means to save others, she binds herself to treat all other ends-in-themselves that way (universalization). In the sacrifice case, to let the many perish is not to fail to treat them as ends-in-themselves. Being an end-in-oneself does not entitle one to have one’s ends achieved and realized no matter what the cost is. What matters for the moral agent is to act always on those principles that can she can will as universal law. The moral agent cannot will as universal law that she act so that all ends-in-themselves have their ends realized. She can only will that she not act so as to be the one who makes an end-in-oneself into a mere means.

In sum, grounding the moral agent’s obligations internally to the moral agent makes it fairly clear why the moral agent is permitted, and sometimes obligated, to produce what would be a worse state of affairs for the utilitarian. States of affairs just are not involved in grounding Korsgaardian obligations (to humans and animals). I take this to be a great strength of Korsgaard’s animal rights view. It captures the idea that “[w]e can impose the form of law on our actions, but we cannot impose the form of the good on nature.”112 I think a commitment to something like this is necessary for solving the myriad of rights conflicts that will arise with animal rights while maintaining a real force to animal rights (as opposed to adopting something like Warren’s weak rights view). I will have just the briefest of comments on this in the Conclusion. To round out the deontological arguments for animal rights, I will now conclude with Rowlands’ contractarian argument for animal rights.

D. ROWLANDS’ CONTRACTARIAN ARGUMENT FOR ANIMAL RIGHTS

Rowlands’ animal rights view aims to rehabilitate contractarianism as a moral theory that can establish directed duties to animals (and marginal human cases), and therefore the moral rights of animals. Rowlands’ rehabilitation of contractarianism depends on distinguishing between two forms of contractarianism: Hobbesian contractarianism and Kantian contractarianism.\footnote{Rowlands (2009, Ch. 6); Rowlands (1997).} The Hobbesian form of contractarianism takes the social contract to be constitutive of the moral right and wrong. The agreement between the contractors, who must be rational agents, is what makes certain actions right and wrong. Hobbesian contractarianism, then, is the traditional view of contractarianism that I called crude contractarianism in Section II.B.2. Because the contract is the thing in virtue of which things are right or wrong, there is nothing that is right or wrong to non-rational actors because they do not participate in making the contract.

Adopting a Kantian contractarianism (i.e. a Rawlsian contractarianism), Rowlands suggests that we deny that the social contract is constitutive of moral right and wrong. Instead, we ought to treat the social contract as merely a heuristic device by which right and wrong are discovered/revealed.\footnote{Whether Rawls’ contractarianism is strictly Kantian or a mix of Kantian and Hobbesian elements, I will not discuss here. See Rowlands (2009, 152–58) for a discussion of the Hobbesian remnants in Rawlsian contractarianism. Rowlands ultimately takes the view that it is the Kantian core of Rawlsian contractarianism that makes the view plausible and that the Hobbesian remnants are simply unfortunate and unnecessary. Ibid, 128. Viewing Rawlsian contractarianism as a reflective procedure for revealing the proper substantive moral commitments is not particularly new and is a dominant thread in Rawls’ A Theory of Justice, see Nagel (1973), so I am not too concerned with treating Rawlsian contractarianism as strictly Kantian in nature here.} This means that there is some conception of moral right and wrong that is independent of the social contract. Furthermore, the authority of the contract is no longer grounded in our agreement to it. The authority of the contract comes from the extent to which it reveals correct moral principles. Power and rationality no longer play fundamental roles in constituting the contract, either. The moral principles, if they are morally correct principles,
reflect the morally right thing to do. Viewing the social contract as a heuristic device to reveal correct moral principles, then, leaves open the possibility that we have duties to non-rational individuals based on the content of the underlying moral principles that the contract reveals.

In Kantian contractarianism, the original position and the veil of ignorance are heuristic devices used to “model the equality of individuals.” There has to be a conception of what counts as a morally arbitrary property that ought to be removed from the contractors when they go behind the veil of ignorance and reason towards the maxims of society. The choice of the original position will produce different moral maxims and our intuitions regarding those maxims may provide insight into the correct or best original position to choose. So, there is a kind of a circular flavor to a Kantian contractarianism. But this is exactly what Rowlands wants to draw out: the original position and veil of ignorance as heuristic devices do not represent some objective state of affairs, but instead represent a kind of reasoning process by which certain hypotheticals are undertaken, evaluated, tweaked and sent back, and re-evaluated until something that resembles morally correct principles emerges.

In determining what the original position ought to look like, we can recall that the original position is supposed to address the power concern that we see in Hobbesian contractarianism. The original position removes those properties from the contractors that most represent undeserved power disparities among humans (e.g. race, sex, social and economic status). If we conceive of the original position as a heuristic device, Rowlands contends that it also removes the rationality condition. Because the original position is itself informed by the principles it produces, there is no reason to think that the original position produces only rights for those who have rationality and participate in reasoning from the original position. Recall the

\[\text{115} \text{ Rowlands (2009, 137).} \]
\[\text{116} \text{ Ibid, 127, 148.} \]
purpose of the rationality condition in Hobbesian contractarianism: you only give up freedom if you get something in return, namely others’ restraint from harming you because there are no moral principles besides those chosen by the contractors. Of course, you only get that restraint from entities that are capable of acting on reasons. Once we have assumed there is a pre-contractual “moral base” that the original position reveals, the rationality condition is no longer necessary because the moral base provides right and wrong prior to the principles that result from reasoning from the original position.

Indeed, it is this moral base that Rowlands claims makes a clear contractarian case for animal rights. Once we start removing properties from the contractors in the original position that are undeserved, commonsense leads us to the conclusion that rationality is an undeserved property as well. After all, we enter the world without rationality. Many human beings leave the world having had their rationality slowly eroded away. Accidents can occur at any time that could strip us of our rationality, either temporarily or permanently. We all know of these possibilities and realities. It would be irrational not to include them in the original position. Because (1) we have been without rationality in the past (this is a fact of nature) and (2) we are very likely to be without rationality again through no decision of our own (at least no direct decision), possessing rationality, like possessing a particular social or economic status or being of a particular gender, is not something we are responsible for possessing. And so it is an undeserved, morally arbitrary property and should be bracketed from the original position.

Let us suppose this reasoning is compelling. We lack more than rationality at different points in our lives. There are times where we are unconscious. There are times when we are just

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118 But see, e.g., Korsgaard (2018, 81) who rejects the view that rationality comes in and out of existence over an individual’s lifetime.
119 Rowlands (2009, 151). Indeed, being human is something that we have no choice over and must be bracketed from the original position. Rowlands (1997, 243).
a bunch of cells growing our mothers’ wombs. There are times when we cannot remember anything from the past (except perhaps childhood or young adulthood). At some point, all of us cease to be a living, functional unity and must give our organic bodies back to the life processes from which they sprang. Perhaps belief, memory, consciousness, even sentience should be bracketed from the original position.

To define a boundary of undeserved properties that are morally relevant to the original position, Rowlands introduces a new principle, namely that the original position be restricted to entities that an occupant of the original position could rationally worry about being.\textsuperscript{120} So, properties that are possessed by entities that a contractor could rationally worry about being are morally relevant for the sake of limiting the abstraction of the original position away from humans. For example, only sentient entities care about what happens to them. Non-sentient entities like rocks and trees do not care what happens to them, so we need not be concerned with imagining that we are, e.g., trees in the original position. So, sentience is the line at which we draw the original position. The contractors must conceive of themselves as sentient creatures.

An initial concern with this argument is whether moving Rawls’ Archimedean point to the line of sentience destroys the coherency of the original position. The coherency challenge to the original position has been made in the past under the (implicit) assumption that the original position is some kind of metaphysical position that we actually inhabit rather than a hypothetical perspective-taking.\textsuperscript{121} However, even as a matter of hypothetical perspective-taking, it is difficult to have any robust conception of what it is to be merely a sentient creature. One of the things about hypothetical perspective-taking among humans is that other humans can communicate in language what it means to be of a different gender, race, or socioeconomic class.

\textsuperscript{120} Rowlands (2009, 160); Rowlands (1997, 245).

\textsuperscript{121} See Rowlands (2009, 155–56). See also Rawls (1971, 11, 104) clearly taking the stance that the original position is best understood as purely hypothetical.
in human society. Through this communication, we can better take on the perspective of being in another human’s shoes who lacks the (undeserved) advantages that we may possess in reality. Neither marginal human cases nor animals can similarly communicate what it is to be in their shoes, so to speak. So, to extend the original position to include such individuals leaves the contractors wondering about taking the perspectives of marginal human cases and animals with not much guidance as to what that life looks like inside of living it. I think this is why Rowlands relies on the notion that animals do not want to suffer or be killed,\(^\text{122}\) because we can make those conclusions from our observations of animals’ external avoidance behaviors. But we really do not know what life looks like from the internal perspective of animals, and it is possible this is not even a coherent question to ask because animals do not have a conception of being wronged.\(^\text{123}\) They have a good-for and bad-for (in Korsgaard’s terms), but as far as we know, they do not see the world as one in which they are being treated rightly or wrongly.

A further concern with Rowlands’ argument for animal rights is that it does not actually provide a ground for animal rights. Both Regan’s view and Korsgaard’s view clearly provide grounds for the moral rights of animals. Rowlands’ view leaves largely unexplained the moral base that the original position heuristic is supposed to illuminate. All that Rowlands says is that he rejects the Moral Law (traditionally Kantian) as the moral base and considers the principle of equal consideration to constitute the moral base.\(^\text{124}\) But this still leaves unanswered where the moral base comes from and what justifies it. I think this also threatens the contractualism as providing anything other than an epistemic procedure for determining the content of our moral

\(^{122}\) See Rowlands (1997, 245); Rowlands (2009, 162–74).

\(^{123}\) This might not be categorically true across all animals. Some non-human primates might have rudimentary conceptions of fairness. However, to the extent this is true, it is not a widespread capacity across animals, and it still does not provide us a very robust understanding of the view from mere sentience.

\(^{124}\) Rowlands (2009, 128).
maxims.\textsuperscript{125} If contractarianism is just the epistemic procedure for elucidating the content of the equal consideration principle, it may not be a deontological moral view. Indeed, it may not be a moral view at all. The moral view is the argument that grounds the equal consideration principle, not the contractarian argument that equal consideration requires such and such. I am sure there is more to say about the relationship between our epistemic procedures for determining the contents of the moral maxims and our grounds for the moral maxims themselves. However, I must leave such a task to future work. Before concluding this chapter, I want to briefly discuss what we get, as a pragmatic matter, from these three animal rights arguments.

IV. ANIMAL RIGHTS

I had previously mentioned that the deontological views provide grounds for our moral obligations and also provide us procedures for determining the content of those moral obligations. As we can see from my discussion of Rowlands’ contractarianism, the line between grounding morality and determining the content of the moral maxims is not always sharp. To the extent that the grounding of morality does not provide the content of any of our moral obligations, such a view is not held by the animal rights theorists I have discussed here. Regan, Korsgaard, and Rowlands all argue that animals have moral rights and then proceed from that argument to demonstrate what the content of at least a few of those rights are. So, the animal rights theorists at least implicitly take their arguments grounding our obligations to animals as establishing some particular animal rights. For illustration purposes, I will consider the case for vegetarianism, i.e. animals have the right not to be killed for food and eaten, through the lens of each of three animal rights arguments.

\textsuperscript{125} See ibid.
For Regan, a particular human practice of treating animals in a certain way is prohibited when it treats animals as a mere means to our ends. So, the question of whether we can raise and slaughter animals for our food comes down to whether this practice treats animals as a mere means to human ends. Simply put, it does not matter how we treat animals that we wish to slaughter for food, to raise animals for food is quintessentially to treat them as a mere means to our ends. It views animals as renewable resources to satisfy human eating preferences. Whether those preferences are based on claims of habit, taste, culture, nutrition, or economics does not change that humans are using animals as a mere means to their ends by eating them.¹²⁶

For Korsgaard, humans are obligated to treat animals as ends-in-themselves, as functional unities for whom things can be good-for or bad-for because when we act rationally we take as good those things that can be good-for natural, functional unities. This means we are obligated to treat animals in ways that are consistent with their natural good. The question then hinges on whether death is consistent with the natural good of the animals that we want to rear as livestock to eat. For Korsgaard, death is not part of animals’ natural good because it is not something that is sought out as an end of action by animals or humans.¹²⁷ Death will vary in badness-for animals along a continuum of cognitive sophistication.¹²⁸ The more cognitively sophisticated an animal is, the worse-for that animal death becomes. So, we cannot raise and slaughter animals for food consistent with treating animals as ends-in-themselves, but we can prefer the death of an animal over the death of a human.

For Rowlands, we must place ourselves in the original position, where we do not know if we will possess rationality or even be human in the actual world and ask ourselves what we

would want that world to look like. We must reason within the bounds of nature as we know it, i.e. we cannot reason from an original position that denies that some living creatures must eat other living creatures to survive. So, we may end up being a human, an animal reared and eaten by humans, or an animal not reared and eaten by humans. We evaluate the practice of humans rearing and eating certain animals from all three perspectives, analyzing what is gained and lost for each type of individual should the practice be permitted or prohibited. If eating animals is prohibited, animal lives are not ended and humans have to give up certain pleasures of the palate. If eating animals is not prohibited, animal lives are ended in large quantities to satisfy human pleasures of the palate. In the former world, a vital interest is respected at the cost of a trivial interest. A contractor in the original position, not knowing whether he will be a human or an animal desirable for human palates, will see this as “no contest.” Therefore, the human practice of raising and killing animals for food should be prohibited.

This is, admittedly, a fairly rough sketch of how the three moral arguments for animal rights might be put to use establishing animals’ rights not to be killed for food and eaten. Interestingly, all three views cannot help but also mention the problems around factory farming. I suppose it is hard not to simply because of how much suffering that factory farming causes. But the animal rights views are supposed to stand apart and beyond the utilitarian view, which can advocate for the abolition of factory farming on the grounds that it causes an enormous amount of suffering. The animal rights views maintain that even if all the suffering were removed from the practice of raising animals for humans to eat, there would still be a problem because it is not the suffering itself in factory farms that is the morally salient point for a deontological theory. I think that Korsgaard puts the point best:

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129 See Rowlands (2009, 162–74).
130 Ibid, 167.
The question is not about just numbers and consequences. It is about you and a particular animal, an individual creature with a life of her own, a creature for whom things can be good or bad. It is about how you are related to that particular creature when you eat her, or use products that have been extracted from her in ways that are incompatible with her good. You are treating her as a mere means to your own ends, and that is wrong.\textsuperscript{131}

V. CONCLUSION

In this chapter, I have explored the role of rights in the big three moral theories: consequentialism, deontology, and virtue ethics. I concluded that rights, conceived of as Hohfeldian relations, are accommodated best by deontological views because deontology readily accepts directed duties, the necessary concept to Hohfeld’s entire system. I then examined three deontological arguments for animal rights: Regan’s patient-centered (loosely) Kantian view, Korsgaard’s agent-centered Kantian view, and Rowlands’ contractarian view. Finally, I briefly discussed how each of the three animal rights views might defend the claim that animals possess claim-rights against us that we not raise and slaughter them for our food.

\textsuperscript{131} Korsgaard (2018, 223).
CHAPTER FIVE: CONCLUSION

I do not doubt that my reader may be frustrated that at this point, I still have not made a clear case for or against animal rights. My primary reservation comes from the fact that I have not addressed the conflicts of rights that will arise in the context of animal rights. A plausible animal rights view has to address the conflicts of rights problem. Without a theory on how to evaluate conflicts of human and animal rights, an animal rights view fails to be action-guiding. Furthermore, each conflict between human and animal rights could be raised as an objection to the claim that animals have rights in the first place. Therefore, I want to briefly outline the concerns that I would address if I were developing a full theory to address the conflicts of human and animal rights. I will proceed in three parts. First, I will discuss the concern that animal rights may not be strong enough to be properly considered rights. Second, I will discuss the concern that animal rights may be too strong, undermining rights as a mechanism by which humans realize their freedom of self-determination. Finally, I will conclude with a comment on why I think animal rights do get it right in important ways, notwithstanding the conflicts of rights problem.¹

To begin my discussion that in the face of conflicts, animal rights may lose their force to be appropriately considered rights, I must describe the rights conflict. The debates in this area often revolve around necessity cases,² so I will use Regan’s lifeboat case³ as an example of an animal rights necessity case. The lifeboat case is as follows. Suppose four humans and a dog are shipwrecked and clinging to a lifeboat for survival. Suppose the lifeboat can only hold four of

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¹ I will be limiting my discussion to intrapersonal conflicts of rights, i.e. conflicts of rights that apply to the same moral agent. Interpersonal conflicts of rights, where moral agents may have contrary obligations over the same action, can certainly arise in the case of human and animal rights conflicts, but I will not discuss them here. See Hurd and Moore (2018, 324–28) for a discussion of the distinction between intra- and interpersonal conflicts of rights.
² See, e.g., Frederick (2014, 376); Oberdiek (2008).
the five individuals (or suppose that the five individuals have been in the lifeboat for weeks and must kill one to eat for the others to survive). An animal rights view that does not resolve conflicts of rights leaves the moral agent with no guidance on how to act in this situation.\textsuperscript{4} Perhaps the dog’s right not to be killed (or eaten) means the moral agent must allow herself to be cast overboard (or eaten) for the dog to survive. Such a result would produce a very strong right for the dog, but it is unpalatable to many that a human be morally required to sacrifice her life for an animal.\textsuperscript{5} On the other hand, perhaps the moral agent is permitted to cast the dog overboard (or eat the dog) to save her own life. If that is the case, then does the dog really have a moral right not to be killed (or eaten)?

Before touching upon the competing solutions to this problem, I want to touch upon the precise nature of the conflict of rights being presented to the moral agent. The conflict looks like this. Generally, moral agents have bilateral privileges to act as to others so as to preserve their own lives. This means that moral agents generally have the discretion to φ or to ~φ so as to preserve their own lives. This is the bilateral privilege that the moral agent has in the life-saving drug case to prefer to give herself (or her child) the life-saving drug over another (or another’s child). In the life-saving drug case, the moral agent has no duty to another (or another’s child) to give them the life-saving drug and no duty to another (or another’s child) not to give them the life-saving drug. In the lifeboat case, however, the dog ostensibly has the claim-right not to be killed (or eaten). So, when we contextualize the moral agent’s bilateral privilege to act as to others so as to preserve her own life, the act that we mean is to kill (or eat) the dog. That is the

\textsuperscript{4} This could be an outcome. It is possible to argue that in necessity cases, all moral bets are off.

\textsuperscript{5} Although notably, if we replace the dog with a fifth human, the criminal law does not allow the fifth human to be cast overboard or eaten to save the other four. The right of the fifth human is not violable or overridable by the rights of the other four to pursue their own survival. See Regina v. Dudley and Stephens. The deontologist will rely on the causing/allowing distinction to justify that is it permissible to give oneself (or one’s child) the life-saving drug but impermissible to toss the fifth human overboard (or to eat the fifth human).
only way that the moral agent can act so as to preserve her life in the lifeboat case. So, now it is clear, the moral agent is under a conflict of duties. Her bilateral privilege means that she has no duty to kill (or eat) and no duty not to kill (or eat) the dog, but the dog's claim-right says the moral agent has a duty not to kill (or eat) the dog. It is logically inconsistent to maintain that the moral agent has a duty not to kill (or eat) the dog and simultaneously does not have a duty not to kill (or eat) the dog. The moral agent should either have a duty or not, otherwise how is the duty supposed to guide the moral agent’s actions?

There are two general approaches to this problem. One approach is to interpret the moral agent’s duty not to kill (or eat) the dog as a pro tanto duty. This means that the duty and claim-right override other considerations in most circumstances. However, there are exceptional circumstances where the duty and claim-right are justifiably overridden. In most of those circumstances, overriding the pro tanto duty will produce a duty on the rights violator to compensate the claim-right holder for the violation of claim-right. This (usually) occurs in necessity cases where lives are saved by violating property rights. Finally, in relatively rare circumstances, a pro tanto duty may be overridden without producing a duty to compensate. These are best understood as the threshold deontology cases, such as torturing a terrorist’s child to reveal the location of a nuclear bomb underneath Manhattan. The relative rarity of such threshold cases is taken to be sufficient to maintain that pro tanto duties and claim-rights really

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6 Note that this is not the conflict of being under a duty to φ and a duty to ¬φ.
7 I limit my discussion here to two contemporary conflicts of rights theories. There is much more to be said about the force and conflicts of rights than I have said here. See, e.g., Waldron (1989) (discussing a resolution of the conflicts of rights based on how the interest theory generates waves of duties for particular claim-rights); Nozick (1974, 30–33) (conceiving of rights as side-constraints on action which would resolve certain rights conflicts).
8 Pro tanto is distinct from being merely prima facie. Pro tanto duties (and their correlative claim-rights) really are duties (and claim-rights) even when they are overridden by other considerations, whereas prima facie duties (and claim-rights) in essence “disappear” when they are “overridden.” See Moore (2016, 352–53).
9 What I am going to describe as the pro tanto view can be ascribed to Frederick’s (2014, 392–93) pro tanto view.
do possess the categorical force of duties and claim-rights, even though they may be justifiably overridden.

Regardless of whether we think the pro tanto approach solves conflicts of human rights, it is not particularly helpful in resolving human and animal rights conflicts. First, animal rights do not appear to contain claim-rights that are readily compensable. Whether or not it is even coherent to talk about compensating an animal for violating his claim-right, the human actions that animal claim-rights are targeting are not particularly compensable actions. For example, we cannot compensate any individual for torturing them and then killing them for food. While the law places monetary values on permanent dismemberment and disfigurement, such compensation does nothing for, e.g., an ex-laboratory animal who now has to live out the rest of her life with permanent physical harms (and pains). So, this means that animal rights are either accorded because there are no overriding circumstances or violated because the circumstances are so significant that the claim-right may be overridden without compensation. Perhaps for experimentation on animals, the former holds: knowledge gained through experimenting on animals is not sufficient to override their claim-rights. But, the lifeboat case does not come out in favor of the dog, but in favor of the human. So, the former cannot hold for the lifeboat case. This means that the lifeboat case must be a case of the latter where the circumstances are so significant to justifiably override the dog’s claim-right without compensation because compensation is impossible.¹⁰

Indeed, this is how Regan and Korsgaard come down on the lifeboat case. The dog can be tossed overboard (or eaten). It is a greater harm for the human to die than for the dog to die because how bad death is for an individual is a function of “the number and variety of

¹⁰ Notably, such circumstances are not akin to the threshold circumstances that the third option is supposed to capture in the pro tanto view. The lifeboat case would rule in favor of the human even if it was one human versus one dog.
I think it is hard to ignore the fact that this readily comes across as just another form of speciesism. It categorically places animal life below human life. At the risk of sounding ludicrous, it reeks of a fear to defend the radical implications that an animal rights view should entail. Furthermore, what is left of the animal rights view then is just the call to abolish human practices where the human interests being satisfied by those practices do not outweigh the animal interests being dissatisfied by those practices. We can get this result through a straight preference utilitarianism that appropriately weighs human gustatory satisfaction (and hunting and trapping satisfaction, and knowledge acquisition satisfaction) against animal suffering in these practices. We can even address the problem of painless killings by recognizing that the animals we raise for food do exhibit behaviors indicating a preference to continue living which preference we would dissatisfy by ending their lives prematurely, even if such endings were painless.

The other approach to resolving cases like the lifeboat case is to specify either the circumstances during which the right holds or the content of the right with enough precision that the apparent conflict is revealed to be no conflict at all. We might call the former external-condition specificationism and the latter internal-condition specificationism. Regardless, the idea is that claim-rights and duties are absolute, and any apparent conflict disappears once the conditions upon which the claim-right holds (external) or the content of the action of the claim-

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11 Regan (1983, 351); see also Korsgaard (2018, 61–67). It is curious to me how quickly the animal rights theorist appeals to quantities of harm to justify overriding the animal’s right. As I discussed in Chapter Four, rights are supposed to stand in opposition to justifying actions on the outcomes they produce.
12 So what if animal lives are less rich on human standards as to what counts as a rich life? They are certainly not less important to those animals who live those lives. Each living creature’s own life is all that each creature has. Just because we think others live simpler lives for themselves does not make them expendable. Would we toss the blade counting human overboard because his life does not appear to mean as much to him as the moral agent’s life means to her?
13 Frederick (2014, 380).
right (internal)\textsuperscript{15} are fully described. So, the lifeboat case is solved in this way. First, the dog’s claim-right ceases to exist when it-is-the-dog-or-the-human circumstances hold (external specificationism). Second, the dog’s claim-right is only a claim-right against the moral agent not to be killed (or eaten) when-it-is-not-the-situation-of-the-dog-or-the-human (internal specificationism). In both cases, for the human to throw the dog overboard (or eat the dog) is no violation of the dog’s claim-right. The dog has no claim-right.

The animal rights views I have explored in this project do not address the possibility of adopting a specificationism to resolve the human and animal rights conflicts. However, it should be fairly obvious that specificationism would require a theory of the boundary of animal rights. In developing that theory, what drives where the boundary lies between respecting human interests and animal interests? If it is something like the number and variety of preferences, then we are back in the same position as we were with the pro tanto view. Animal rights will be relegated to second class “rights,” except rather than being justifiably overridden in conflicts with human rights, they will be considered to have disappeared completely from the moral landscape.

On the one hand, these concerns roughly translate into the idea that animal rights are not strong enough if we resolve conflicts in these ways. On the other hand, because animal rights are really claim-rights (protected by immunities), I have concerns that they are too strong and disrupt the way in which claim-rights and bilateral privileges work over the scope of human relations.\textsuperscript{16} Part of this project in the rights theory discussion was to rehabilitate the importance of bilateral privileges even when those privileges are not strictly protected from interference by

\textsuperscript{15} See, e.g., Oberdiek (2008).
\textsuperscript{16} This approach rejects the possibility of the conflict I discussed above. It takes the position that the logic of the Hohfeldian relations precludes the moral agent from simultaneously having no duty not to kill (or eat) the dog and having a duty not to kill (or eat) the dog.
claim-rights. While all privileges are technically protected by the perimeter of general obligation, it is bilateral privileges, not the claim-rights, that represent human discretion and freedom. It is in this world of bilateral privileges that the majority (if not all) of our most important projects related to our agency and self-determination (e.g. Williams’ S projects) are undertaken. For the most part, we do not have claim-rights that others not interfere with the actions that constitute such S projects. We have claim-rights that others not falsely imprison us, assault us, kill us, claim-rights on the perimeter of general obligation, but generally, we have to operate in a world of other bilateral privilege holders acting in pursuit of their S projects without being able to claim against them that they change their actions so that we can act. To the extent we have claim-rights against more specific interference with certain actions, such claim-rights operate similarly to the perimeter of general obligation (just at a more specific scale): they facilitate the exercise of our discretion and autonomy, humans’ ability to self-determine how their lives go. The discretion is still important beyond the claim-right we hold against others.

So, what then is the problem with animal rights? As a matter of Hohfeldian logic, animal rights negate human bilateral privileges. Animal rights are duties on human moral agents where there might not have been duties. Because these bilateral privileges play an important role in humans self-determining their lives, we ought to be at least aware when they are negated by the existence of claim-right. Such negations reduce the sphere of freedom for humans and increase the sphere of obligation. When the tradeoff occurs between humans, one human is made freer and obtains greater discretion while another is made more restricted. In the case of animal rights, however, increasing the sphere of obligation plays no role in increasing any humans’ discretion and freedom to self-determine the way their lives go. In the tradeoff between humans and
animals, humans simply end up more restricted. No one is made freer in terms of autonomous self-determination.\textsuperscript{17}

Part of the shortcomings of such a concern with animal rights is that animal rights are not so prolific that humans would have not freedom. There are lots of ways that we can exercise our discretion and craft S projects that do not depend on treating animals as mere resources. Furthermore, the animal rights theorist might be able to avail herself of some of the agent-centered deontologist’s distinctions, such as acting/omitting, intending/foreseeing, doing/allowing,\textsuperscript{18} to define the scope of animal rights in ways that make the loss of human discretion exactly appropriate to strike the correct moral considerability owed to animals. To fully resolve this (or even conclude that the concern is resolvable) is not within the scope of this project, but the groundwork I have discussed here would be valuable to such a discussion.

With these reservations in mind, there can be no doubt in my mind, however, that animal rights do get something fundamentally right about grounding a meaningful moral considerability for animals. Rights can be coherently maintained despite the fact that nature will not permit every creature to achieve its good (or flourish). It does not trouble a rights account that much Good that could be achieved in nature is left unsatisfied.\textsuperscript{19} It is not the job of moral agents qua moral agents to fight against nature in this regard. This is a point that utilitarianism just misses. There is nothing inherently bad (or inherently good for that matter) about failing to maximize the use of or failing to be perfectly efficient with scarce resources. All life is finite, and many lives

\textsuperscript{17}The concern perhaps goes something like this. Extending rights to non-humans is just to recognize that non-humans have claim-rights against humans. But extending claim-rights necessarily curtails human freedom by imposing duties and removing discretion (i.e. bilateral privileges). Because claim-rights among humans facilitate human freedom by creating the conditions for the possibility of exercising bilateral privileges, extending rights beyond humans becomes self-undermining.

\textsuperscript{18}See Moore and Alexander (2007).

\textsuperscript{19}Kant did not think that we could achieve the Good through moral action alone unless we had faith in a God that made the laws of nature align with our moral laws. See Korsgaard (2018, 111–12). Abandoning any appeal to any conception of a God, it is hard to see how there is even a conception of an absolute Good in nature. See ibid, 154.
are supported only by the sacrifice of many other lives. In extending our morality beyond humans, all that matters is how we humans treat other living creatures. However nature comes down on each living creature, it is not our place to interfere or substitute judgment as to how it ought to be. In this way, a rights account of the moral considerability of animals is not narcissistic or egoistic; rather, it is almost a form of humility. We do not step in and impose our conception of how the world should be on animals. Rather we are obligated (categorically) to respect animals as pursuers of lives that are good for them, regardless of what we think and regardless of whether or not they will achieve that good (with or without intervention from us). This is the kind of respect that parents give their children when their children grow up into adults. It is the mark of being accepted and treated as an equal. That is an animal rights view I could get behind.
REFERENCES


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