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Towards an interspecies health policy : great apes and the right to health

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Citation

Nieuwland, J. (2020, May 13). *Towards an interspecies health policy : great apes and the right to health*. Retrieved from <https://hdl.handle.net/1887/87894>

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Issue Date: 2020-05-13

3. How interests generate moral rights

Starting from interests, moral theory plays an important role in further determining our obligations towards animals. In section 3.1, I will point out the differences between a will-based and an interest-based account of rights to then argue in favor of the latter. My argument can be read as a consistent extrapolation of an interest-based approach to human moral rights. If one accepts that interests do much of the justificatory work with regard to moral rights for humans, it may consequently be presumed that animals have certain rights as well. This conclusion falls in line with the theory presented by the political theorist Alasdair Cochrane which is discussed in 3.1.2. Fully agreeing with the plausibility of a *prima facie* moral right not to be made to suffer and a right to life, I also endorse the claim that the lack of autonomy entails a lack of an intrinsic interest in liberty. However, following from the understanding of well-being developed in chapter 1, animals should acquire sufficient opportunities to explore and develop possible lives available to them. Although animals have no intrinsic interest in liberty due to a lack of autonomy, their interest in freedom of opportunity does challenge the restriction of freedom. The reason for this is not because any restriction of freedom impinges negatively on their experiential welfare but because they are withheld not only the opportunity to experience a greater level of freedom but also to take decisions at the level of macro-agency. It is up to the individual animal, if this decision-taking falls within her/his range of capacities, to decide on the level of freedom. On this account, freedom of opportunity is an aspect of well-being, which differs from inviolable liberty rights resulting from autonomy. The implications of acknowledging the interest in freedom of opportunity are nonetheless rather considerable. In the chapter 4, I will bring this account to bear on the issue whether animals could have a right to health.

3.1 An interest-based theory of moral rights

Considering the conception of well-being as outlined in chapter 1, what does this further entail in terms of obligations towards animals? An answer to this question demands an ethical theory. A conception of well-being presents us with an idea about what matters to individuals, not precisely what others should do in terms of moral obligation.

Let us set off from the assumption that humans have moral rights, as discussed in chapter 1. How does this affect our moral obligations to animals? In order to address this question, we must take a closer look at the nature of human moral rights. Which philosophical foundation

has been provided to support the claim of human rights? And, how does this affect the extent to which animals have similar entitlements? The distinction between will-based and interest-based understandings of moral rights provides a good place to start addressing these issues.

Rights comprise a significant moral protection of individuals. Accounts of moral rights generally invoke a Hohfeldian understanding of rights in reference to the legal scholar Wesley N. Hohfeld (1879-1918), whereby claim-rights involve a demand on others in terms of corresponding duties. Such duties may require non-interference on the account of the duty bearer, for example by not damaging or stealing someone's property. It may also call for efforts to ensure that the right-holder can enjoy his or her rights, which applies in the case of the right to education. In all these instances, the rights of individuals correspond to the duties of others. Moreover, these duties can either be claimed or waived by the right-holders.

Philosophers and legal scholars disagree on what it takes to hold any rights. One side of the discourse that pertains to the interest-based theory of rights having interests provides a plausible underpinning for moral rights. It is argued that "X has a right if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty" (Raz 1986: 166). On the interest-based account, interests present a necessary condition for being a right-holder. Only beings with interests can possess moral rights. However, if rights were to protect all conceivable interests, this outcome would shake up our concept of what we could reasonably expect from each other. My trivial interest may need significant efforts from others, a requirement many would judge an unreasonable demand (Cochrane 2012). Proponents of an interest-based theory of rights therefore understand interests as a necessary but not sufficient condition for rights. The latter applies if interests are important enough. Whether an interest deserves any protection by rights depends on its significance and should be of sufficient importance in order to hold others under a duty.

On the other side of this debate, the will or choice theory of rights prefers the capacity of autonomous choice above interests to ground rights. One does not view relevant interests as a necessary and/or sufficient condition for rights. Instead, this viewpoint holds that rights presuppose the ability of individuals to either claim or waive one's right. Several groups (e.g., children, mentally incapacitated, future generations) as well as animals are left unfit to bear any rights (Feinberg 1974). While beings lacking any form of autonomy are not excluded

from moral consideration, moral rights on such an account require by definition the capacity to either claim or waive one's rights.

Proponents of a will-based approach to rights are consequently presented with a bullet to bite. Do humans without the capacity to make any autonomous choices really miss out on moral rights? Critics will quickly point out, as Joel Feinberg (1974) has done, that whereas a number of humans cannot claim their own rights, others can represent them to then claim their rights by proxy. If one believes that humans who lack the ability to make an autonomous choice still possess certain rights, this could perhaps indicate that autonomy provides us with a sufficient but not necessary condition to hold rights; not all rights-holders are autonomous agents. Autonomy may well be associated with certain specific rights without excluding the possibility of rights grounded on something else. Could interests perhaps create a sufficient condition for rights as well? If one understands rights as the robust protection of individuals against trade-offs, then it remains unclear why this should involve autonomous agency. Maybe the protection against trade-offs captures the nature of a moral right? Whether a moral right tracks the interests of autonomous agents specifically appears a less defining trait of what creates a moral right. Feinberg questions the need for any second-order reflection in order to take the interests of non-autonomous beings into account. The protect-worthiness of those interests rather than an ability to reflect on them executes the justificatory work related to moral rights.

Another reason for favoring an interest-based account of moral rights is: it delivers a better justification of certain rights held by autonomous beings e.g., the human right directed against torture. The will-based theory of rights will explain how torture severely restricts the autonomous agency of individuals by violating one's psychological and physical integrity (Griffin 1986). Needless to say, any abuse is also precisely reprehensible for how it feels, thus not only pertaining to how it affects one's autonomous agency. Interest-based theorists emphasize this aspect, pushing it forward as being worthy of rights protection. An interest-based account "provides a more natural and secure style of justification for paradigmatic human rights, one that is both less counter-intuitively circuitous and less of a hostage to contingencies ... the right not to be tortured can be interpreted as resting directly, in key part, on the victim's interest in avoiding severe pain" (Tasioulas 2014: 663). Interests may well explain why non-autonomous humans too have the right not to be tortured. Whereas the restriction of autonomous agency is indeed a severe harm, it does not appear to forward a

complete explanation of why one should be protected against torture in the first place. Needless to say, on a will-based theory of rights, one's interests in avoiding any infliction of severe suffering by others could also be explained in terms of one's interests. If one recognizes the importance of the interests of autonomous agents not to suffer severely as a result of how it feels, why should we then not acknowledge these interests of non-autonomous beings as possible grounds for the protection of rights?

Based on the above-mentioned considerations, the interest-based theory of rights provides us with a plausible approach to moral rights. It is not my aim to present the complete defense of either an interest-based approach in itself or in comparison with a will-based theory. Rather, the aim is to explore the implications following from an interests-based theory, in particular with regard to great apes. Even if we agree upon this assumption, plenty of philosophical labor still lies ahead of us, as a commitment to an interest-based theory of rights does not come with either a well-defined set of rights or with an agreement among theorists of animal rights. Disagreement on the extent of moral rights follows from the specification and comparison of interests rather than from the interest-based theory of rights itself. The rather general depiction which Raz (1988) delivered pertaining to an interest-based theory of rights may lead to various accounts of rights whereby a great deal depends on the reasons one forwards in order to explain the sufficiency of particular interests to warrant protection by rights. In 3.2 (see below), I will discuss how one sets off from interests to arrive at moral rights by taking a closer look at Alasdair Cochrane's theory, which is one of the first fully articulated versions of an interest-based theory of animal rights.

3.2 From interests to rights

In his recent publication (2012) entitled *Animal Rights Without Liberation: Applied Ethics and Human Obligations*, Cochrane has developed an interest-based theory of animal rights. Its central premise can be traced back to Feinberg's (1974) well-known defense whereby animals are considered as possible rights holders based on their interests, which falls in line with the Razian conception of interest-based rights as discussed above. In that sense, while inspired by Singer's utilitarian defense of animal welfare (indebted, in turn, to Bentham), the emphasis lies on sentience and interests in understanding our moral obligations towards animals while at the same time fitting into a framework of moral rights. In the process, Cochrane provides us with an alternative understanding of moral rights countering Tom Regan (whose philosophy aligns with Immanuel Kant's) who based his account of moral right

on the respect for the inherent value of animals (Regan 2004). Rather than relying on the concept of inherent value, as Regan does, Cochrane opts for the moral leverage of interests. Moreover, rather than utilitarianism, the framework Singer prefers, Cochrane pursues moral rights instead. The theoretical discussion has for a long time mainly revolved around the opposition of respectively Singer's utilitarianism and Regan's moral rights. Cochrane uncovers the fruitful ground positioned between these points of view.

Interests thus now take center stage. Interests have been understood in the sense that "if something is in my interests, the satisfaction of it will make my life better, while the frustration of it will make my life worse" (Cochrane 2007: 296). As components of well-being, interests involve prudential value; it "concerns how life goes for the individual whose life it is" (Cochrane 2007: 296). This observation does not imply that whatever one prefers at a given time reflects one's interests. It may be added here that Cochrane remarks that individuals may be wrong about what lies in their interest, for example, when they wish to injure themselves.

Considering this theoretical framework, the question arises: which interests ground a right? As discussed earlier, not all interests do so. Only sufficiently important interests are able to generate moral rights. One may commence by looking closer at the practice of human rights which may provide us with a moral baseline for animal rights founded on the interests humans and animals share.⁴⁶ The right not to be tortured appears to fit the bill concerning such an account, as the interests between humans and animals with regard to this right reveal a considerable overlap. However, one could object that this observation makes the case for animal rights being contingent on human rights without providing a basis for such rights to begin with. The issue of justification would then be sidestepped, because it relies on the justifications of those rights rather than providing a justification itself.

It is suggested that moral rights will be carved out in the light of "competing interests and their strengths, as well as the burdens on the potential duty-bearers" (Cochrane 2012: 42). Such a proposal implies at a minimum that, in order to provide for the interest of others, individuals need not seriously compromise their own interests; the burden should be reasonable. What does this entail? It could be postulated that granting animals rights based on

⁴⁶ See also Berkey 2017.

their interests, for example the right to life, would demand too much of humans, especially because animals can serve human purposes (Cochrane 2007). Nevertheless, while the infringement of animal interests to further human interests forms a central aspect of numerous human societies, it is often not necessary. In other words, there is no frequent need to compromise any basic human interests in order to protect the basic interest of animals. Thus, at one point in time, survival would imply the killing of animals. At present, however, alternative food sources are available to large groups of people. The availability of alternatives does not immediately provide animals with the right to life but does challenge the thought that putting an end to slaughtering animals for food would overburden the possible duty holder (Donaldson & Kymlicka 2011).

By and large, however, the existence and extent of duties are in the eye of the beholder. Libertarian versions, limiting rights and obligations to the bare minimum, as well as full-fledged cosmopolitan accounts could exist, hereby imposing an array of positive obligations on duty-holders. Criteria such as necessity and assuming the burden placed upon duty holders to be reasonable does help but nevertheless leaves ample room for a different account of an interest-based theory of rights. I will return to this quandary below.

First, if one succeeds in providing plausible grounds for generating moral rights, as Cochrane reflects on, what will happen if the rights of different individuals conflict? How does this affect the translation of interests into rights? The ubiquitous limit to resources renders conflict inevitable. This fact touches upon the nature of rights. If rights impose demands that cannot be trumped by means of other interests or considerations, how should we deal with any conflicts of rights? Does the idea of moral rights result in an inevitable, permanent stalemate?

This issue could be dealt with by distinguishing between abstract or *prima facie* rights on the one hand and concrete rights on the other, where “*prima facie* rights are not ‘all things considered’ rights, but rights that are established via a more general judgment about whether an interest is sufficient to impose a duty on another ... [they] can meaningfully conflict and will inevitably conflict” (Cochrane 2012: 45). Access to healthcare serves as an example to further support his newly acquired viewpoint. All kinds of individuals may hold the abstract right to have access to health care based on the general judgment on the importance of having such access and the demand placed upon duty holders. However, because distributive issues are inevitable, further specification as well as an evaluation of the interests involved is called

for. Contextual considerations thus determine if one also holds a concrete right to receiving health care. As suffering from minor ailments would require high costs to resolve at the expense of making treatment available to those affected by more serious diseases, one could argue that members of both groups hold a *prima facie* right to health care, whereby only the latter can benefit from a concrete right in this specific situation. Recognizing concrete rights thus largely depends on contextual consideration.⁴⁷

With the distinction of *prima facie* and concrete rights, let us now return to the issue raised above with regard to what specifically generates moral rights and its accompanying duties. How do I understand the basis of these rights in this thesis? On an account of justice, including Cochrane's, one generally starts from the self-interests or goods of the beneficiaries of justice. Individuals are in competition with each other to secure their own projects and interests in life against the background of scarce resources. We need distributive justice and the framework of rights in order to make sure everyone gets what they deserve. Anything above that requirement is voluntary and not subject to the scope of justice. In the end, also on Cochrane's account, rights are intimately tied to self-interest, leaving it vulnerable to libertarians who do not feel that they should hold any substantial duties so as to safeguard the right to health of others.

We need not follow this path. Instead,

The construction of an edifice of rights can ... be seen, as [David] Hume saw it, as a device for extending the reach of natural compassion and for securing the goods that compassion enables to all persons in a society. For, he saw, compassion is a natural endowment of the human being, present in each of us as the innate attitude toward those close to us—those for whom we care and those who care for us. (Garfield 2001: 199)

Hence, rather than taking competing self-interests in the public domain as starting point, we could start from the natural capacity to care for those near and dear and extend the reach of our compassion beyond the confines of our private lives. As Jay Garfield highlights in

⁴⁷ One might object that this remark perhaps steers too much towards a consequentialist rather than a rights-based view. Does the weighing of interests render Cochrane's account to now be consequentialist? This issue will be dealt with in the discussion on the animal right not to be made to suffer (see 3.3).

contrast to, for example, Buddhist Philosophy, not many have taken this route when dealing with the history of Western Philosophy, of which David Hume (1711-1776), Arthur Schopenhauer (1788-1860) and more recently, ethics of care theorists such the developmental psychologist Carol Gilligan and the feminist philosopher Josephine Donovan are prominent exceptions.⁴⁸ A certain degree of affiliation exists with utilitarianism. For, a compassionate outlook devalues suffering just as much wherever it is found, cutting across the contingent borders of membership of species, nation, generation, etc. Unlike utilitarianism, however, compassion involves affective engagement with the suffering of others, culminating in the personal “wish for others to be free from suffering” (Goodman 2010). Intention matters, keeping at bay any utilitarian inclinations, such as aggregation of welfare and preoccupation with consequences (Fink 2013).

Amidst the vibrant complexity of daily life, acting with compassion is hard. If we find ourselves in a more reflective mood, perhaps it is not so difficult to endorse human rights as an ideal. Perhaps this is why we should see *prima facie* rights as generated out of compassion, providing the incentive to act with compassion whenever we have to determine the demands of concrete rights of others in real life. So, in response to the libertarian, Cochrane could refer to human’s natural endowment of compassion for those near and dear, and the way in which rights secure interests that many would emphatically endorse on an abstract level. The normative force of such a response is derived from questioning the moral relevance of who suffers. As Garfield (2001: 199) puts it,

in short, others' rights generate claims on us not because of the brute fact of rights-possession, but rather because of the brute fact that those others are seen *not* to be *other*, but rather as *our own*. And hence they have a claim on our feeling. Rights are on this account not insignificant: they have a central moral role in gaining recognition, in giving specificity to claims for action, and even as tools against those who withhold recognition. But without a foundation in the compassion that recognition facilitates, rights become pointless.

Instead of being something beyond the demands of justice, compassion provides a bedrock for developing moral rights, especially when understood along the lines of an interests-based

⁴⁸ Notably both Hume and Schopenhauer support rights generated from compassion, whereas ethics of care ethicists in general are more wary of the rights-discourse because of its associations with patriarchal reasoning.

theory. Moreover, rights facilitate compassionate action when we take prima facie rights as compassionate ideals, as a reminder when determining concrete rights that “those others are *seen* not to be *other*, but rather as *our own*” (Garfield 2001: 199).

With this elaboration on the question of how interests generate rights, let us recap Cochrane’s account of moral rights. Central to his theory is the claim that sentient beings have interests, rendering them eligible to hold moral rights. It is *an interest-based theory of moral rights*. Interests that suffice to impose duties upon others are plausible grounds for rights protection. These interests in turn give rise to abstract or prima facie rights. Depending on contextual considerations (including demands of feasibility) these rights can translate into concrete rights.

3.3 The moral right not to be made to suffer

Which kinds of interests are worthy of rights protection in Cochrane’s view? One of the most basic interests of a sentient being comprises an interest in avoiding suffering. This interest is comparable across species to the degree that individuals are sentient. Cognitive capacities (e.g., rationality) cannot discount the interests of less cognitive complex animals whenever the subjective experience of suffering is relevantly similar as with the example of a dog breaking a bone. Cochrane (2012: 55) argues that cognitive capacities may be relevant in the sense that they either make it better or worse for the individual who suffers. Cognitive capacities could enable certain future-oriented concerns, for example, when an athlete is injured just before an important event. He or she may suffer additionally from the prospect of being unable to perform in the near future. Conversely, the ability to reflect on one’s first-order thought may also provide comfort. The athlete can anticipate pain relief, whereas the dog is unable to think such mitigating thoughts. Thus, with regard to suffering, although one’s cognitive capacities play a role, at the most basic level, sentience provides individuals with the ability to suffer. Cochrane opines that sentience and its associated vulnerability provides a strong case for a prima facie moral right not to undergo any suffering brought on by others.

If humans, regardless of their cognitive capacities, possess the prima facie moral right not to be made to suffer, then the same reasoning applies to animals as well. Cochrane’s argumentation hinges on the “argument from marginal cases which involves a comparative argument that takes moral obligations towards people with cognitive disabilities or young

children as a reference point for moral obligations towards animals.”⁴⁹ In doing so this argument points out the inconsistencies in the treatment of beings with relevantly similar capacities. Recalling Singer’s criticism of speciesism, it remains unclear how species-membership in itself can be of any direct moral relevance with regard to interests such as the avoidance of suffering. An unequal consideration of similar interests would therefore be unjustified.

What does such emphasis placed on sentience entail for practices which impose a level of suffering on animals? To what extent does the specification of rights when viewed in the light of contextual considerations allow for such harm? As Cochrane points out, “one cannot justify painful experimentation on animals solely by appealing to its contribution to medical progress. Human experiments are normally morally unjustifiable because human beings have rights not to be subjected to painful and invasive procedures” (Cochrane 2007: 301). Thus, whereas the *prima facie* right not to be made to suffer requires further specification in order to arrive at a concrete right, even if the stakes are high and it is assumed that animal experiments contribute to human interests,⁵⁰ the fact that humans and animals share the relevant interests is sufficient to uphold a concrete right for both.

As to the importance of sentience in explaining the interests in avoiding suffering, I consider this argument to be compelling, especially if one assumes that humans hold the moral right not to be made to suffer irrespective of their cognitive capacities. This assumption I share. Matters may differ when pertaining to the interests in continued life. It is frequently opined that death harms humans more than it does animals (DeGrazia 2016a). To what extent do animals hold a right to life based on their interests in continued life?

3.4 The moral right to life

As discussed in chapter 2, animals do indeed have interests in continued life. Relevant differences have been noted between individuals: animals with a high psychological unity are more harmed by death than creatures with less psychological unity. The value of future goods

⁴⁹ The argument of marginal cases is controversial. It has recently been described as the argument from species overlap (Horta 2014), which among other things removes any demeaning associations such as seeing humans that diverge from normal adult functioning as “marginal”. For, this “perpetuates a deeply problematic conception of neurotypical human cognition as defining the core of moral status, and treats other forms of subjectivity as somehow deficient bases of moral status” (Donaldson & Kymlicka 2016d: 87).

⁵⁰ For an in-depth discussion on the purported benefits of animal research, see 1.4.

is discounted in the light of the psychological unity overtime. Do these interests ground a right to life? Cochrane opines they do. His point of view is based on similar reasoning when compared to the right not to be made to suffer. Not all humans have acquired high levels of psychological unity over time. Despite lacking a robust ability to entertain future-oriented thoughts, an interest in continued life, irrespective of the extent to which the individual is aware of these goods in the future, securely buttress a right to life. The time-relative interests account carves out a position between desire-satisfaction and a whole-lifetime account by combining the strong points of both. It is aptly remarked that:

The desire-satisfaction view is correct that caring about or appreciating (and therefore desiring) one's future is relevant to the harm of death, but incorrect that one who does not appreciate or desire one's future loses nothing from having that future snatched away. The whole-lifetime approach is correct that appreciating one's own future is not necessary for having a stake in that future, but incorrect in thinking that such appreciation is irrelevant to the magnitude of the harm of death. (DeGrazia 2007: 67)

On this viewpoint, the future goods of non-autonomous beings are discounted in the light of psychological unity, but not to the extent they become worthless. Whether or not the value of future goods is sufficient to uphold the protection of rights should be the next consideration. Do all humans have sufficiently strong interests to ground a right to life? If the time-relative interests account is accepted as a justification for establishing a human right to life, then this should also apply to non-human and non-autonomous beings. As with the right not to be made to suffer, if one rejects speciesism, the interests involved should subsequently be weighed irrespective of species membership. This outcome implies that if the interests of humans with weak psychological unity suffice to buttress a right to life, the interests of animals with comparable psychological unity overtime should suffice, too (Cochrane 2012).

The normative strength of the right to life may differ across individuals. The interests of beings with high psychological unity overtime (e.g., great apes) will generate stronger rights than creatures with less psychological unity. Still, "birds do have at least a *prima facie* right to life. That right to life may be weaker than that possessed by more cognitively complex creatures, and so more easily overridden in certain circumstances, but that does not mean that the right itself should not be recognized" (Cochrane 2016: 206). This statement prompts the question as to which circumstances allow for the interests in continued life to be overridden.

If we would wish to kill the bird to eat it, it remains doubtful whether the reasons for doing so are strong enough indeed. In other words, it is not unreasonable, one could argue, for the interests in continued life to impose a duty upon others not to kill for food. The interest is sufficient to acknowledge a concrete right to life in this situation.

However, although alternatives pertaining to animal protein diets may exist, other ways of animal use appear to be more necessary: “we might claim that while the interest is sufficient to ground a general or *prima facie* animal right to life, this right is not supported in the context of medical experiments on animals” (Cochrane 2007: 309). Again, in response to this postulation, Cochrane develops his argumentation in the light of the argument of species overlap. If all humans hold a right not to be killed in experimentation, then animals with relevantly similar capacities and interests should have the same right. If we do not deem it acceptable to perform research on non-autonomous humans for reason of their interests in continued life, comparable interests encountered in non-human and non-autonomous beings should consequently also receive the kind of protection moral rights provide. The abstract and *prima facie* moral right to life is cashed out in terms of concrete rights for animals by means of a reference to the concrete rights of humans.

The comparative argument is put forward in order to justify not only the right not to be made to suffer but also a right to life. I assume both the methodology and the rights resulting from this line of reasoning to be plausible. In 3.5 (see below) I will focus on my disagreement with Cochrane’s theory, which pertains to the interests of animals living in freedom and whether this stance translates into animal liberation.

3.5 The moral right to freedom of opportunity

Whether animals possess the kind of interests in liberty to establish a right is as yet hotly debated among animal rights-based theorists (Cochrane 2009; Milligan 2015; Garner 2011; Giroux 2016) of which Cochrane has put the fox in the henhouse by arguing for animal rights without liberation. Theorists (Francione 2000; Regan 2004) have debated in favor of animal liberation, which involves animal rights including the right to be free from human domination. Based on such a view, animal use should be abolished, and animals set free. According to Cochrane, however, animals lack the required interests in bringing animal use to a conclusion and then demand liberation. Cochran arrives at this viewpoint by means of distinguishing between intrinsic and instrumental interests in liberty.

On an instrumental account, liberty only matters with regard to the way it contributes to other values e.g., pleasure. Opining this to be a misapprehension of the true nature of liberty, Cochrane illustrates his point by referring to the 1998 comedy/drama entitled *The Truman Show*, in which the protagonist's life is scripted and filmed for television without him being aware of this. Truman Burbank is forced to live a life without having the genuine ability to alter its course. Although he enjoys his life, its true nature hugely deceives him. To a certain degree, Truman is a "happy slave" who undergoes a rather strong restriction of autonomous agency without any negative consequences in terms of the levels of pleasure experienced in life. Therefore, pleasure in itself cannot explain Truman's interest in liberty. Another reason why liberty matters must exist. Cochrane states that an explanation of the importance of liberty in terms of preference-satisfaction also fails. A slave, for example, may have the desire not to be liberated from his or her master. If one assumes that enslavement irrespective of conditions violates the human interest in liberty, the preference-satisfaction view in itself fails to explain the reason why.

On what grounds now do humans have an intrinsic interest in liberty? It is claimed that for individuals such as Truman Burbank, it is in the "individuals' interests to have the freedom to frame, revise and pursue their own ends because they are autonomous agents" (Cochrane 2009: 666). An intrinsic interest in liberty is the outcome of one's capacity for autonomous agency. Therefore if, and only if, a being is autonomous, he or she has an intrinsic interest in liberty.

Perhaps autonomy need not imply an intrinsic interest in liberty. The instrumental accounts of liberty as discussed above could be amended in order to address their inability to explain the importance of liberty. Certain theorists have included autonomous endorsement as a condition for genuine well-being. Cochrane refers, among others, to the theory proposed by Sumner (see also chapter 2) in which "humans have an interest in liberty only in so far as liberty promotes the pleasure of a self-governing subject" (Cochrane 2009: 665).

The problem with such an approach, according to Cochrane, lies in the fact it ultimately presupposes the intrinsic interest in liberty without providing any justification. The intrinsic importance of liberty sneaks into Sumner's account as it merely acknowledges happiness when endorsed by a self-governing subject. In this way, "the relevant intrinsic good is no longer mere pleasure or mere preference satisfaction; instead, liberty itself is recognised to be

of intrinsic value. In other words, these accounts only become plausible when they are altered to acknowledge the central importance of liberty itself for the lives of human beings” (Cochrane 2009: 665).

Does Sumner indeed presuppose an intrinsic interest in liberty? Both Cochrane and Sumner do indeed underline the importance of autonomy in their theories. The former does so in order to claim the intrinsic value of liberty without much further argumentation. The capacity for autonomy entails an intrinsic interest in liberty. Sumner, however, aims to account for autonomy in developing his subjective account of well-being. The nature of well-being involves self-assessment to be carried out by the subject, and Sumner takes autonomy as the capacity required in order to execute such a self-assessment.

In Sumner’s opinion, liberty is important to the extent that it contributes to and enriches one’s life. In this manner, any interest in liberty becomes instrumental; the intrinsic interest in liberty that Cochrane purports evaporates. Sumner does recognize autonomy as vitally important, but only for the way it enriches one’s life; not to put forward an intrinsic interest in liberty. If liberty does not enrich one’s life, it has no value, which prompts the following argumentation:

I can find no ethical value in promoting achievement or knowledge or liberty, or any personal good, if no one at all will be better off for it: neither the person whose good it is nor anyone else. To my mind, the value of these states of affairs is adequately captured by the role they play in enriching our lives; there is no remainder which requires independent acknowledgment beyond this prudential payoff. (Sumner 1996: 202)

Being free from enslavement is important because it contributes to one’s own happiness. Freedom makes one better off. Understanding the restrictions that enslavement imposes, virtually all humans would opt for freedom for reasons of well-being. An intrinsic interest in liberty does not appear necessary. Autonomy is important because it enables a subject to choose the most satisfying life. In the end, its value is instrumental to the intrinsic value of well-being. It therefore remains unclear whether an intrinsic interest in liberty indeed follows from autonomy. Perhaps all interests in liberty are instrumental rather than intrinsic.

Either way, even if all interests in liberty were instrumental, as on Sumner's reading, the supposed lack of animal autonomy appears most relevant. The right to liberty may be denied when based on the dearth of autonomy, implying that non-autonomous beings i.e., those without "the capacity to frame, revise and pursue one's own conception of the good" (Cochrane 2009: 665) also lack the kind of interests that would grant them a right to liberty.

All interests of non-autonomous beings in liberty are hereby not rejected. Restricting freedom of movement may lead to frustration and suffering, causing animals to have an interest in freedom at least to the extent that it is associated with the absence of negative experiences. However, if freedom indeed boils down to avoidance of negative experiences, it also appears to follow that one may restrict the freedom of animals in order to benefit others, too, as long as it does not induce any suffering and frustration. This is how Cochrane arrives at an interest-based approach of animal rights without the need for liberating animals, as they do not have interests in freedom as such.

Cochrane (2009) considers the following two challenges aimed at the pivotal role of autonomy to grant liberty rights to animals:

(a) the natural functionings argument, which Cochrane identifies in the accounts presented by Nussbaum (2006) and Taylor (2011). This line of thought or argument sets off from a broad conception of welfare-interests and fits into a teleological approach that could be traced back to the Greek philosopher Aristotle (384-322 BCE). On Nussbaum's account, animals (and on Taylor's account, all living beings) need to pursue their species-specific objectives, which could include freedom and does in fact amount to an objective list account of well-being. Nevertheless, when arguing from an experientialist account of well-being, as Cochrane does, it is unclear how these ends are morally relevant if they do not enter or affect the experiential well-being of the individual animal. The reason why animals should behave in accordance with how their conspecifics behave in nature remains open to question. Of course, severely restricting the freedom of movement of for example migratory animals may cause suffering and frustration, but should animals engage in species-typical ways when their inability to do so would not involve any negative experiences?

(b) an approach which takes issue with the notion of autonomy at play. As discussed in chapter 2, it has been postulated that many animals do possess a trait resembling autonomy. It

is argued that animals display preference-autonomy in the sense that “they have preferences and have the ability to initiate action with a view to satisfying them” (Regan,2004: 84-85).

Does the recognition of preference-autonomy then provide us with any grounds to recognize an animal’s right to liberty after all? Cochrane opines this is not the case because he rejects that preference-autonomy overlaps sufficiently with autonomy. No second-order reflection is involved here, merely volition. Preference-autonomy stretches the concept of autonomy too far, as it lacks a central aspect that accords autonomy with its particular relevance in political theory and moral philosophy (DeGrazia 1996). Cochrane proposes for the sake of the argument to presume that a broader conception of autonomy would be appropriate. Even then, if animals have preference-autonomy, this does not substantiate an intrinsic interest in liberty. He also suggests to, “consider, for example, an animal in a well-run wildlife park, who has all of his desires for food, company, stimulation, sex, and the like all satisfied” (Cochrane 2012: 76). This observation indicates that preference autonomy alone does not imply liberation, because it requires a satisfaction of the preferences. Most animals⁵¹ do not have either the preference or the intrinsic interests to be free in the sense that autonomous persons do. Thus, they do not have a right to liberty.

Is Cochrane correct in reporting that individual animals lack the ability to meaningfully opt for their own way of life? Are they in some relevant manner able to take such a decision? He argues that “sentient animals can make choices and act on those choices, but that is something quite different. Without the capacity to reflect on their choices, or on the reasons for their choices, animals are locked into their ends and goals in a way that most human adults are not” (Cochrane 2012: 73). Animals can therefore not rise above the immediate experience of the world around them in order to then make a major choice in how to lead their lives and give shape to what it means to live a good life. However, as argued above (see chapter 2), animals can take consequential decisions as to their subjective good on both a micro- and a macro level. Does this faculty not also create a significant instrumental interest in liberty? Moreover, how does this relate to the other instrumental interests of animals in liberty which Cochrane acknowledges?

⁵¹ For the argument that, for example, great apes and cetaceans may be autonomous in the required sense and that we should take a precautionary approach, see Cochrane 2012:12.

A significant gap between autonomy and preference-autonomy concepts remains. Personal cognitive capacities, in particular autonomy, are relevant in the way they enable individuals to make important choices regarding their subjective good. The capacity for autonomy opens up specific opportunities in order to reflect upon the course of one's life to the level that one, upon autonomous reflection, is truly satisfied with one's life, whereby each and every interest in liberty is satisfied. However, the significance of autonomy should not disregard the capacities of non-human animals to take meaningful decisions concerning their lives. Regan has a point when suggesting that autonomy modeled on adult human beings is not all there is in relation to freedom. Indeed, his understanding of preference-autonomy appears similar in relevant ways to that which has been described as agency in chapter 2. The ability of an animal to make meaningful choices and determine its subjective good may prove to be relevant to the issue of freedom.

Returning to Regan's discourse, we can apparently trace both micro- and macro agency back to preference-autonomy. Regan discusses two examples in which preference-autonomy is at work. In the first case, animals can take consequential decisions when familiar with the available options. Fido the dog may opt to run off instead of eating its food. This event largely falls within the scope of micro-agency: individuals make a choice within a predefined way of life. Regan argues that animals can also make meaningful choices when confronted with unfamiliar situations. Given the choice between its food or something new, to wit, interacting with an unfamiliar animal, Fido may go for the latter. This outcome may lie within the scope of macro-agency, which involves a choice regarding one's preferred way of life (if given an option) rather than a choice falling within a predefined way of life. This is merely a single instance of such a situation. A far greater involvement is encountered at the level of macro-agency. For example, determining how a new situation should be presented may take a little extra effort. Should more choices simply be made available for the individual to choose? Or, must various novel situations be tailored towards the individual's capacities and previous experiences as part of a process of training and familiarization (Haynes 2008; Donaldson & Kymlicka 2016d)? For, "one can easily imagine circumstances in which exposure to "alternatives", if presented in a void, would be a recipe for paralysis or anguish, not agency" (Donaldson & Kymlicka 2016d: 185). Especially at the level of macro-agency, one should enable the individual to, as much as reasonably possible, consequentially explore alternate ways of life, a process which involves more than merely offering alternatives. While Cochrane (2012: 73) states that "animals are locked into their ends and goals in a way that

most human adults are not”, he fails to consider the ways in which humans can unlock the potential of animals.

The interests of animals extend beyond the preferences expressed at a certain point in time. It does not suffice to claim that all interests in liberty are covered when each and every preference an animal happens to display are satisfied. We must also carefully look into how creatures end up with these specific preferences in order to then provide individual animals with opportunities to not only explore but also develop their own possibilities in line with their agential abilities. The instrumental interests in freedom may turn out to include freedom of opportunity.

Such a perspective dovetails with recent viewpoints on the subjective good of humans who do not possess full autonomy, such as those with cognitive disabilities and children up to a certain age. It has been indicated that concepts on citizenship for the two latter groups have evolved from “paternalistic protection from harms and provision for objectively-defined basic needs” (Donaldson & Kymlicka 2016d: 168) to exploring ways of enabling agency as much as possible.⁵² Going beyond satisfying any preferences individuals happen to have is implied here, because these preferences could have been the outcome of sub-optimal conditions. With regard to children, “paternalistic restrictions on freedom can lead to self-fulfilling prophecies, in which children lack opportunities to develop skills and competence, which becomes justification for the restriction” (Donaldson & Kymlicka 2016d: 182). The range of opportunities available to individuals hugely shapes their preferences. Donaldson and Kymlicka then transpose this way of thinking onto animals. For example, if one provides them with the option to decide on the terms of companionship, a number of critters may opt to spend more time with humans whereas others may choose for more independence. Humans greatly affect the ability of animals to make meaningful decisions, as

the potential scope for agency depends on engaging DAs [domesticated animals] as presumptive agents under less and less restrictive (but carefully scaffolded) conditions. The range of relevant options will vary for different species and breeds ... and the resulting choices will also vary with individual personality ... This process will inevitably involve a lot of trial by error and adjustment, but insofar as DAs can

⁵² Though I do not argue that animals require citizenship, this debate does present us with an interesting starting point to then reflect upon the subjective good of not fully autonomous beings.

explore meaningful options concerning the fundamental shape of their lives, it is tyranny to deny them opportunities to do so. (Donaldson & Kymlicka 2016d: 184)

Matters differ on Cochrane's account, whereby the prevention of suffering and frustration appears key. To him, it remains unclear to which degree humans have a moral obligation to offer animals the opportunity to broaden and explore their own preferences. This is a remarkable conclusion if one compares this with the way we look at moral obligations vis-à-vis non-autonomous humans. Cochrane draws this comparison continuously when establishing the plausibility of (a) the right not to be made to suffer and (b) the right to life. Granting non-autonomous humans the right not to be made to suffer and the right to life, Cochrane's theory denies them the right to liberty (Garner 2011; Giroux 2016). We are hereby invited to further investigate the right to liberty in the light of our obligations towards non-autonomous humans. Which moral obligations must we comply with in the case of humans who are not autonomous? How do these commitments affect our obligations towards animals? As Donaldson and Kymlicka have suggested, we perhaps need to consider non-autonomous individuals as presumptive agents to next provide them with a reasonable range of opportunities, whereby their interests are reflected in the process. The question now rises: under which conditions can animals take meaningful decisions?

Donaldson and Kymlicka inform their position by means of taking note of the developments regarding the subjective goods of people with cognitive disabilities and children. Based on this point of view, they endorse the concept of a "scaffolded choice" whereby certain background conditions need to be in place in order to enable macro-agency. Choices do not happen in a vacuum but presuppose the ability of individuals to choose. Indeed, animals lack the ability to reflect on their choices like humans. However, we could facilitate animals in various ways rendering their choices meaningful.

What does the term "scaffolded choice" entail according to Donaldson and Kymlicka? A first aspect of this type of scaffolding comprises basic socialization. Returning to Fido, this process involves, for example, when still a puppy (thus susceptible to socialization) to become familiar with humans, animals, and specific contexts which are/might be part of his social life. This process could further include a basic training which strongly resembles the commitments parents make when educating their children. This phenomenon involves paying attention to the context of future lives of youngsters and will include a number of standard

elements. Maternal deprivation, for example, can result in harmful consequences for individual animals later in life.⁵³

Developing and maintaining a stable social identity form a second aspect of a “scaffolded choice”. Here the fact is emphasized that individuals are unique and entitled to their own personality. At the same time the need of social individuals to be part of a particular community is highlighted. Individuals should be permitted to live the life which is truly theirs (i.e., not entirely determined by any references to species-typical behavior or by human interests).⁵⁴ In addition, they should be allowed to do so in a social context which retains its integrity over time. Here families are the first type of communities to come to mind, other social relations which have developed over time may also be considered. Next, one can “expose the individual (patiently, thoughtfully) to different opportunities, environments, activities and associates. We need to structure these opportunities so that she can make meaningful choices, and then we need to respond to those choices in ways which confirm her agency and set the stage for further opportunities, and further choices” (Donaldson & Kymlicka 2016d: 187).

The arguments forwarded by Donaldson and Kymlicka provide us with an innovative manner of looking into the interests of animals whereby the emphasis lies on their ability to determine their own subjective good. As discussed in chapter 2 (see 2.3-2.4), their account is compatible with the subjective understanding of well-being which Sumner and Haynes subscribe to in their publications. Although animals do not possess any intrinsic interest in liberty, their agency delivers a reason for presenting them with a reasonable range of opportunities in order to determine their own subjective good. One does not need to be autonomous to take meaningful decisions. The lack of autonomy does not imply that guardians can do whatever they please with animals as long as no suffering or frustration is caused. Rather, by acknowledging agency, one should allow individuals to carve out their own preferred way of life as much as possible, giving up overtly fixed ideas about what the interests of animals are. To some extent, the individual herself knows best, and what well-being involves emerges

⁵³ The Harlow Experiments provide the contested support of this claim. Maternal deprivation gravely affected the mental health of the rhesus monkeys, see https://en.wikipedia.org/wiki/Harry_Harlow [accessed 27 November 2018].

⁵⁴ The affinity between Haynes on the one and Donaldson and Kymlicka on the other hand becomes apparent in the way both emphasize the need for individuals to express their unique subjective good.

during the process of fostering agency. The process is of prudential value, both for epistemic and ethical reasons. This conclusion puts pressure on for instance the following conclusion:

the harms of animal agriculture derive from the suffering and killing inflicted upon animals, rather than their use. Their use is not problematic in and of itself, because, as non-persons, animals have no interest in framing and pursuing their own freely chosen ends ... In other words, raising animals for their milk and eggs can be permissible when it avoids the routine infliction of suffering on and killing of animals. (Cochrane 2012: 87)

This may be too low a standard. Moreover, it need not be the outcome of an interest-based account of rights. Instead, though benefitting from animals is not necessarily incorrect, animals should be presented with a reasonable range of opportunities with which to explore and develop their own preferences. It is pretty much up to the animal when he or she chooses between alternative ways of life, if supported in taking significant choices. Forming a challenge to this example of animal agriculture, the maternal deprivation of calves may, as some suggest, not lead to greater suffering or frustration if this occurs immediately after birth.⁵⁵ Separating mother from calf does, however, offer a narrow range of opportunities for animals to engage in various social interactions. If we bring this to bear on the well-being of great apes, then enrolling chimpanzees in behavioral research for example without attempting to discover if they could either meaningfully consent or dissent concerns yet another manner of limiting the range of opportunities.

The case for autonomy in animals remains contentious. Cochrane leaves this issue undecided but does advise us to take a precautionary approach and continue to work on the assumption that great apes as well as cetaceans are autonomous and own liberty rights. However, as argued in chapter 2 (see 2.3), it remains unclear if animals with highly sophisticated cognitive capacities (e.g., great apes, cetaceans) are autonomous in the required sense,⁵⁶ rendering a retreat to precautionary argumentation particularly vulnerable. Rather than giving benefit of the doubt, one could also make the more challenging assumption that great apes are not

⁵⁵ However, similar to the rhesus monkeys in the aforementioned Harlow experiment (see note 58), calves appear to grow up as more socially competent when they stay with their mothers after birth, see Wagner et al. 2015.

⁵⁶ The strongest case for animal autonomy, as discussed above (see 2.3), would probably be language-trained apes.

autonomous. Even if great apes lack the capacity for autonomy, their agential capacities already give rise to numerous instrumental interests in freedom. Rather than relying upon the capacity for autonomy to do the work, we should take agency seriously. Subsequently, phenomena closely resembling full liberty rights will transpire, and the need for resorting to precautionary argumentation will evaporate.⁵⁷

Cochrane throws out the proverbial baby with the bathwater when he remarks that because animals do not have an intrinsic interest in liberty, they have only instrumental interests in freedom in order to avoid any suffering and frustrations. I draw here from the argumentation Cochrane provides in support of the animal right to life. Any interest in life being instrumental does not stop Cochrane from acknowledging a right to life. One could argue that the right to life and liberty are similar to the extent that they are instrumental with regard to other interests.⁵⁸ Animals do not have an intrinsic interest in liberty, just as they do not have an intrinsic interest in life. If animals have a right to life (based on the instrumental value of life to experience future well-being), they can also have a right to liberty, or to be more specific, as I would like to propose here, a right to freedom of opportunity (based on the instrumental value of freedom in acquiring well-being).

Just as the right to life can differ in normative weight (a gorilla will have a stronger right to life when compared with a merely sentient animal with limited psychological unity), the strength of the right to freedom of opportunity will depend on the agency of the animal (great apes present a strong case for a broad range of opportunities; fish on the other hand, will demand less in terms of opportunity range). As stated in chapter 2 (see 2.3), while autonomy appears to pertain to a more absolute nature, agency allows for differences along a gradient. Where agency is obviously present, a rather robust interest in freedom in terms of opportunities materializes.

⁵⁷ For another argument in favour of recognizing a right to liberty, see Giroux 2016. Here the account involves a republican conception of liberty and rejects Cochrane's understanding of autonomy. The account developed in this chapter does not take issue with the concept of autonomy but considers it as a sufficient and not necessary condition for having significant interests in freedom. Moreover, it disagrees with Cochrane as to the extent of instrumental interests in liberty on an interest-based account of moral rights.

⁵⁸ For a similar remark, see Giroux 2016: 37.

3.6 Concluding remarks

Deeming Cochrane's theory to present a plausible understanding of animal rights, I conclude he too hastily but nonetheless fully dismisses a moral right to liberty for the majority of animals. If one understands well-being along the lines set out in chapter 2, it is in the interests of animals to have a sufficient range of opportunities in order to determine their own subjective good. Next, I argue that whereas animals lack a right to liberty, they do have a *prima facie* moral right to freedom of opportunity. In line with the arguments forwarded by Donaldson and Kymlicka as well as by Haynes, animals are only "locked in" with regard to their own lives to the extent that humans limit their opportunities. Given the chance, animals endowed with agency are capable of making meaningful choices concerning their own subjective good.

