

The consistency-from-marginal cases argument for animal rights: a critical examination

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The question of animal rights has attracted considerable academic interest recently, and has been given popular focus by the highly-publicised activities of the Animal Liberation Front in the United Kingdom, efforts to curtail the use of dolphins at Napier's Marineland, and by increasing attention given to anti-vivisectionists in New Zealand. In this article, Grant Liddell examines one of the arguments used to justify the giving of rights to animals, the argument that says that because some animals at least are as deserving as humans of having rights, then for the sake of consistency, humans should recognise that animals should have rights as well. He concludes that the argument, put forward principally by Regan, is not made out.

I propose to examine what can be called the weaker¹ form of the "consistency" argument for the ascription of rights to non-human animals. The argument is of the form that "if humans, including marginal or non-paradigmatic humans, have rights, then at least some animals have rights too." Or put another way, if there is some necessary criterion for the ascription of rights, then both all humans and at least some animals are capable of fulfilling that condition. Non-paradigmatic humans include the irreversibly comatose, the severely mentally handicapped, neonates, and the permanently insane — the so-called marginal or puzzle cases.²

The paper will take the following form:

1. A discussion of the concept of rights; I do not attempt to prove or disprove whether rights exist or whether humans can and do have them;
2. Some criteria for the ascription of rights that have been proposed as both

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1 T. Regan "An Examination and Defense of One Argument Concerning Animal Rights" (1979) 22 *Inquiry* 189. Regan notes also the existence of a stronger argument: that certain animals have certain rights because humans have these rights. This is posited on the proof of humans having rights, a proposition of which neither he nor I am convinced.

2 H. J. McCloskey "Moral Rights and Animals" (1979) 22 *Inquiry* 23, 30.

necessary and sufficient will be examined; a typology of criteria upon which rights may be ascribed to humans and/or animals is developed;

3. Regan's³ concept of "inherent value" as the most reasonable necessary and sufficient criterion for the ascription of rights to humans and at least some animals is examined critically. I attempt to show that this criterion is empty as a basis for rights-ascription.

Thus I propose to show that the argument of the form "if humans have rights, then animals which share the same criteria for rights-possession do also" remains open because no satisfactory criterion has been proposed.

I have chosen this argument to discuss as it seems capable of producing the best case in favour of the ascription of rights to animals, that is assuming that humans can possess them as well.

Firstly, some definition: "animals" I take to mean living non-human animals; "humans" includes both paradigmatic and non-paradigmatic humans.

I. RIGHTS AS CONCEPTS

The question of what constitutes rights is difficult, both theoretically and practically. Martin and Nickel⁴ offer a general characterisation based on normative, functional and justificatory aspects. Most theses focus on the first, usually in terms of second-party duties or other normative categories such as liberties, claims and immunities. Rights can be considered as entitlements, as McCloskey,⁵ Nozick,⁶ Wasserstrom,⁷ and Regan⁸ all variously agree. In McCloskey's words,⁹ rights are best

explained positively as entitlements to do, have, enjoy, or have done, and not negatively as something against others, or as something one ought to have.

Rights as entitlements are held independently of other beings and are intrinsic to their possessors. It is important to note that rights do not necessarily import correlative duties, nor duties correlative rights. While it is valid to say that any genuine right must involve some normative direction of the behaviour of persons other than the holder, that normative direction may be a disability or restriction, as for example upon a legislature which is prevented from removing rights constitutionally enshrined, or a liability, in, for example, the recipient of the exercise of a power. It need not be a duty.¹⁰ This is of significance; many proponents of animal rights are seeking to ground claims for better treatment of

3 Regan, *supra* n. 1, 206-215.

4 R. Martin and J. W. Nickel "Recent Work on the Concept of Rights" (1980) 17 *American Philosophical Quarterly* 165.

5 McCloskey "Rights" (1965) 15 *Philosophical Quarterly* 115, 122; and "Moral Rights and Animals" (1979) 22 *Inquiry* 23, 26.

6 R. Nozick *Anarchy, State and Utopia* (Basic Books Inc., New York, 1974) Ch. 3.

7 R. Wasserstrom "Rights, Human Rights and Racial Discrimination" (1964) 61 *Journal of Philosophy* 628.

8 Regan, *supra* n. 1, 191.

9 McCloskey "Rights — Some Conceptual Issues" (1976) 54 *Australian Journal of Philosophy* 99.

10 Martin and Nickel, *supra* n. 4, 166-167.

animals (in experiments, farming, etc.) on their supposed possession of rights, i.e. humans owe duties to animals because animals, they say, have rights. However, we may have duties to animals independently of their possessing rights. (Feinberg, for example, argues that the duty of charity where we are required to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his or her right, is such a duty-without-correlative-right.¹¹) To show that animals possess rights against persons, it is not sufficient merely to establish that persons have duties in respect of animals.

As well as rights-as-entitlements, there are other theories such as Dworkin's characterisation in terms of function. He is concerned with the role rights play in relation to other normative considerations — rights give the right-holder an especially strong justification for acting in a particular way, independent of and generally triumphant over collective goals such as welfare, prosperity, security¹² and any utilitarian considerations.

However, it is not my intention to focus directly on the content of rights (although one must ascribe some meaning to the term), nor is it intended to elaborate a full theory of rights. Thus the question of whether humans do possess rights (assuming that rights exist) is beyond the scope of this paper. The argument for animals that is discussed here is "if humans can and do possess rights, then animals (at least some of them) can and do also." But even animal rightists are not contending that animals and humans have equal rights (i.e. the same sets of rights) or that they should necessarily be accorded the same status (i.e. that the rights are of equal weight). Those questions are also beyond this paper.

II. RIGHTS-ASCRIBING CRITERIA

Our discussion will lead to a critical examination of points in dispute between Regan who proposes that animals have rights (but only if humans have rights, a matter upon which he professes doubt)¹³ and McCloskey who argues to the contrary (but nevertheless concedes that animals may deserve better treatment from humans).¹⁴ Both view the question in terms of basic moral rights. McCloskey sees basic moral rights as "entitlements which confer moral liberties on their possessors to do, demand, enjoy, etc.; and they are entitlements which impose moral constraints on others, to abstain from interference, to do, to assist, etc."¹⁵ Basic moral rights are possessed by their possessors independently of other beings.¹⁶ Regan's basic moral right is itself "the ground of a moral obligation."¹⁷ This is analogous to McCloskey's imposition of moral constraints on others ("side constraints" as Nozick would describe them).¹⁸ According to Regan, beings with basic moral rights possess them "just because of the sort of being they are."¹⁹

That is, rights-ascription is not a matter of desert, and, therefore, rights are

11 J. Feinberg "The Nature and Value of Rights" (1970) 4 *Journal of Value Inquiry* 243, 244.

12 R. Dworkin *Taking Rights Seriously* (Duckworth Press, London, 1977) especially 91-92.

13 Regan, *supra* n. 1, 193.

14 McCloskey, *supra* n. 2, 23.

15 *Ibid.* 26.

16 *Ibid.* 27.

17 Regan, *supra* n. 1, 191.

18 Nozick, *supra* n. 6, 32.

19 Regan, *supra* n. 1, 191.

ascribed to rights-holders independently of other beings. The two definitions, although framed slightly differently, are the same. They do not define for us, although both offer hints, what the necessary characteristic(s) of rights-holders is (are).

If humans have basic moral rights, what then are the necessary and sufficient criteria for rights-possession? That is, what is there that is true of those beings assumed to have rights which can most reasonably be construed as the grounds of their possessing them? Advocates of the consistency argument hold that whatever most reasonable criterion is found animals will also qualify as rights holders. This will be because at the margin of "human-ness", any common denominator sufficiently "low" to include non-paradigmatic humans opens the door to (at least) animals of similar capabilities or capacities. This "most reasonable" criterion must be both a necessary and a sufficient criterion because, as Regan notes, the same criterion is used as a basis for excluding other animals, as well as plants and inanimate objects, from rights-possession.²⁰

Criteria upon which rights-possession may be granted are logically possessible by either all, some, or no humans, and all, some, or no animals. A typology of "possibility of necessary criteria" can be constructed. (See Table 1.)

Table 1
CRITERIA POSSESSIBILITY

| Criteria possessible by | | all = H | HUMANS some = h | none = 0 |
|-------------------------|----------|------------------------|---------------------------|-----------------------|
| ANI- MALS | all = A | (H, A) e.g. life | (h, A) e.g. ? | (0, A) "animalness" |
| | some = a | (H, a) e.g. sentience? | (h, a) e.g. consciousness | (0, a) submarine life |
| | none = 0 | (H, 0) "humanness" | (h, 0) e.g. speech | (0, 0) e.g. God |

This typology represents types of necessary criteria which depending on their inclusiveness or exclusiveness of possession have logical implications for the argument: "If humans have rights, then at least some animals do." For example, a criterion of the form (H, A) is possessible by all humans and all animals, e.g. the fact of being alive would prove the syllogism logically correct. We will consider the contents of each of the pairs of coordinates in more detail later. Firstly, which locations in the diagram will produce a true outcome for our argument? Clearly, (H, A) as noted, and also (H, a) — a criterion which all humans and some animals satisfy. (H, 0), any criterion which all humans meet but no animals do, will cause the argument to fail (because the criterion is necessary, not just sufficient) but runs the risk of being labelled "speciesist". Singer²¹ developed this term to cover arguments that discriminate between species

20 Ibid. 198.

21 P. Singer *Animal Liberation. A New Ethics for Our Treatment of Animals* (Avon Books, New York, 1975).

on irrelevant bases — analogous to the meaning of “racism” and “sexism” with respect to race and sex.

In the form in which the argument is proposed, “If *all* humans . . .”, all locations other than (H,A) and (H,a) will cause the argument to fail. In Regan’s modified form of the argument which makes an allowance for the irreversibly comatose (we shall develop this later), criteria of the forms (H,A), (H,a), (h,A) and (h,a) will succeed. (h,0) will accord rights to some but not all humans and to no animals e.g. to all humans except the irreversibly comatose, without risking a speciesist criticism (“humanness” cannot be a criterion). If the necessary criterion for rights-possession is of the form (0,0) such that neither humans nor animals can satisfy it, e.g. a truly spiritual existence (God) then the argument can never have a meaningful outcome, as there could not, on such a criterion, be any human rights. This result applies also for (0,a) and (0,A). They, however, outside our arguments, would produce bases for rights to at least some animals but no humans. (0,A) is potentially speciesist.

The examples noted in the locations in the table are neither necessarily exclusively located in each space to which they have been assigned (although in most cases they will in fact be located there), nor are they necessarily exhaustive of each space. Readers can add and alter as appropriate. Criteria await empirical establishment (usually regarding animals’ potentialities).

What merit do the various criteria have? Proponents of animal rights arguments in our forms seek criteria which non-paradigmatic humans can meet. “Sentience” is offered as such a criterion by Linzey²² and Singer²³ (though acknowledging difficulties). McCloskey²⁴ defines sentience as sense-perception and a capacity for feeling (including feelings such as those of pleasure and pain, heat and cold, etc.). The moral significance of sentience, McCloskey says, seems to relate to duties not rights.²⁵ Regan lodges a greater objection,²⁶ the irreversibly comatose are not sentient. Yet given the premise that all humans (including marginal ones) have rights, and the irreversibly comatose are human, we must reject this criterion as the basis for rights-ascription, even if it is one that some animals can meet.

The same result follows for most criteria suggested, some of which are more animal-exclusive than others. Those eliminated on the objection are: consciousness, capacity for pleasure and pain, capacity to have desires, self-consciousness, rationality in some fuller sense or senses, such as a capacity to conceptualise, construct a language, communicate with others, engage in acts of creativity and to be able to make moral judgments and act on the basis of them.

A word should be said about the capacity to have interests. The irreversibly comatose (and other marginal humans) are capable of having interests: we can make informed judgments about what constitutes the interests of a neonate or a mental defective (it is in this sense only that “interests” is used), and thus can

22 A. Linzey *Animal Rights: A Christian Assessment of Man’s Treatment of Animals* (London, SCM Press, 1976) 27-28.

23 Singer, *supra* n. 21, 8.

24 McCloskey, *supra* n. 2, 34.

25 *Idem.*

26 Regan, *supra* n. 1, 200-201.

represent those interests (although there are serious practical difficulties). McCloskey offers a successful objection to interests as the rights-ascriptive criterion:²⁷ rights and interests are completely distinct. That interests can be represented does not tell us that rights can be. It is how the possessor of the rights who cannot express his or her wishes would wish to exercise those rights or even claim them that is important. Where there is no mind or will, actually or potentially, to be read, rights cannot be represented. Even assuming the difficulties of representation can be circumvented, does not the concept of interests become too wide? Cannot plants be said to have interests? But as McCloskey notes,²⁸ the reluctance to ascribe rights to plants (which would occur if we accepted the capacity to have interests as the criterion for rights-bearing) lies in the fact that plants can be seen to be things, incapable of action, lacking selves, wills, identities as beings.

It seems then that we are left with a position where no criterion of sufficiently wide application that includes non-paradigmatic humans has been proven. If no such criterion can be found (and that is an open question) we are offered a choice:

1. Either modify our premise as Regan²⁹ would suggest to the form, "If all humans, except the irreversibly comatose . . .", develop a criterion of the form (h,a) and concede that the irreversibly comatose are not to have basic moral rights;
2. Develop a criterion that includes the irreversibly comatose, and will therefore include at least some animals. There is no possibility of animal rights' opponents defeating the argument if they have to include the irreversibly comatose who on most if not all criteria examined in the literature rank at best with some animals in terms of meaningful moral capacities.
3. Abandon the argument. This is not necessary.

III. REGAN'S CONCEPT OF INHERENT VALUE

Regan³⁰ proposes the concept of "inherent value" as the most reasonable criterion for rights-possession. "Inherent value" is possessed by those beings whose lives are valuable in themselves. Regan means by this that the lives of those beings who or which are the subjects of lives which are better or worse for the beings themselves, logically independent of whether any other beings take an interest in them or find them useful as a means to an end, are ones which have inherent value. Or put another way, their inherent value is that the value of their life is logically independent of their being useful as a means. This is a concept capable of including most non-paradigmatic humans (only the irreversibly comatose are excluded). Even in the case of the severely mentally enfeebled there are alternative forms of life concerning which it is intelligible to say that they (i.e. the humans in question) are better off or worse off having one form of life rather than another. This shows why it would be wrong to treat these humans merely as a means. If one did, one would treat them as if their value was logically dependent on their answering to the needs, purposes, etc. of others, when in fact as subjects of a life more or less good for them, they have value logically independent of how others might value them.

27 McCloskey, *supra* n. 2, 39.

28 *Ibid.* 33.

29 Regan, *supra* n. 1, 200.

30 *Ibid.* 205-212.

Inherent value need not be accorded equally to all beings or all humans.³¹ Regan refines the concept³² by arguing that those who can *lead* a life have greater inherent value than those who *have* but *cannot lead* such a life, although both still qualify for some minimal inherent value.

The irreversibly comatose, however, have only the capacity of being alive:³³ theirs is not a life which is better or worse for them which they can have or lead. The question remains open, says Regan, as to whether they can have non-basic moral rights (a matter we will not explore). On Regan's test, however, they cannot have basic moral rights.

The justification for the ascription of rights to at least some animals then follows directly.³⁴ Regan concedes that he cannot prove that non-human animals have inherent value, but says that³⁵

it is difficult at best to understand how anyone could reasonably deny that there are many, many species of animals whose members satisfy this requirement

in, for example, that animals can have a life better or worse in terms of the comparative amount of suffering they undergo, or in the satisfaction or otherwise of their interests generally, independently of whether other animals or humans find them useful.

Whether animals can lead a life (which thus has greater inherent value) is an open question. Clearly the implication is that those beings with greater inherent moral value can be ascribed greater (in quality or quantity) basic moral rights.

Leaving aside the higher category of inherent value (leading a life) we focus on the concept of *having* a life which is better or worse for the being independent of whether it is treated instrumentally, because if Regan is right, this is sufficient to ground an ascription of rights to (a) all humans except the irreversibly comatose; and (b) at least some animals.

My contention is that the minimal inherent value criterion is of such width that it

1. includes the irreversibly comatose,
2. is capable of including almost all (if not all) living creatures; and thus is
3. not much different from the capacity of being-alive.

If this is so, it is not a meaningful criterion on which to ascribe moral rights to beings.

Regan concedes³⁶ that it is conceivable that even beings lacking the potential for consciousness (such as the irreversibly comatose or trees) might have inherent value. The concept of having a life that is better or worse for the being itself, independent of whether the being is treated instrumentally, does not mean that one should disregard the effects of being treated as a means. If treated better or worse, the being will have a better or worse life, independently of how others regard it. Their lives are better or worse for them irrespective of whether they know them

31 Ibid. 209.

33 Ibid. 211.

35 Idem.

32 Ibid. 210.

34 Ibid. 212.

36 Ibid. 206.

to be better or worse. For example, vital indicators (blood pressure, pulse, blood sugars, etc.) may change as an infection develops in an irreversibly comatose patient. The patient's life is changed whether or not he or she is able to determine that a change has occurred. Thus consciousness (or even potential consciousness) is not a necessary criterion for determining inherent value. Any life therefore has inherent value, whether the subject of the life is a tree, a neonate human, an irreversibly comatose human (or animal), or indeed any animal. Thus the criterion does not differ from that of being-alive, which Regan argues is insufficient to ground moral rights.³⁷

Thus his argument is not proven; his criterion of inherent value is capable of including all living creatures, which is not a meaningful ground for determining the ascription of moral rights. His criterion has shifted from (h,a) to (H,A) in our typology.

Our concluding point is why life itself is not a satisfactory ground for ascribing rights. Here we must give meaning to the content of rights. If rights are generally accepted to import normative indicators of the behaviour of others with respect to the rights-holder (whether those normative indicators be duties, disabilities or liabilities in a Hohfeldian sense) how is it that these normative indicators are to be communicated to those with no capacity to communicate? That is, assuming for example, that our life-possessing criterion ascribes a right in respect of that capacity (which is not unreasonable) how is that right to have meaning between species? There is as McCloskey notes³⁸ a logical incompatibility between a predator's right to life (made meaningful by being able to kill and eat its prey) and the prey's right to life against the aggressor. The entitlements arising from the rights are mutually exclusive. (The whole problem of interspecific justice is discussed by VanDeVeer.³⁹)

What this paper shows is not that the consistency argument based on marginal cases of the forms "If all humans . . ." or "If all humans except the irreversibly comatose . . ." necessarily fails, but that the attempts to find a most reasonable necessary and sufficient criterion to satisfy the argument have not been successful. It leaves open the questions of

1. Whether humans have rights;
2. Whether animals can or do have rights based on (a) either the argument discussed here in either form; or (b) some other, probably utilitarian argument;
3. If rights exist, what content is to be given them. This is particularly important in determining whether acceptance of the kinds of rights likely to be ascribed to animals (e.g. minimal-level rights such as the right to life and the right to freedom from unnecessary suffering—that is, assuming that such rights exist) is compatible with the maximum satisfaction of rights remaining a meaningful, logically coherent goal.⁴⁰

37 Ibid. 211; see also McCloskey, *supra* n. 2, 53; on the grounds that mere life does not necessarily carry with it any suggestion of a capacity for action.

38 McCloskey, *supra* n. 2, 53.

39 D. VanDeVeer "Interspecific Justice" (1979) 22 *Inquiry* 55.

40 McCloskey, *supra* n. 2, 53.

The organisation and determination of behaviour is an important moral and political question. Rights questions are an integral facet of the theoretical discussion and provide valuable means of shaping questions regarding the proper moral treatment not only of animals but also of humans. The debates have far to go.

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