

BETWEEN THE SPECIES

Demystifying Animal Rights

ABSTRACT

According to the *mysteriousness objection*, moral rights are wholly mysterious, metaphysically suspect entities. Given their unexplained character and dubious metaphysical status, the objection goes, we should be ontologically parsimonious and deny that such entities exist. I defend Tom Regan's rights view from the mysteriousness objection. In particular, I argue that what makes moral rights seem metaphysically mysterious is the mistaken tendency to reify such rights. Once we understand what moral rights are and what they are not, we will see that rights talk is neither mysterious nor nonsensical. I then consider a second aspect of Regan's rights view that some critics have found "mystifying." I circumvent this objection by identifying and defending an alternative rights-conferring property. I conclude by pointing out the moral significance of these findings vis-à-vis our current treatment of nonhuman animals.

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1. Introduction

In his seminal and groundbreaking work *The Case for Animal Rights* (1983), Tom Regan advanced the most comprehensive defense of animal rights to date. There, he offers an argument from elimination to show that *the rights view* provides the best account of our moral duties to our fellow human beings. He begins by arguing that the other leading approaches to ethics fail: Utilitarianism fails because it sanctions sacrificing individuals for trivial gains in aggregate utility, something the rights view would never condone. Contractarianism fails because it entails that we have no direct duties to those humans (e.g., human infants and intellectually disabled humans) who are incapable of understanding the social contract. In contrast, Regan's rights view holds that all human beings have *equal inherent value*. Because all humans are equally inherently valuable, Regan argues, they have an equal right to be treated in ways that respect their inherent value.

What makes all human beings *equally* inherently valuable, according to Regan, is the fact that they are all equally *experiencing subjects of a life*.¹ He explains what it is to be a subject of a life as follows: "Individuals are subjects of a life if they are able to perceive and remember; if they have beliefs, desires,

¹ Here, for ease of exposition, I am bracketing pre-sentient human fetuses, anencephalic humans, and irreversibly comatose humans. Obviously, these humans are not experiencing subjects of a life. Regan argues that being an experiencing subject of a life is sufficient for having inherent value and the right to respectful treatment, but he never claims that it is necessary for having inherent value and the rights that such value bestows. To my knowledge, throughout his writings, Regan leaves it an open question whether pre-sentient human fetuses have rights. Since nothing in the present paper turns on whether these human non-subjects-of-a-life have rights, I will continue to speak of "all" humans being subjects of a life, "all" humans having equal inherent value, and "all" humans having the rights that such value bestows.

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and preferences; if they are able to act intentionally in pursuit of their goals or desires; if they are sentient and have an emotional life” (1983, 264). As such, subjects of a life are *someones*, not *some things*; they have biographies, not just histories; and they “have an *individual experiential welfare*, logically independent of their utility relative to the interests or welfare of others” (1989, 38). Since human infants, senile humans, and intellectually disabled humans are all equally experiencing subjects of a life, Regan maintains that they have equal inherent value and the same right to respectful treatment as all other human beings.

Having argued that all subjects of a life have equal inherent value, Regan next observes that humans aren’t the only animals who are experiencing subjects of a life. Many nonhuman animals are also subjects of a life in that they, too, are conscious creatures with preferences and individual welfares that are important to them; they “want and prefer things, believe and feel things, recall and expect things” (2016, 11). Since these animals are also experiencing subjects of a life, Regan concludes that they too have equal inherent value and an equal moral right to be treated in ways that respect their value, and as such, they cannot be used as a mere means to our ends. When we treat inherently valuable animal subjects in ways that reduce them to the status of “things,” we fail to respect their inherent value, we violate their rights, and we act wrongly, as a result. Since it is wrong to treat inherently valuable animal subjects as mere things, the rights view calls for “the total abolition of the use of animals in science; the total dissolution of commercial animal agriculture; [and] the total elimination of commercial and sport hunting and trapping” (2016, 3).

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Over the years, in numerous volumes (1983; 2001; 2003; 2004), Regan has defended the rights view from countless objections, but there is one objection which, to my knowledge, he has not addressed. I call it *the mysteriousness objection*. According to the objection, moral rights are wholly mysterious, metaphysically suspect entities. What exactly are they? Where do they come from? What is the fundamental basis or ground of moral rights? Given their unexplained character and dubious metaphysical status, the objection goes, we should be ontologically parsimonious and deny that such entities exist. Collectively, these reasons lead rights nihilists to echo Jeremy Bentham in insisting that talk of *moral rights* is “nonsense” and talk of *imprescriptible moral rights* is “nonsense on stilts” (Bentham 1838–43, 501). If moral rights talk is nonsense, then so is animal rights talk.

In what follows, I will first argue that Regan’s account of moral rights is immune to the mysteriousness objection. In particular, I will argue that what makes moral rights talk *seem* metaphysically mysterious is the mistaken tendency to reify such rights. Once we understand how Regan conceives of rights, we will see that rights talk is neither mysterious nor nonsensical. Indeed, we will see that rights ascriptions have readily satisfiable truth conditions. We will even see that utilitarians are committed to animals having moral rights. Next, I will address another aspect of Regan’s rights view that some critics (e.g., Stephen Sapontzis, 1987) have found “mystifying,” namely, his notion of inherent value. I will circumvent this objection by identifying and defending an alternative, much-less-mysterious, rights-conferring property. Finally, I will conclude, as Regan so often does, by pointing out the significance of these findings vis-à-vis our current treatment of nonhuman animals.

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2. Demystifying Moral Rights

Regan (1983, 266–73) follows both John Stuart Mill and Joel Feinberg in conceiving of moral rights as *valid moral claims*. He first cites Mill:

When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it,... If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it.... To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. (Mill 1861, 66)

To unpack the idea of “rights as valid claims,” Regan draws on Feinberg's highly influential analysis of moral rights. According to Feinberg: “To have a [moral] right is to have a [valid] claim *to* something and *against* someone, the recognition of which is called for . . . by the principles of an enlightened conscience” (Feinberg 1974, 43–44). Regan embraces the key elements of Feinberg's account of moral claim rights, which he summarizes as follows:

To make a claim thus involves both claims-to and claims-against. It involves claims-against a given individual, or many individuals, to do or forbear doing what is claimed is due, and it involves a claim-to what one is claiming is owed. Both these features of making a claim are crucial to the process of validating a claim that has been made. I cannot have a valid claim (i.e., a right) if I do not have a valid claim-against someone, and I cannot have a valid claim-against someone if that

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individual does not have a duty to me to do or forbear doing the act I claim is owed me. (1983, 271–72)

Thus, Regan conceives of moral rights as “valid claims that have correlative duties”² (1983, 266). As such, moral rights are valid moral claims about that to which the right holder is *duly entitled*. A moral claim is *valid* if and only if the claimant (or her proxy) is *justified* in making it.³ Since those who possess

²There are, of course, competing views of moral rights, but these views are irrelevant to the present project. My aim is to show that *Regan's* account of moral rights is immune to the mysteriousness objection. The fact that other conceptions of moral rights might be susceptible to the mysteriousness objection has no bearing on whether Regan's account is susceptible to the objection. That said, Regan's view that moral rights are “valid moral claims that have correlative duties” is widely held. We have already seen that Feinberg conceives of rights as valid claims *to* something *against* others. Wesley Hohfeld maintains that rights, in the strictest sense, are *claims*:

if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place. If . . . we should seek a synonym for the term “right” in this limited and *proper meaning*, perhaps the word “*claim*” would prove best. (1919, 38; my emphasis)

Joseph Raz makes the point as follows: “A person who says to another ‘I have a right to do it’ is not saying that . . . it is not wrong to do it. He is *claiming* that the other has a duty not to interfere. It is . . . a *claim* that there are some ways of interference which would be *wrong* because they are against an interest of the right-holder” (1994, 259; my emphasis). So, in showing that Regan's account of moral rights is immune to the mysteriousness objection, we remove a common but mistaken objection to *animal rights*, where such rights are understood as valid moral claims *against* moral agents *to* treat animals with respect.

³Since justification proceeds in terms of reasons, moral rights are grounded in non-mysterious moral reasons. The fact that suffering is intrinsically bad is a moral reason to refrain from inflicting suffering on others (without just cause). In light of this moral reason, for any subject S who is capable of suffering, S (or her proxy) can justly demand that others refrain from causing S

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moral rights are *duly* entitled to be treated in ways that respect their rights, moral rights generate corresponding *moral duties* on the part of others. Just who has these corresponding duties is a function of the right in question. For example, some moral rights are *acquired*, against *specific* individuals, as a result of voluntary agreements by all the parties involved. Suppose a borrower signs a promissory note agreeing to repay a \$2000 loan in two months time and a lender lends that borrower the money under the terms spelled out in the note. The lender then acquires the right to be repaid, and the borrower acquires a corresponding duty to repay the money borrowed. In such a case, the right is a right *to* repayment *against* one specific person, namely, the borrower. But other rights are neither *specific* nor *acquired*. Your moral right not to be killed is a valid claim against all other moral agents that they not intentionally kill you (without just cause), and you have this right quite independent of any contingent contractual agreements. I will follow Regan in referring to such non-acquired moral rights as *basic moral rights*.

Basic moral rights differ from legal rights in important ways. Legal rights are created by governments through acts of legislation and can be rescinded by those same governments by enacting new laws. As a result, what legal rights one possesses is a function of the laws at the time of the country in which one resides. In 1900, women in the U.S. did not have a legal right to vote. In 1920, women in the U.S. were granted the legal right to vote, but women in France still did not have a legal right to vote at that time. Thus, one's legal rights are contingent on the legislative actions of governments.

to suffer (without just cause). Accordingly, S has a prima facie right against moral agents to not be caused to suffer by those agents.

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Basic moral rights are not contingent in this way. They are not created by governments and cannot be revoked by them (though governments can violate them). Unlike legal rights, which have their basis in legislation, basic moral rights are grounded both in reason and in the fundamental moral status of their possessors. We rationally *judge* that certain individuals possess properties that morally entitle them to certain forms of treatment (or forbearance) on the part of other moral agents. Because these individuals are *duly* entitled to such treatment (or forbearance), they have a valid moral claim (i.e., a right) to be treated accordingly.

It is at this point that the mysteriousness objection is likely to emerge. The surface grammar of rights ascriptions naturally leads us to reify rights. Consider the ascription “John has a right not to be harmed.” The surface grammar suggests that there is a *thing*, viz., *a right*, which John possesses. Once rights are quantified over, it’s no surprise that philosophers start to worry about the ontological status of such alleged entities, their metaphysical basis, etc. But the surface grammar is misleading. Claims are not *things*; rather, they are performances/actions.

Feinberg shows us the proper path to the non-reification of rights with his distinction between *making claim to* and *having a claim*. Feinberg explains the difference as follows: *Making claim to X* is a speech act in which one demands *X* as one’s due (1973, 64). What, then, is it to *have a claim*? Feinberg suggests that: “*having a claim consists in being in a position to claim in the performative sense, that is, to make claim to*” (1973, 65). He continues:

If this suggestion is correct, then it shows the primacy of the *verbal* over the nominative forms [of “claim”].

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It links claims to a kind of *activity* and obviates the temptation to think of claims as things, on the model of coins, pencils, and other material possessions which we can carry in our hip pockets. (1973, 65; my emphasis)

Regan clearly endorses this Feinbergian performative sense of rights: “To make a claim is a performance; it is to assert that one is oneself entitled, or that someone else is entitled, to treatment of a certain kind and that the treatment is due or owed directly to the individual(s) in question” (1983, 271).

Once we realize that rights are valid moral *claims*, it is obvious that rights are not *things*.⁴ They are performances/speech acts (or potential performances/speech acts) by the right holder or the right holder’s proxy. They are morally justified demands (or potential demands) that the right holder be given what she is due. There is nothing mysterious or spooky about an individual being *duly* entitled to a certain form of treatment or forbearance on the part of another. And there is nothing mysterious or spooky about demanding that one be treated in the ways that

⁴ As Feinberg makes clear, moral rights in the performative sense are not concrete objects. A token speech act is neither a concrete object nor an abstract object. And while it is true that any token speech act will be an instant of a speech act type and types are abstract objects, rights—as valid claims—don’t reduce to speech act types, because some tokens of a speech-act type asserting a moral claim will be valid and other tokens of that type will be invalid. Consider the claim type ‘I have a right to an abortion.’ A token utterance of ‘I have a right to an abortion’ will be valid when uttered by a woman who will die if she carries her fetus to term, whereas a token utterance of ‘I have a right to an abortion’ will be invalid when uttered by a male. Thus, there is reason to think that moral claim rights are neither concrete nor abstract entities. As we will see, the truth of animal rights turns, not on the reified existence of rights, but rather on the truth conditions of animal rights ascriptions.

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one is duly entitled to be treated. Consequently, rights talk is not metaphysically suspect, and it is not nonsensical. Quite the contrary, rights ascriptions have clearly delineable truth conditions. Consider the basic (negative) right not to be harmed. The rights ascription “*S* has a basic moral right not to be harmed” is true if and only if *S* (or *S*’s proxy) is morally justified in demanding that all moral agents refrain from harming *S* (without just cause). The crucial point is this: One need not quantify over rights in order for rights ascriptions to have readily satisfiable truth conditions.

Given this understanding of what rights are (i.e., valid (actual or potential) moral claims), we can now see why even hedonistic utilitarians are committed to animal rights (albeit different rights than the utility-trumping right to respectful treatment that Regan champions). According to hedonistic utilitarianism, all sentient beings deserve equal moral consideration. Consequently, when carrying out our utilitarian calculations, we are morally required to give equal weight to the like interests of all sentient beings. If, however, we don’t give the same moral consideration to a pig’s interest in avoiding suffering that we give to our own interest in avoiding the same amount of suffering, then we have failed to give that pig the moral consideration she is *due*, and the pig’s proxy could justifiably demand that the pig be given the same moral consideration as every other sentient being. In short, given the correct understanding of moral rights as valid claims, utilitarianism entails that all sentient beings have a right to have their interests considered equally with the like interests of all other sentient beings. (Note: This won’t be a utility-trumping right, but it will be a moral right—a valid moral claim—nonetheless.)

3. Inherent Value vs. the Capacity to Be Harmed

For Regan, the most fundamental moral right is the right to respectful treatment. What makes a being worthy of respect is the fact that that being has *inherent value*. Since, according to Regan, every subject of a life has equal inherent value, every subject of a life has a right to be treated in ways that respect that value.

As Regan himself notes, “Some critics (Sapontzis 1987) allege that the idea [of inherent value] is ‘mystifying,’ meaning that it lacks any clear meaning” (2001, 18). Regan responds to this criticism as follows:

the notion of inherent value is no less ‘mystifying’ than Kant’s idea of end in itself. As applied to human beings, Kant’s idea of an end in itself is an attempt to articulate the cherished belief that the value or worth of a human being is not reducible to instrumental value.... All that the rights view alleges is that the same moral judgment be made in those cases where non-human animals who are subjects of a life are treated in a similar fashion. (2001, 18)

While I don’t find the notion of inherent value mystifying, those critics who do are likely to find Kant’s notions of human dignity and inherent worth equally mystifying. So, it would be good if we could identify a rights-conferring property that Regan’s critics won’t find mystifying. That is what I will attempt to do in the remainder of this section.

Elsewhere, I have argued that when identifying a rights-conferring property, “the property picked must have some *plausible rationale*. There must be some *reason* for thinking that

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possessing the property in question is necessary and sufficient for possessing [the right in question]” (Engel 2016, 46). What property must a being possess to have a prima facie right not to be harmed? As Feinberg (1974) rightly notes, all and only those beings with *welfare interests* can be harmed or benefited in morally significant ways. Since any being capable of being harmed has a welfare interest in not being harmed, it is plausible to think that the right not to be harmed is rooted in *the capacity to be harmed*. Since sentient beings are harmed when they are forced to suffer, sentient beings have a right not to be harmed. In short, there is a *highly plausible rationale* for picking *sentience* as the morally relevant rights-conferring property: Any sentient being has welfare interests and the capacity to be harmed, and any being with the capacity to be harmed has a right not to be harmed.

While Regan insists that the fundamental moral right is the right to respectful treatment, I submit that the fundamental moral right is *the right not to be harmed*. It’s also plausible to think that sentient beings with a life worth living are *harmed* by premature death. To see why, consider our commonsense understanding of *harm*. To harm a being is to make that entity worse off than that being otherwise would have been.

Harm: For any being *X*, action *A* harms *X* if and only if action *A* makes *X* worse off than *X* otherwise would have been, had action *A* not occurred.⁵

⁵ An anonymous referee [hereafter, R] objected to my use of this commonsense account of harm with the following standard objection: “Suppose my welfare is currently sky-high (a 10 on a scale of 10) because I’m eating my favorite cereal, but later my favorite cereal is replaced with a slightly less pleasing cereal, bringing my welfare down from 10 to 9.8. This hardly seems like a harm, yet the author’s account implies otherwise since I’m *worse-off*”

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It follows from **Harm** that not all deaths are harms. The death of a terminally ill, incurable cancer patient wracked with pain is not a harm. Every additional day such a person lives makes her/him worse off. Death, in such cases, is a relief, a benefit.

We can use this general account of harm to explain when death harms an animal:

Harmful Death: Death harms an animal to the extent that it results in that animal's life containing less net well-being than it would otherwise have contained.

than I would have been had I continued eating my favorite cereal." First, **Harm** is intended to capture our intuitive commonsense understanding of harm—to harm a being is to make that being worse off than she otherwise would have been. Second, if R is made *worse-off* by having R's favorite cereal replaced by R's second favorite cereal, *as R acknowledges in the quoted objection*, then R is harmed by having R's favorite cereal replaced by R's second favorite cereal [Not all harms hurt.]. Third, counterfactuals are context dependent. Since harm ascriptions are cashed out in terms of counterfactuals, they too are context dependent in the sense that conversational context determines what the salient counterfactual alternative action/treatment would have been [see Norcross 2005]. Suppose the alternative to taking away R's favorite cereal and replacing it with R's second favorite cereal were taking away R's favorite cereal and replacing it with nothing. If the latter were the conversationally salient counterfactual alternative, then replacing R's favorite cereal with R's second favorite cereal would be a *benefit* since R is better off having R's second favorite cereal than having no cereal at all. Fourth, the point of introducing **Harm** is to explain when death is a harm. **Harmful death** makes the contextually salient alternative (i.e., *not being killed*) readily apparent. If killing a being B would result in B's life containing less net well-being than B's life would have contained, were B not killed, then killing B harms B. There is nothing particularly controversial here. Stephen Luper makes the same point in his *Stanford Encyclopedia of Philosophy* article on death: "To decide whether a person's death is bad for that person, we must compare her actual welfare level to the welfare level she would have had if she had not died" (2014, section 3.1).

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Prematurely killing a healthy, sentient being with a life worth living results in that being's life containing considerably less net well-being than it would have had if that being were allowed to live, and thus harms that being. Since sentient beings have a right not to be harmed, and premature death harms any sentient being with a life worth living, the sentience-based right not to be harmed entails the right not to be killed. On this view, the right not to be killed only extends to those situations where death is a harm. This claim requires one important qualification. If the reason a sentient being B does not have a life worth living is because B's right not to be harmed is systematically being violated, then killing B would still violate B's right not to be killed, because the proper rights-respecting remedy to the situation is to stop harming B and to allow B to live the worthwhile life that B is capable of living.

4. Conclusion

I have argued that moral rights are not spooky, mysterious, metaphysically suspect entities, but rather are actual (or potential) speech acts that *make a valid moral claim*. So understood, moral rights ascriptions are *true* just in case the rights holder (or the rights holder's proxy) is morally justified in demanding the treatment (or forbearance) in question from the parties in question. Finally, I've argued that sentience confers both the right not to be harmed and the right not to be killed (when death is a harm, i.e., when death reduces *net* well-being). These conclusions have far-reaching moral implications regarding our current treatment of nonhuman animals. To see why, consider just four of the ways humans routinely treat animals.

- Worldwide, over 60 billion land animals are reared and slaughtered for food each year (FAOSTAT 2012), nearly all of whom are subjected to some

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form of mutilation *without anesthesia* (including branding, dehorning, debeaking, tail docking, and castration), forced to live in filthy, massively overcrowded sheds with no straw or bedding, and slaughtered at a fraction of their natural lifespans.

- 50–100 million animals are experimented on annually in scientific laboratories around the world. (Nuffield Council on Bioethics 2005, 7) Regan highlights the some of the kinds of research conducted on animals: “Experimental procedures include drowning, suffocating, starving, and burning; blinding animals and destroying their hearing; damaging their brains, severing their limbs, crushing their organs, inducing heart attacks, ulcers, paralysis and seizures” (2012, 108). By the researchers’ own admission, much of this research causes the animal subjects “significant and sometimes extreme pain, distress, and injury” (Garrett 2012, 3). Many die as a result of the experiments. Those that survive are typically killed at the end of the experiment, having outlived their scientific usefulness.
- Every year, 41 million animals are killed for their fur. Methods of killing include trapping, compression, gassing, and anal electrocution.
- Each year in the U.S. alone, over 200 million animals are killed for fun by sport hunters. Many of these animals are wounded and die slow painful deaths, before eventually being tracked down and retrieved, if retrieved at all.

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No reasonable person can deny that treating sentient animals in these ways harms them. So, if sentient animals have moral rights, including *the right not to be harmed* and *the right not to be killed*, then all of these practices systematically violate their rights and ought to be abolished. Indeed, if sentient animals have the right not to be harmed and the right not to be killed, no other human activity is responsible for a greater number of rights violations than our current treatment of animals. Given the common-sense case for non-reified animal rights delineated above, *justice*—not kindness—demands that we refuse to participate in the above practices and that we actively work to bring them to an end. In particular, *justice*—not kindness—requires that we *actively refrain* from eating animals, wearing animals, hunting animals, and using products tested on animals. To do any less is to participate in an unjust practice and to act wrongly where animals are concerned.

As this issue of *Between the Species* is dedicated to celebrating Tom Regan's life-long contributions to animal rights philosophy, it is only fitting to let Tom have the last word:

Animal rights is a simple idea because, at the most basic level, it means only that animals have a right to be treated with respect. It is a profound idea because its implications are far-reaching. How far-reaching? Here are a few examples of how the world will have to change once we learn to treat animals with respect.

- We will have to stop raising them for their flesh.
- We will have to stop killing them for their fur.
- We will have to stop training them to entertain us.

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- We will have to stop using them in scientific research.

Each example illustrates the same moral logic. When it comes to how humans exploit animals, recognition of their rights requires abolition, not reform.... Whether we exploit animals to eat, to wear, to entertain us, or to learn, the truth of animal rights requires empty cages, not larger cages. (2004, 9–10)⁶

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