The Rights-Ascription Problem

Neither race, nor ethnicity, nor sex constitute morally relevant factors in the ascription of fundamental rights. A sexual preference for women, a belief in the messiah, or a love of jazz ought neither qualify nor disqualify someone from justifiably laying claim to that which is protected by such rights. These and innumerable other similar assertions of *ir*relevance regarding the relationship between certain properties or characteristics and the ascription of fundamental rights now seem noncontroversial. Yet why should this be so? In determining whether or not to ascribe fundamental rights—moral rights putatively prior to and independent of fairly specific moral or legal relationships—to certain beings, what arguments undergird the confidence with which these assertions of irrelevance are affirmed? Has some reasonable standard surfaced that identifies the properties or characteristics required for rights ascription and, because none of the above characteristics is included, shows them all to be irrelevant?

There is of course the standard, deeply rooted in the western philosophical tradition, that holds that humanity is the key to the possession of fundamental rights. On a common understanding of the "humanity standard," if one is a human being, one has (or is capable of having) humanity and thus qualifies for fundamental rights in the sense in which one is a kind of being to whom fundamental rights may be properly ascribed. A stronger take sees *only* human beings as (capable of) having humanity, and thus *only* human beings qualify for fundamental rights. If true, the humanity standard enjoys the not inconsiderable virtue that race, ethnicity, sex, and an extensive range of beliefs, personal preferences, and plans for one's life are demonstrably irrelevant to the ascription of fundamental rights. For while these traits are possessed by virtually all relatively mature human beings, none is required by anyone's humanity. Thus this standard plainly protects the funda-

mental rights of many human beings against attacks grounded on claims that they are of the "wrong" race, religion, sex, or class, or that they have chosen an "aberrant" or "perverse" life style.

Had this matter been left as it began, with moral and political concerns emanating from and limited to the systematic denial of fundamental rights to whole groups of mature human beings, philosophers might well have found silly requests for a defense of the humanity standard of rights ascription. Admittedly, issues concerning the ascription of quite specific (i.e., nonfundamental) moral and legal rights to entities other than actual individual human beings (such as corporations, the dead, and future generations) would need to be addressed. But perhaps these could best be handled separately, that is, by a more complete theory of moral and legal rights ascription. Were it not for those pesky and recurrent moral concerns with human fetuses and neonates, the comatose, sentient animals, and a host of other creatures and things, it might well have been taken as axiomatic that all and only relatively mature human beings have or are capable of having humanity and thus qualify for fundamental rights. However, in recent years, these sorts of concerns have forced the rights-ascription problem. As a result, the problem has been reformulated in a way such that the humanity standard finds itself to be not only controversial, but in deep trouble.

Yet some reflection on the humanity standard is instructive, not because the standard is necessarily worth saving, but because investigating the reasons proffered for its rejection helps identify and clarify critical components of the rights-ascription problem. This serves to narrow the scope of the problem and focus attention on issues that must be addressed if the problem is to be solved. Pursuing those issues will, in turn, help establish the groundwork for an adequate theory of fundamental rights ascription.

1.

Taken in its weak form—where being human is seen to provide a sufficient but not necessary condition for fundamental rights ascription—the humanity standard has been found defective because it is (1) overly broad in mistakenly including in the class of beings

with humanity certain human beings such as early-stage fetuses or the irretrievably comatose.[1] In its stronger form, the humanity standard has been objected to as (2) overly narrow in mistakenly excluding from the class of beings with humanity certain non-human beings, particularly sentient animals, but especially the great apes.[2] But no matter whether being human is taken as sufficient or necessary for humanity and thus for fundamental rights, the humanity standard has been rejected as: (3) vague in its imprecision (and evasiveness) regarding the relationship between membership in a biological category (the human species) and membership in a moral category (humanity),[3] or (4) circular and uninformative in defining humanity in terms of rights possession only to define rights possession in terms of humanity.[4]

Consider first the broadness and narrowness objections, that is, (1) and (2) above. These objections rely upon counterexamples that are not self-evidently effective. After all, it is not as if having humanity is like having red hair or a membership in the Boy Scouts. Unlike these cases, in which there are fairly clear criteria for determining whether or not one has some property or other, it is unclear and quite contentious (rather as objection (3) suggests) just which criteria determine what it is to have humanity in the sense in which having humanity qualifies one for fundamental rights. Objections (1) and (2) provide counterexamples to the humanity standard, then, only insofar as they can be supported by some explicit, rationally defensible criterion or criteria of rights ascription and not by appeals to bald assertions or various thought experiments which, though presumed to uncover deeply held unassailable moral intuitions, can be argued to do little more than invoke precisely the sorts of sentimental prejudices often argued to underlie the humanity standard. Hence the rational effectiveness of objections (1) and (2) depends on their being tied to arguments that demonstrate rather than assume the inadequacy of the humanity standard.

One such argument begins with a premise that need do no damage to the humanity standard: If fundamental rights are correctly ascribed to some being or thing, A, then A must possess (or be capable of possessing) certain characteristics or properties (henceforth, R-Q properties) that morally qualify A for the

ascription of those rights. Depending on the R-Q property or properties favored by a particular critic of the humanity standard, the second premise of the argument will be an instantiation of the claim that certain clearly identifiable properties (for example, consciousness, sentience, the having or capacity of having certain interests, and so on) constitute R-Q properties. Assuming that the favored R-Q properties designated in the second premise can be shown to be present in some non-human beings (the narrowness objection) and absent in other human beings (the broadness objection), being a human being is plainly irrelevant to the possession of R-Q properties. But since being a human being is, on the common understanding of the humanity standard, either sufficient or necessary for having humanity, the humanity standard as commonly understood is false. Rather as objection (4) above suggests, then, "humanity" adds neither clarification nor moral weight to "fundamental rights-holder" and "humanity" now seems to be nothing other than a *deus ex machina.*

Notice that the major premise of the argument does *not* say that the presence of R-Q properties is sufficient for the ascription of quite specific fundamental rights either to the ascriptee in question or to ascriptees of a similar kind. This is reasonable, for assuming that an adequate theory of fundamental rights must determine whether and when such rights are alienable or prescriptible, it should remain an open question whether those who are presumed to qualify for fundamental rights may acquire, lose, or be denied specific fundamental rights for any of a variety of compelling moral reasons.[5] But there is a further critical point here about the nature of the relationship between the possession of the requisite R-Q properties and the ascription of fundamental rights. A putative ascriptee's possessing *any* fundamental rights presupposes that that ascriptee enjoys precisely the characteristic(s) in the absence of which the possession of fundamental rights qua rights would have neither value nor purpose for or with respect to that ascriptee. This calls attention to a distinction often ignored in discussions of the rights-ascription problem. Whether or not a candidate for fundamental rights qualifies *at all* for fundamental rights is logically distinct from whether that candidate actually possesses certain specific fundamental rights. These matters are

related in that the latter can be addressed in individual cases, for example, regarding whether a fetus has a fundamental right to life, only if the putative subject of the specific fundamental right in question (here, the fetus) has the R-Q property or properties necessary to qualify, in general, for fundamental rights. A fetus can have the fundamental right to life, then, only if it possesses the R-Q property or properties requisite to qualify in general for the ascription of fundamental rights.[6] But it does not follow that because a fetus has the R-Q property (or properties), it qualifies for a specific fundamental right. A fetus does not have the fundamental right of free expression, for example, even if it does possess the R-Q properties requisite for the coherent ascription of the fundamental right to life.

This way of understanding the rights-ascription problem can be elucidated by appeal to a phenomenon evident within developed legal systems, that is, the relationship between the factors requisite for assigning legal standing to, or determining legal standing for, some individual, and the existence of certain specific legal rights presupposing legal standing.[7] In order, for example, for a litigant to have the right to bring a civil suit, she must first be determined to have standing with regard to the issues or interests of such a suit. The conditions requisite for this standing are usually not only quite distinct, logically, from those conditions requisite for whichever particular rights accrue given standing, but also are tied to whether the individual laying claim to standing enjoys the characteristics in the absence of which the legal advantages attending standing would have neither value nor purpose, that is, would make no sense as legal rights for the individual in question. In short, qualifications for standing are logically distinct from qualifications for various rights that are or might be triggered by standing. Appealing to this legal example is *not* intended to deny the moral possibility that simply in virtue of having fulfilled the conditions necessary to qualify in general for fundamental rights, one automatically enjoys certain specific fundamental rights.[8] In fact this may prove to be the case, otherwise possessing the R-Q properties requisite for fundamental rights in general might amount to little or nothing of any moral significance. But what cannot prove to be the case is that an individual will have a specific

fundamental right if that individual does not qualify in general for fundamental rights.

This suggests that the rights-ascription problem is a two-tier problem of moral predication regarding *actual* individuals. For in the absence of relevant information about an actual candidate for fundamental rights, determining whether, first, that candidate qualifies for fundamental rights and, second, in fact possesses specific fundamental rights will always be a matter of conjectures and speculation. Of course in certain kinds of cases, say, with relatively mature human beings, these conjectures and speculation have great a priori plausibility of the sort that lends qualified support to the presumption that, at least on grounds of moral prudence, all relatively mature human beings ought to be treated as qualifying for and possessing a full complement of fundamental rights. But it does not follow that this plausibility *guarantees* that all individual humans qualify for fundamental rights, let alone that they possess quite specific fundamental rights.[9]

So now it seems that the crux of the matter regarding the reasonableness of objections (1) and (2) above is whether humanity, understood in terms inseparable from a particular biological kind—the species homo sapiens—is indeed a (or the) R-Q property that qualifies an actual individual for fundamental rights. By emphasizing counterexamples who are actual individuals, these objections function as an insistence that the ascription problem cannot be solved, even on an interim basis, by appeals to vague generalizations regarding humanity or platitudes extolling the rights of humanity. Fundamental rights ascription is, on this insistence, a matter of something about *individual* candidates (whether human beings or not) for fundamental rights such that these rights have value or purpose for or with respect to *them* and not about whole classes or kinds of beings or things, each individual member of which may or may not possess the relevant R-Q properties. Of course if there is something specifiable about being human, that is, some morally relevant R-Q property possessed by each and every member of this species, then because of *that* R-Q property, appeal to the humanity standard (in its weak formulation) may serve limited purposes as a vague placeholder. But worth underscoring here is the importance for rights ascription

of the relevant R-Q property; humanity, as tied in some sufficient or necessary way to a biological kind, is irrelevant. Certain biological kinds such as the species homo sapiens may have far more members with far more fundamental rights than other biological kinds, but it does not follow that being a member of a kind heavily populated with fundamental rights-holders suffices for rights ascription, or that simply being of that kind is relevant to whether or not some actual individual has fundamental rights.

Thus, responses to the broadness objection that insist on denying the relevance of counterexamples (such as fetuses or the irretrievably comatose) because: (a) only members of the biological kind homo sapiens can or do have the requisite R-Q property or properties, or (b) the possibility or potential (as opposed to actual capacity) for the acquisition of R-Q properties should suffice, morally, for the ascription of rights, rely on a deep confusion about the logical nature of the rights-ascription problem as a two-tier problem of moral predication regarding actual individuals.[10] Even if, for example, moral agency of a sort possessed only by certain relatively mature human beings were the *only* R-Q property requisite to the ascription of certain complex fundamental rights (as some philosophers believe),[11] it would still not follow that the humanity standard is true. *Individual* humans qualifying for fundamental rights have quite specific rights, rather as they have specfic personalities, and refusing to consider the relevance of particular human counterexamples to the humanity standard can be taken, as in (a) above, as tantamount to ascribing rights to a biological kind rather than to individual members of a particular class, that is, the class of rights-holders. And it certainly should go without saying that a biological kind no more has rights than it has a personality. Alternatively, as in (b), denying the relevance of human counterexamples to the humanity standard on grounds that some biological human might possibly develop or acquire the requisite R-Q property (such as moral agency) confounds the distinction between *being* an individual to which a certain predicate is correctly and coherently attributed with *becoming* a being to which a certain predicate is *usually* attributed. This maneuver combines a modal error with a question-begging generalization.[12] Logically possible members (e.g., the

irretrievably comatose) of a class of things (e.g., human beings who are moral agents) that frequently have a certain property (e.g., moral agency) are not actual members of the class of things all of which have that certain property (e.g., human beings who are moral agents).

2.

When treated as a two-tier problem of moral predication regarding actual individuals who possess the requisite rights-qualifying property (or properties), the rights-ascription problem seems solvable only if these individuals can be correctly identified. Yet unless the problem is treated as little more than an intuition-driven scavenger hunt ("Surely an individual with this property qualifies for fundamental rights?" "Surely this property is irrelevant to the possession of rights?"), some reasonable criterion or standard is necessary for determining how to identify individuals qualifying for fundamental rights. For in the absence of such a criterion or standard, any putative R-Q property seems open to the question of just why that property (or kind of property) ought to be taken as an R-Q property while others ought not. A defense of any answer to the first-order question—What is or are the properties requisite for the ascription of fundamental rights?—thus presupposes a criterion or standard of acceptability for an answer to the second order question—*Why* is some property or other an R-Q property? But what sort of criterion or standard will do?

As a start, one type of conceptual standard recommends itself. On this standard it is asked, as Joel Feinberg has, whether there are things that could *not*, on penalty of absurdity, enjoy a moral predicate of this nature?[13] By excluding the obvious non-candidates for rights ascription, this standard should work to narrow the field of bona fide candidates so that a meaningful, that is, non-absurd, search might then proceed. But notice that this type of conceptual standard is not a strictly logical standard, that is, finding it "absurd to say that rocks can have rights . . . because rocks belong to a category of entities of whom rights cannot be meaningfully predicated"[14] is not the same as finding it (logically) absurd to say that jellyfish can have timbre or, (in homage to

Bentham) that the darkness can be resplendent.[15] For the alleged absurdity resulting from ascribing rights of any sort (let alone fundamental rights) to rocks will not be evidenced by simply examining the terms in the assertion that a certain rock (say Plymouth Rock) has rights and asking whether, given standard lexical definitions, this assertion involves a contradiction in terms. If the sentence: "Plymouth Rock has a right not to be vandalized" is absurd, its absurdity is quite different from that of the sentence "Plymouth Rock has a square root."

Nor will any logical absurdity regarding the ascription of rights to rocks be evidenced by simple appeal to a general, theory-neutral schema designed to isolate the basic components involved in having a right. Assume, as is now commonplace, that such a schema will include four components: the rights-holder, R; the audience of the right, that is, those to or against whom the right is addressed, A; the content of the right, that is, what the right is a right to or regarding, C; and a specifiable relationship, D (usually taken to be an obligation or duty of some kind) between R and A regarding C. On this schema, R has a right if, and only if, A bears D to R regarding C.[16] On the sole basis of this assertion, nothing about R's being a rock *logically* precludes A from bearing some D to R regarding C. And while it may be incumbent on those who affirm that Plymouth Rock has a right against its visitors not to be vandalized to explain away any moral oddness or incoherence about such a claim (especially with respect to the nature of the D-relationship between R and A), still, the claim is not logically absurd and hence meaningless in that narrow sense.

If the standard employed for determining the acceptability of an R-Q property is not a conceptual standard in the narrow logical sense of that phrase, then perhaps the appropriate standard is a normative one. On this option, the type of absurdity that arises when rights are ascribed to inanimate things like rocks results because of the affirmation of certain beliefs and hypotheses about the normative work accomplished by rights and rights relationships. Entertaining this possibility entails a shift of attention resulting in a shift in procedure. Rather than beginning the inquiry with the spotlight focused upon individuals and the appropriate question presumed to be: What does an individual

have to be like to qualify for rights?, the inquiry now begins with: What normative purpose is served by the ascription of rights to certain individuals? This shift requires that attention be directed towards the issue of what is required of rights-ascriptees, that is, what they must be like *if* any special normative purpose is to be served by the ascription of rights to them. The idea is that if the normative implications for the holder of fundamental rights is distinctive in comparison with other, especially weaker, normative requirements, then this should be explicable in terms of what a rights-ascriptee must be like, that is, what property or properties an ascriptee must possess, in order to have fundamental rights. Thus the guiding hypothesis here will be that if the ascription of rights has normative implications that are different from those resulting from other kinds of normative considerations, then the standard for determining whether some property or other is acceptable as an R-Q property should reflect that fact.

3.

Pursue this hypothesis by considering an argument, an expanded and significantly modified rendition of that offered by Feinberg, that begins with a complex, biconditional premise that can be read to include certain elements that are captured distinctively, or at least most effectively, only by rights relationships: An individual, L, has a fundamental right if, and only if (1) L has a morally justified claim, C, against another or others, $P_1...P_n$, for or with respect to something, S; (2) L's C for or with respect to S is for L's own sake or good; (3) C can be asserted by L, or another acting as L's proxy, as L's due; and (4) C is morally justified on grounds prior to and independent of any special moral or legal transactions or relationships to which L is a party, willful or not. To this add the assertion that all and only those individuals who have or are capable of having interests can qualify for having a justifiable claim regarding something for their own sake or good as their due. From these premises it follows that because they neither have nor ever will acquire interests of their own, rocks (and all other inanimate, "interest-less" entities) will not qualify for rights and thus rights cannot be correctly ascribed to them.[17]

The conclusion of this argument holds true even when the obvious is conceded, namely that based on certain standards, for example, that of adequacy as a geological sample, the condition of particular rocks will be maintained or improved only if those rocks are treated in one way as opposed to another; that is, *as if* they had certain rights. But any beneficial results that accrue with respect to a rock do not and cannot accrue for the rock in any sense in which these results have value or purpose *for* the rock. For this reason, while such results might constitute an objective improvement in a rock, that is, an improvement in the rock qua object that certain individuals may use or value, they cannot constitute what might be thought of as a subjective benefit *for* the rock, that is, a benefit to or with respect to which the rock is sensitive. Were a rock to be damaged or destroyed, this could involve or amount to a subjective loss to certain individuals, but it would not involve a subjective loss to the rock. So setting aside various metaphorical expressions that involve projections to rocks of properties or capacities that they simply do not possess, rocks cannot and will not enjoy subjective benefits or endure subjective losses even if their objective condition is dramatically altered.

As an interest-less entity lacking any minimal capacity for subjective benefit or loss, a rock can have no sake or good of its own or any justifiable claim to a sake or good that is its due. Subjective benefit or loss can result for those for whom the preservation of a rock constitutes an objective good in that they are sensitive to the fact that significant changes in the condition of the rock have consequences for them. Thus it is certainly not absurd that someone who can suffer a subjective loss owing to the destruction of a rock might have a right to the rock or its protection and preservation. In this important way, inanimate things that have no sake or good of their own, including rocks and other natural resources, can be rights-protected even though they do not and cannot have rights. Insofar as they are never capable of subjective benefit or loss, natural resources never have rights, but if the protection of a natural resource is something to which some individual does have a right, the normative consequences of that individual's right for the resource's protection can approximate (although not be morally equivalent to) the resource's having a right.[18]

Consider now the possibility—a minimalist possibility—that all that is required for an individual to qualify for having rights is that that individual be capable of subjective benefit or loss in the sense indicated adequately by *any* discernible threshold sensitivity to the various phenomena affecting it. This possibility seems an easy target for rejection because it fails to exclude, as possibly qualifying for rights, an excessively broad range of entities that do not seem to have a sake or good of their own and thus cannot have a justified claim to such. That thigmotactic plants could qualify for rights would thus count as a *reductio* of the minimalist possibility. But this move does not put the possibility to rest. For (*pace* Feinberg[19]) it does make some nonmetaphorical sense to speak of such plants as having a sake or good that could reasonably be regarded as their due by someone acting on their behalf as their proxy. The challenge presented by the minimalist possibility, then, consists in the question of why plants, unlike rocks and other interest-less entities, do not have the sort of sake or good that can be their due in the normatively distinctive sense necessary for them to qualify for a right to something that is for their sake or good. Why is it that *any* due possessed by plants is not the kind of due to which they can have a right?

It is not that there is *no* coherent sense in which plants can have as their good something that is their due. Given that plants thrive under certain circumstances and not others, that there are certain things that are good for them and others that are not, plants plainly can have their sake or good as their due in that sense of "due" routinely relied upon in discussions of what is optimal for plants if they are to thrive. This sense of an individual's due concerns what is suitable to or fitting for that individual given that certain things (in the case of plants, sunlight, water, nutrition, and so on) are conducive to its good while other things are not. In this sense of due, it is both appropriate and accurate to speak of an enormously wide range of beings, both sentient and not, as having a good that is their due. But notice here that because plants are not self-conscious beings who can recognize and actively seek that which is necessary for their good, whether their good is provided for or sustained by the forces of nature or a hired attendant is irrelevant to whether plants receive their due. The same point holds

regarding plants being denied that which is necessary for their good. Because plants' lives include neither cognitive nor conative components and their good is markedly immune to any moral or other differences regarding its origins, development, and terms of fulfillment, their due, in the only sense in which they have one, extends only over their having that which constitutes or is instrumental to their particular kind of good.

As a general principle, the limits of a being's good determine both the nature and the limits of its due. Because their good includes *only* that what is provided for their sake or good be received, what is due plants does *not* include and does not imply that what is for their sake or good be provided by a specifiable other or others. Their good cannot be enhanced from the fact that their good merely befalls them rather than being provided to them because others have acted according to certain obligations or duties. As a result, plants do not have the kind of due that entails justifiable claims against the conduct of specifiable others. Thus, it becomes critical to distinguish the "fittingness" sense of an individual's due (which plants have) from another sense—the "owed" or "transitive" sense of due (being owed certain treatment by others). On the basis of this distinction, a more promising reply can be provided to the query regarding why the standard of subjective benefit or loss appropriate to the ascription of fundamental rights is too high to be met by plants as well as certain other living things.

Why, then, and to what extent does the normatively distinctive work of rights claims and rights relationships depend on certain capacities for different kinds of subjective benefit or loss beyond those necessary for a fittingness due and including those required by a transitive due? Answering this will help explain why it makes no normative sense to ascribe rights to certain things (for example, plants, the irretrievably comatose) which, while correctly taken to have a sake or good of their own that is their fittingness due, are incapable of the special kinds of subjective benefits and losses encompassed by the full value of their rights claims.

Notice that the first premise of the argument opening this section offers an analysis of what is involved in an individual's having a fundamental right. Conditions (1) and (2) of that analysis

take rights to involve a specific kind of relationship between a rights-holder and another or others with respect to the content of the right (that is, what the right is a right to—for example, certain objects or ideas). The analysis properly allows that the content of a right might have no value for the possessor of the right. Individuals can have rights to something that has been promised to them, for example, even though what is promised may be without value or even harmful to them. But the value of the right to the rights-holder endures even if this is the case. Someone who will not benefit at all from the content of a right still benefits from the respect afforded the moral power of her claims against another or others with respect to this content. Thus the benefit or value secured by rights for the individuals possessing them is not wholly reducible to the content of those rights even though it is often the content that is the focus of attention. But the rights-holder's *claim* against others always constitutes an interest to the rights-holder whether she (or someone acting as proxy) chooses to exercise the claim or relucts from doing so. In either case, the interest involved just is that of the rights-holder with respect to the power over the conduct of others such that they—those designated by $P_1...P_n$ of condition (1)—tailor their conduct to the justified claims of the rights-holder. The full value of a rights relationship, then, cannot be understood independent of the value to the rights-holders of their rights-prescribed moral power over the conduct of others. But this value cannot be understood simply in terms of objective changes or benefits that might or might not occur in certain individuals given what is suitable for their thriving. The value of rights is a value added to any of these possible benefits. This is the full sense, then, in which an indispensable component of the value of rights consists in having a morally justified claim against others regarding their conduct whether or not that conduct results in beneficial objective changes in or for the rights-holder. And this is why the normatively distinctive nature of rights claims and rights relationships precludes certain living things from qualifying for fundamental rights.

Recall the hypothesis (at the end of section 2, above) that the standard for determining whether some property is an R-Q property should reflect the fact that the ascription of rights has

normative implications that are demonstrably different from those resulting from other kinds of normative considerations. If it is acknowledged, as argued above and as seems noncontroversial given any reasonable, theory-neutral account of rights, that rights-holders (or those acting on their behalf) are parties to transitive relationships wherein what is owed them, individually, includes moral power over the conduct of a specifiable other or others, and that rights relationships are distinctively capable, normatively, of accommodating this fact, then it cannot be a matter of normative indifference to individual rights-holders how (that is, under what circumstances) or by whom what is owed to them is provided or denied. Thus, rather as only certain individuals are capable of having duties to others, duties that are correlative with rights, only certain individuals are capable, normatively, of having duties owed to them.[20] Of course an individual, L (or her proxy), might waive a right to something, S, which L no longer wants or needs, with the result that another individual, P, against whom L's right holds, is no longer duty-bound to provide S to L. But P's duty to L is not satisfied simply because L happens to receive S in a manner having nothing to do with P. L's right is a right that *P provide S* to L. Though the content of a right can, in many instances, be isolated ontologically from the individual against whom the right is asserted, the full normative function of rights—the value added by rights relationships—is annulled when it is forgotten that the content of the rights must be provided by the individual(s) against whom the right stands. In a critical sense, then, the complete normative significance of a right includes not only that to which the right is a right, but also a transitive, other-regarding component that always extends to include a morally justified expectation regarding the conduct of those against whom the right is asserted.[21]

Thus, the critical defect in the minimalist possibility considered above resides in its inattentiveness to the relationship between an individual's having a sake or good of its own and its capacity for a *transitive* due—a psychological capacity to benefit from the moral respect concomitant with the morally justified power to make claims on the conduct of others. So debating whether plants have a sake or good of their own only distracts attention from the

issue of what is presupposed, normatively, by assertions that certain states of affairs can be something to which an individual plant can have a right. That a plant or a living thing such as an irretrievably comatose being may, in a minimalist sense, have a sake or good of its own implies nothing about whether either the plant or the being is the sort of thing to which anything, including that which is necessary for its good, can be due in the relevant rights-based transitive sense. Of course, as in the case of rocks and other non-living natural resources, some individual could have a right to certain states of affairs that promote or protect a particular plant's or comatose being's good, and here the good would be due the rights-holder. But it does not follow that because there can be rights to the sake or good of a plant or an irretrievably comatose being, either of these holds or is capable of possessing these rights. Some living thing's or being's benefiting from some state of affairs to which another individual has a right is normatively distinct from having that state of affairs as its transitive due. If this were not so, the individual rights-holder's waiving the right to the thing's or being's benefit would not alter the normative implications of a claim that might be made on the plant's or being's behalf to that state of affairs that promotes their respective goods. But this seems plainly not to be so. Although there are undoubtedly powerful non-rights-based reasons for providing benefits to both plants, the comatose, and other beings incapable of a transitive due, if the reasons for providing the benefits are solely rights-based, then the absence of the right undercuts any claim made on behalf of these living things. As has been widely noted, third-party beneficiaries of rights relationships must be kept distinct from the rights-holders in such relationships.[22] Thus, that a living thing, whether plant or not, will benefit objectively because of the normative implications of another's right is insufficient ground for any assertions about whether the benefit is due that thing in the explicit sense of "due" that correlates with having a right.

The argument against the minimalist possibility shows that while it is certainly necessary that a rights-ascriptee be the sort of individual who has a sake or good of its own, it is also necessary that such an individual be capable of subjective benefit or loss in the specific sense of being capable of benefiting from the power

over others who must behave in accord with the individual's justified claims regarding that which is her moral due. Individuals without the capacity for a sake or good of their own can have no rights; but it does not follow that individuals with such a capacity are ipso facto candidates for rights. For the minimal capacity for a sake or good of one's own is not equivalent to and does not entail the complex psychological capacity for subjective benefit or loss when the latter capacity is understood as a presupposition of an individual's benefiting from the complete value of a rights claim to something that is his or her moral due. Hence one can allow that thigmotactic plants and irretrievably comatose human beings have a sake or good of their own and deny correctly that they qualify for rights because they do not have a sake or good that encompasses or incorporates the capacity for the kind of subjective benefit or loss implied by the full value of a rights claim. *Only if* an individual has the capacity for a transitive due, only if she has the psychological capacity to benefit subjectively from the full value of morally justified claims against another or others, will she qualify for the ascription of fundamental rights. On this ground, it would seem reasonable to presume that the standard of subjective benefit or loss appropriate for the ascription of fundamental rights to an individual must be dramatically higher than is achievable by any known plants or by irretrievably comatose humans.

4.

On the transitive or owed sense of an individual's due, it makes all the normative difference by whom and for what reason an individual is provided with or denied that which is for her sake or good. Notice that this point is not spoiled by the commitment that at least some fundamental rights are best regarded as general rights, or rights *in rem,* or, more controversially, as welfare rights held by individual rights-holders against the community at large. For in both cases, while it may prove impossible to specify, a priori, precisely which individual(s) are duty-bound to forbear or contribute (to a general fund, for example) to fulfill the terms of a particular fundamental right, still, some specifiable individual or set of individuals must in fact be duty-bound to act in accord with

the terms of these individually possessed rights. If this were not the case, it would be impossible to discern the normative difference between, for instance, those utilitarianly desirable benefits that can be blind to both the duties and the claims of specific individuals, and the rights-based claims of a specific individual against another or others to the content of the fundamental right in question.[23] In terms of both their rights and duties, rights-based claims tag specific individuals in a way that direct or unrestricted utility can at best only approximate.

This critical difference requires rights to function, normatively, so that certain individuals are required to provide something (either positive, when the content of the right is some good or benefit, or negative, when the content is a protection against loss or interference) to rights-holders *only* because qua rights-holders what is provided is owed to them by another or others. For example, if the justification for providing something, say, free preventative medical treatment, to an individual invokes *only* the community-wide benefit (reduced total insurance premiums) that might result therefrom, then that justification is not a rights justification, since no normative function that is distinctively a rights function is necessarily served. Indeed, if on this type of justification an individual were to be deprived of a benefit, this deprivation would neither constitute a denial of a right nor would it count as evidence that a duty correlative with a right had been neglected. This does not preclude mixed reasons for providing benefits or protections to individuals; there can be both non-rights consequentialist and rights-based reasons for treating an individual in exactly the same way. But for a distinctive rights function to endure in such cases, it must remain an open question whether an individual would continue to be treated in ways productive of optimal aggregate benefit should this be inconsistent with that which is for that individual's sake, given that individual's transitive due.[24] The same point can be made in cases where affording something to certain classes of individuals—preventative health care for all indigents, for example—in accord with a certain distributive pattern would contribute to the aggregate good.[25] Only if the distinctive moral function of rights is forgotten can "rights" be ascribed to such groups or classes of persons (as

opposed to the specific individuals who comprise them), but then such an ascription is not a *rights* ascription at all.

Acknowledging that the good of certain individuals includes, as a necessary component, their capacity for a transitive due constitutes the moral foundation for affording specific individuals that distinctive kind of moral respect that rights relationships have been traditionally understood as ideally suited to provide. So when some consequentialists insist that it often makes no practical difference from whom an individual gets that which she is owed (it matters only that she gets it), this does not vitiate the point that only because possessors of fundamental rights have the capacity to appreciate this difference can the ascription of rights serve a distinctive normative purpose, a purpose without distinctive moral significance were it not for this capacity. With respect to moral rights, then, it cannot be a matter of normative indifference why those against whom the right is asserted have acted or refrained from acting. Thus, even with an indirect or restricted utilitarianism that includes the value to individuals of others acting towards them in a certain way, ascribing rights to individuals will have utilitarian value only if the persons to whom they are ascribed have the capacity for a transitive due.[26]

The same point holds, but in a much different way, with strictly deontological or duty-based theories. When someone complies with that which is implied by a fundamental right of a specific individual not from duty, but begrudgingly, out of spite, or accidentally, an indispensable moral component of a normative rights relationship has been ignored. This component consists in the recognition that unless an individual rights-holder is presumed, qua individual, to deserve that to which her rights are rights, *she* is being denied the moral respect that properly attends the rule-governed status of an individual holder of fundamental rights. Insofar as duty-based theories can accommodate the value of duties to act towards other *specific* individuals deserving duty-based respect, then they too must acknowledge that any rights claims these specific individuals have will depend upon their capacity for a transitive due.[27] Thus, even with moral theories that are not rights-based, insofar as the full value of individual rights

can be accommodated, these theories can properly ascribe rights only to persons with the capacity for a transitive due.

Strong evidence that individual rights-holders can enjoy this kind of respect is provided by the fact that others can accurately recognize certain individuals, qua individuals, to deserve treatment consistent with that respect and thus can act according to the terms of rights-holders' transitive due *because* it is their transitive due that these terms (duties) be fulfilled. But then it seems obviously correct that only those for whom being denied their transitive due constitutes a morally significant subjective loss—a loss of the moral respect they deserve—have the capacity to qualify for fundamental rights. If an individual were incapable of appreciating others adhering to their duties to her *because* to do so is *her* due as owed by another, then her good cannot be accurately understood to include a transitive due. On all such individuals, moral rights, including fundamental rights, are normatively wasted.

For these reasons, the necessary condition asserted in clause (3) of the biconditional first premise of the argument offered at the beginning of section 3, above, must be read as incorporating only a transitive notion of an individual's due. With this in mind, the meaning and significance of the argument's second premise, that all and only those individuals who have or are capable of having interests can qualify for rights, are now more amenable to investigation and assessment. Specifically, it now becomes possible to concentrate on that premise's two critical components—the "capable-of-having-interests" clause and the "qualify-for-rights" clause. The remainder of this section concerns the first of these components; section 5 concerns the latter.

Many creatures are sensitive to benefits and losses and can, given this sensitivity, enjoy a range of benefits and endure a range of harms. But benefit can be distinguished from well-being, as can harm from deprivation or suffering. In an important way, these distinctions parallel that which can be drawn between a simple and a complex notion of what it is to have or be capable of having an interest. On the simple notion, some being, B, has or is capable of having an interest in or with respect to something, S, if, and only if, B's having S can benefit or count as an advantage to B. Butterflies and crayfish have such simple interests, as do human

fetuses. On the complex notion of interest, however, the notion taken by Feinberg and others to be necessary (though not sufficient) for the ascription of rights, only beings with a developed and relatively sophisticated psychology, including a fairly well developed self-consciousness, are capable of having interests. Here, butterflies, crayfish, and human fetuses are likely to be excluded, while many mature animals are not. Considerable controversy arises when precise criteria are sought to determine which creatures actually enjoy the complex psychology required for the transformation of simple benefits or losses into subjectively identifiable complex interests.[28] But this dispute, while plainly germane to how best, on unrestricted consequentialist grounds, to treat many animals, is not sufficient to answer the question of which beings can qualify, in general, for fundamental rights. What does seem a reasonable empirical speculation is that far fewer beings enjoy the complex psychological capacity necessary to appreciate or recognize certain benefits or losses as component elements of what is owed to them by others—that is, of their transitive due. And if, as argued earlier, only those for whom the denial of that which is their transitive due constitutes a discernible morally significant subjective loss can have fundamental rights, then it would seem that only those individuals with a psychological make-up sufficiently complex to discern such losses as constitutive elements of their transitive due are capable of having the sorts of interests necessary to qualify for fundamental rights.

On the view defended here, then, the mere presence in certain beings of the simple capacity to have just any interest does not serve as a necessary condition for qualifying, in general, for fundamental rights. And only because such a capacity is, in certain beings, implied by far more complex capacities for far more complex interests—in particular those morally significant interests incorporating an individual's transitive due—can the presence of the simple capacity be taken as a necessary condition for qualifying for specific moral rights. So Feinberg was correct to employ a complex concept of interest, whereby a being's having an interest is properly understood as "compounded out of *desires* and *aims*, both of which presuppose *belief* or awareness"[29] when arguing that the capacity for interests is a necessary condition for

having rights. For certainly any being lacking rudimentary conative and cognitive capacities also lacks a good that is sufficiently complex to incorporate a transitive due. But with respect to moral (as opposed to legal) rights, he was mistaken to think that a rudimentary capacity for pleasure, pain, and cruel treatment constitutes an adequate explication of this necessary condition. The kind of loss endured by a being because of pain, even pain resulting from cruelty, is not necessarily the kind of loss that it is the business of moral rights always to protect against.[30] So unless it makes a morally subjective difference to an individual capable of experiencing pain and cruelty *who* inflicts or forbears from inflicting that pain and why they do so, or *who* acts or forbears from acting with this cruelty and why they do so, that individual is incapable of the kind of subjective loss or benefit that defines the kind of complex interest necessary to qualify for having fundamental rights.

This position does not deny that there are powerful non-rights moral reasons that protect against the wanton infliction of pain and suffering on those beings who are incapable of the kinds of complex interests that rights-holders possess. Rather as sophisticated versions of consequentialism provide adequate moral evaluations for actions and policies where no claims based upon fundamental rights are at stake, such considerations can serve to evaluate actions and policies affecting beings incapable of the complex interests implied by the possession of fundamental rights. This commitment is consistent with, though logically independent of, the truth of the position affirmed here. Only the capacity for certain complex interests, those that imply or are incorporated by a being's own transitive due, is adequate as a necessary condition to qualify, in general, for having moral rights. And if this is the case, it is probably an empirical fact that many non-human and some human animals cannot qualify for fundamental rights, even though there are powerful consequentialist reasons that all these animals be treated in ways consistent with and conducive to their nontransitive due.

If it is assumed, then, that the capacity to have an interest in something means only that having that something contributes to an individual's good or benefit, then the fittingness sense of any

individual's due will suffice to show that that individual can qualify for a right to that something. But as has been shown, this is not the case: plants cannot have moral rights to water and Japanese beetles cannot have moral rights not to be treated cruelly. Since only beings with sufficiently complex psychological capacities to have an interest in their transitive due qualify for having rights, so the "capable-of-having-interests" clause of the second premise of the argument must be rewritten as "capable of having interests in one's transitive due," as only this specification of the clause affords the appropriate logical connection to the normatively correct reading of the argument's first premise.

5.

Just as the general appeal to the capacity for interests is inadequate to warrant the ascription of fundamental rights to individuals, so too is it inadequate to account for what it is to qualify for these rights. Defending this claim involves distinguishing two ways in which individuals can qualify for rights and understanding the important relationship between these ways and two different and normatively distinct functions of rights. In the first way, where it will be convenient to speak of the "attribution" of rights, in order to qualify for a right one must already be a recognizable party in a rule-governed system in which there are rights. As such a party within this system, an individual can be partially or fully qualified for the attribution of a right. For partial qualification, certain normatively prescribed properties or characteristics must be possessed by an individual in order to be considered for the attribution of a specific right. Here these properties or characteristics are necessary but not sufficient for the actual possession of the right. To use a legal example, a woman is partially qualified for the right to vote in a state-wide election if she is eighteen years of age. But she may not be fully qualified—that is, she may not possess the right. Thus, still following the way in which an individual can qualify for the attribution of rights, someone is fully qualified for a right if, and only if, she meets all of the requirements for the attribution of the right; that is, she has all the normatively prescribed necessary and sufficient properties or characteristics for

the right at issue.[31] Staying with the same legal example, then, in order to determine whether an individual is fully qualified for the right to vote in a state-wide election, it could prove necessary to determine whether she is eighteen years of age, whether she is a legal resident of the state, whether or not she is a felon who has served over a year and a day in prison, and so on. Only if she is found to fulfill all the normatively prescribed conditions does she qualify completely, that is, does she have the right.

Notice, however, that with respect to both partial and complete qualification for the *attributon* of a right, to qualify for a right in this way is to qualify only within a context where the putative rights-holder is presumed to be an appropriate subject of rights in the first place, that is, where there are adequate reasons to presume that she qualifies, in general, for the rights afforded within that context. Thus, questions concerning whether an individual is qualified for the attribution of a right are, to recall a point made in section 1, above, appropriate at and relevant to the second tier of the rights-ascription problem. That is, these questions of rights qualification are normatively important because of the necessity of determining precisely to whom and exactly why specific rights are to be predicated of particular individuals. At this level, then, the critical normative function being served by questions concerning who has which rights and why is that of how these rights and their correlative duties are to be properly distributed among those already presumed to be appropriate subjects of rights.

Depending on the nature of the normative work accomplished by a particular kind of rights within a particular kind of system of rights, the reasons for presuming that an individual qualifies for a right may not always be the same, the result being different warranted assertions regarding who or what is an appropriate subject of rights. For example, in the context of decisions occurring within a mature system of legal rights where, to take Hohfeld's account, the central purpose of rights ascription is to identify parties with a discernible legal interest, the central normative function of legal rights is to facilitate judicial reasoning within adversarial contexts, both criminal and civil.[32] That someone or something, C (say, a corporation), possesses a discernible legal interest thus counts as grounds for attributing a right to C,

thereby creating a judicially recognizable legal advantage in adversarial proceedings in which C may be involved. The reason for attributing a legal right to C, then, just is the normative usefulness of the right as a jural mechanism for adjudicating disputes. C is correctly taken as an appropriate subject of rights because the normative function of (here) legal rights requires it.

Notice, though, that with respect to findings regarding the *attribution* (either partial or complete) of rights in a system of legal rights, such determinations can function *without* any presupposition of a substantive *moral* theory of legal rights whereby the moral reason for the attribution of a right would go beyond its use as a jural implement. Indeed, here C's having a discernible legal interest may be nothing more than a useful legal fiction (such as "corporate interests") or C's interest may be an immoral interest (such as the interest of a slave owner in the location of his runaway slave). Still, in both cases, since C can be treated as a subject of legal interests, C can qualify, either partially or completely, for the attribution of legal rights. However, in order to assure that the normative work accomplished at the level of rights attribution is not merely formal work—that is, determining who (or what) has which rights given the morally uncritical application of morally unquestioned rules—a more fundamental question of rights qualification, the rights-ascription question, must be asked. For only in asking this question can rights-qualification inquiries begin to address issues concerning the morally correct distribution of fundamental rights and duties among individuals.

The second way in which an individual can qualify for rights—the way that introduces a distinctive moral component into systems of rights and where it is appropriate to speak of the "ascription" of rights—addresses these issues because it concems the first tier of the rights-ascription problem, that is, the issues of what it is to qualify, morally and in general, for rights. The appropriate question here is that of what an individual must be like in order to be an appropriate subject of rights, particularly fundamental or basic rights, *simpliciter*. Here the critical questions are not, for example, how an individual is or is not to be treated (for example, in a tort action) *given* her partial or complete qualification for the right to which she (or her proxy) is *presumed to*

have a claim, but rather whether she is the kind of being who *ought*, in fact, be a claimant at all. Staying within the context of examples arising within a developed legal system of rights here can be both confusing and dangerously misleading, for sometimes (though not usually) questions of whether an individual qualifies for the attribution of a right can be addressed at either a merely formal level or a morally substantive level. And judicial decisions frequently do not recognize, nor do they obviously reflect, the significance of this difference. For example, a question of rights qualification might be one of whether an individual possessing a specific complement of legal rights, say, certain property rights, has standing with respect to a specific action or set of actions triggering rights specific to and dependent on that standing. In such a case there may be one set of formal attribution questions presupposed by yet another set of formal attribution questions. And the question of rights attribution may never proceed beyond these formal considerations to the moral implications of attributing certain rights and rights-based powers to certain individuals in certain contexts. However, the inquiry might also be considered at an entirely different level, that is, at the morally substantive level of fundamental rights ascription. Here certain legal examples can be quite instructive, for they help indicate how, when the rights-ascription problems arise at the ascription (as opposed to the attribution) level, they do so because of the normatively different function of rights within the context of an established rule-governed system thereof.

Consider, for example, the issue of whether an individual human being qualifies for the attribution of the legal right to life under the laws against homicide. Bill would not qualify for this right if, for example, he were killed because of his role in threatening the life of another who, in self-defense, killed him. In such a case, Bill is disqualified for the right to life because of an established legal rule. But now assume that Bill is a human fetus. Here the rights-attribution question can be taken, rather as Justice Blackmun did in the majority opinion in *Roe v. Wade*,[33] as presupposing a normatively more primitive question of whether an individual qualifies for the ascription of certain fundamental constitutional rights, especially the due-process rights of the Fourteenth Amend-

ment. When taken in this way, the question of whether an individual qualifies for a right or set of rights may be appropriately answered by direct appeal to constitutional language (Must an individual be born in order to qualify, either partially or completely, for due-process protection?) or legal precedent whereby constitutional commitments have been interpreted (Is there constitutional interpretation, in precedent-making decisions, whereby indivviduals of a certain sort, that is, unborn individuals, are provided with complete constitutional protection?), just because of the normative commitment within the legal system that such questions are to be answered in this way. The question is appropriately one of (legal) ascription and not merely attribution, then, because a correct answer can be provided only by following a rule of a different order, a rule about how best to answer questions of who should count as an appropriate subject for rights attribution. And when this occurs, the concern is with a different and more normatively fundamental function of rights. So looking to specific state statutes here would be of no help, for they can beg those critical ascription questions that are raised appropriately only at the more fundamental level where a decision must be reached regarding whether, following the example, fetuses are to be taken as counting as appropriate subjects for rights. While the resulting answer to particular attribution questions might imply an answer to the ascription question, it will in truth do so only when and because an answer to the latter question has been provided and the issue is considered settled.

Notice now that if the question of the ascription of basic constitutional rights is taken as analogous (or, as in the case of the abortion controversy, at root equivalent) to the moral question of fundamental rights ascription, then answers regarding whether an individual qualifies for rights attribution presuppose answers to the rights-ascription question. When understood properly, then, this question works at a different normative level that admits only those normative considerations consistent with the distinctive nature and function of moral rights. On the position defended here, and now actively resisting the temptation to use a mature legal system of rights as a wholly adequate model, in a system of *moral* rights, the only individuals qualifying for the ascription of

fundamental moral rights are those capable of those particular complex interests implied by their capacity for a transitive due. And only if an individual possesses this capacity and thus qualifies for fundamental rights can that individual qualify for the attribution of nonfundamental moral rights. The ascription of fundamental moral rights to an individual thus counts as a necessary condition for the attribution of any moral right; but the capacity for a transitive due counts as both necessary and sufficient conditions for the morally normative *possibility* of the attribution of any nonfundamental moral right to an individual. Therefore, the general appeal to the capacity for interests cannot be adequate to qualify an individual for either the ascription of fundamental moral rights or the attribution of nonfundamental moral rights. So it is a mistake to speak of someone as being the sort of being who *can* qualify for rights simply in virtue of the fact that that individual is capable of certain interests, even certain complex interests, other than that of the capacity for a transitive due. And it is also an error to speak of beings as qualifying in some proportional or partial way for the ascription of fundamental rights. While a specific individual may not qualify for the full complement of fundamental rights, she cannot partially qualify for the ascription of fundamental rights in general. There is no such thing as partial qualification for the *ascription* of fundamental moral rights in this latter sense; it is an all or nothing affair.

6.

The theory of fundamental rights ascription offered here is designed to be consistent with any morally plausible theory of the nature and value of fundamental rights. However, the theory does provide certain minimal constraints, in the form of conditions of adequacy, for such theories. Thus, should a theory of fundamental rights entail the ascription of such rights to rocks, plants, invertebrates or other individuals who seem to be incapable of a transitive due, this would be reason to reject that theory, not reason to reject the view proposed here. The idea is to protect the rights-ascription problem from what can be thought of as moralistic front-loading. Such front-loading occurs when, for instance, a favored moral

commitment dictates an answer to the rights-ascription problem without providing an argument to show that the essential normative functions of moral rights would be lost unless rights were ascribed in this way. Clear examples of such front-loading can be found in theological views holding that all of God's creatures have rights, "naturalistic" views holding that most of the constitutive elements of nature have rights or, as argued earlier on, the widely held "humanitarian" view that all human beings have fundamental moral rights simply in virtue of their species membership.

Perhaps the common thread running through all these positions is the desire of their proponents to ensure an extraordinarily high regard for certain entities and individuals that requires a presumptively unexceptional protection of these entities and individuals against arbitrary or even wanton misuse, abuse, or destruction. Yet while such commitments are sometimes laudable and even defensible on a wide range of grounds, they tend to involve the common error of thinking that because rights-based reasons provide powerful moral grounds for regulating or even proscribing morally suspect behavior regarding certain entities and individuals, they are the most appropriate grounds for advancing these legitimate goals. Unless these positions include or provide arguments demonstrating that this is indeed the case, that the distinctive normative function of fundamental rights can be sustained when rights are ascribed to individuals lacking the capacity for a transitive due, then these positions will fail. It is the argument of this paper that no such argument will succeed.

This leaves open the question of whether the theory of fundamental rights ascription provided here establishes too stringent a set of conditions for otherwise highly attractive theories of fundamental rights. Such theories tend to be one of two types. The first takes as prerequisite for the proper and meaningful ascription and function of moral rights (whether fundamental or not) the existence of certain component elements of individual well-being, for example, the general capacity of individuals to possess certain inherently valuable interests that are served best by the actions or forbearances of others. To the same end, the second type invokes the indispensable conditions of systematic morality such as the capacity of some individuals to act as rational

agents in a community of these agents all possessing certain duties to each other. But so long as theories of both types accommodate fundamental rights ascription as necessarily involving a distinctive kind of moral predication of a distinctively relational sort, where it always matters not only what good or value is served to or for some individual but also exactly why and by whom it is served, then there is no flagrant incompatibility between both sorts of theories and the view defended here.

Thus, while considerable disagreement endures regarding issues such as whether these theories are mutually compatible and whether each can perform the formidable chores that an acceptable general theory of moral rights must perform, there seems no a priori reason for believing either sort of theory to be wholly undermined by a transitive-due theory of fundamental rights ascription. Yet it may well work out, and nothing here provides assurances to the contrary, that such theories need to be more carefully tailored so as to be fully compatible with a transitive-due theory. Otherwise, interest theories—especially when inadequately qualified and thus not restricted to include only certain interests—may create moral rights where there are none, while agency theories (which frequently succumb to the allure of the humanity standard) may deny certain rights to those who indeed possess them. A tolerable theory of fundamental rights ascription does not preclude attractive theories of rights, but it can launch warnings against their excesses.

Notes

1. See Mary Ann Warren, "On The Moral and Legal Status of Abortion," *Monist* 57 (1973): 43-61; and Douglas N. Husak, "Why There Are No Human Rights," *Social Theory and Practice* 10 (1984): 125-41.
2. See Tom Regan, *The Case for Animal Rights* (Berkeley: Univ. of California Press, 1983), chap. 7; and Bernard E. Rollin, "The Ascent of Apes—Broadening The Moral Community," Dale Jamieson, "Great Apes and the Human Resistance to Equality," and Robert W. Mitchell, "Humans, Nonhumans and Personhood," in Paola Cavalieri and Peter Singer (eds.), *The Great Ape Project, Equality Beyond Humanity* (London: Fourth Estate, 1993).
3. See Diana T. Meyers, *Inalienable Rights: A Defense* (New York: Columbia Univ. Press, 1985), pp. 116-19.

4. See Joel Feinberg, *Social Philosophy* (Englewood Cliffs: Prentice-Hall, 1973), p. 92; and Margaret MacDonald, "Natural Rights," *Proceedings of the Aristotelian Society 1947-48* (The Aristotelian Society, 1949), pp. 37-38.
5. For a seminal discussion of these issues as they arise in consideration of the fundamental right to life, see Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," in Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton Univ. Press, 1980), pp. 221-51.
6. This does not preclude the possibility that a fetus could have a right to life that is not a fundamental right but a nonfundamental moral or legal right.
7. For reasons provided in section 5, below, this example is intended as an elucidation, not as an analogy.
8. Similarly, in the law, if a class action suit were decided such that anyone showing standing to bring a claim would automatically receive damages consistent with the judgment, fulfilling the conditions necessary for standing would be equivalent to fulfilling the conditions for receiving damages. With respect to fundamental rights, all of which are moral rights but not all of which are legal rights, it may be worth keeping in mind that the kinds of rights that may be possessed simply in virtue of qualifying for fundamental rights are not isolated claim rights. See George E. Panichas, "The Structure of Basic Human Rights," *Law and Philosophy* 4 (1985): 343-75.
9. The humanity standard can be defended for strategic reasons. For unless all human beings qua human beings are *presumed to* possess fundamental rights, the burden of showing why certain human beings (say, members of a racial minority traditionally denied fundamental rights) prima facie deserve to be treated as if they have these rights can be shifted to those with such a commitment and away from those who deny it. And rather as some have argued that denying rights to fetuses and the comatose contributes to a diminution of respect for other human beings, abandoning the humanity standard runs very high moral risks regarding the nurturing and cultivation of crucial moral attitudes regarding how most humans ought to be treated. But as persuasive as this kind of argument may be in many contexts, it provides only strategic grounds for prima facie rights ascription. And in the face of "rights conflicts" between those humans to whom rights are presumed to be ascribable and those who actually possess rights, the rights of the latter must trump the presumed rights of the former. This seems especially evident when humanity is understood to span the range from the yet-to-be-conceived through the conceived, the gestating, the born, the living, and of course terminating with but not excluding the dead.
10. Carl Cohen succumbs to this confusion in "The Case for the Use of Animals in Biomedical Research," *The New England Journal of Medicine* 315, no. 14 (2 October 1986), pp. 865-69.
11. For example, H.L.A. Hart, "Are There Any Natural Rights?," *Philosophical Review* 64 (1955): 175-91; Alan Gewirth, "The Basis and Content of Human Rights," in J. Roland Pennock and John W. Chapman (eds.), *Human Rights*

(*Nomos* 23) (New York: New York Univ. Press, 1981), pp. 119-47; and Meyers, *Inalienable Rights*, p.127, passim.

12. Alan Gewirth commits the modal error in insisting that so long as there is a possibility that an individual may acquire or recover some capacity of agency, then that individual *has* rights (see Alan Gewirth, "Why There Are Human Rights," *Social Theory and Practice* 11 (1984): 235-48; cf. esp. sec. 2b). As noted earlier, there may be reasons for treating such individuals *as if* they have rights, but treating them as actually having rights not only involves the modal error indicated, but also simulates rights conflicts (between rights that certain individuals actually possess and the "rights" of certain prospective agents) where none exist.
13. Joel Feinberg employs this strategy in "The Rights of Animals and Unborn Generations," in *Rights, Justice, and the Bounds of Liberty*, pp. 159-84.
14. Ibid. p. 160.
15. Bentham writes: "To me a right and a legal right are the same thing, for I know no other. Right and law are correlative terms: as much so as son and father . . . A natural right is a son that never had a father . . . A natural right is a species of cold heat, a sort of dry moisture, a kind of resplendent darkness." See W. Stark (ed.), *Jeremy Bentham's Economic Writings* (London: George Allen and Unwin, 1952), vol. 1, pp. 333-34.
16. This summary statement glosses significant complexity, the origins of which are now widely held to have been initially uncovered in Hohfeld's analysis of legal rights. See Walter Wheeler Cook (ed.), *Fundamental Legal Conceptions* (New Haven: Yale Univ. Press, 1919). For one of several recent accounts of moral rights that involve important discussions of Hohfeld's contribution, see Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard Univ. Press, 1990), chap. 1.
17. Joel Feinberg, "The Rights of Animals and Unborn Generations," pp. 167-73, passim. Feinberg's account does not distinguish moral rights and legal rights, nor does it aim to distinguish fundamental moral rights from other moral rights. In the analysis offered here, conditions (1)-(3) of the biconditional first premise can be taken as necessary and sufficient for L's having any moral right, except fundamental rights. Condition (4) makes the analysis one of moral rights that are fundamental rights. Notice that (2) says that L's *claim* for S is for L's own sake or good. Thus it need not be the case that having or controlling S is for L's sake or good or in L's interest. Individuals have rights to or regarding things that are not good for them, a point that will be of some importance below. Notice that the capacity for interests is not assumed to be a sufficient condition for the attribution of quite specific fundamental rights, for this capacity may not capture the full normative significance of those rights for its possessors. Thus the argument begs no questions against "choice" theories of rights attribution.
18. The lack of moral equivalence is evidenced by at least two facts: (1) the individual with the right to the rock could waive that right and the rock would

no longer be rights-protected; (2) any duties with respect to the rock are owed to the individual with the right to the rock and not to the rock. Neither of these would be the case if the rock actually had a right of its own.

19. Feinberg, "The Rights of Animals and Unborn Generations," pp. 168-69.
20. It is important *not* to assume, as some philosophers have, that the conditions for the former are the same as the conditions for the latter. What is required for the possession of duties, i.e., agency, autonomy, the ability to act on principle, etc., are not required to qualify for rights in general, though they may certainly be required for the ascription of certain quite specific rights.
21. This affirms an indispensable role of choice in theories of rights in that if someone has a right, moral limitations on the choices and activities of others are implied. But it does not follow that only those capable of choice, let alone autonomous choice, are capable of qualifying, in general, for rights.
22. That such a distinction cannot be sustained by early "unqualified" beneficiary theories of rights, such as that attributed to Bentham, has been taken as grounds for rejection of such theories (see H.L.A. Hart, "Are There Any Natural Rights?"). But see also David Lyons, "Rights, Claimants, and Beneficiaries," *American Philosophical Quarterly* 6 (1969): 173-85.
23. For an account of a model on which fundamental rights correlate with duties, see Panichas, "The Structure of Basic Human Rights," esp. sec. 2B.
24. It is important here not to prejudge the important question of whether the moral function of rights is vitiated unless rights always override the general good. See T.M. Scanlon, "Rights, Goals, and Fairness," *Erkenntnis* 2 (1977): 81-94, for arguments showing that the distinctive moral function of rights can be preserved even in such cases. What is being insisted upon, though, is that rights have a distinctive function that is, in theory, always distinguishable from consequentialist requirements to seek the optimal aggregate good.
25. This does not preclude that the claim might be made on some other, non-rights grounds or that the ascription of certain special rights to particular individuals might be justified because in so doing an aggregate or community-wide benefit would, under certain circumstances, result.
26. Whether any form of utilitarianism can accommodate rights in a stable way is, of course, another matter.
27. For a more detailed investigation of the problems confronting strictly deontological theories that do not make room for rights, see George E. Panichas, "Rights, Respect, and the Decent Society," *Journal of Social Philosophy*, forthcoming.
28. Analyses of having an interest that conjoin conative and cognitive components, as does Feinberg's, have been criticized by Tom Regan as being too narrow and thus too inclusive. See Tom Regan, "Feinberg on What Sorts of Beings Can Have Rights," *Southern Journal of Philosophy* 14 (1976): 485-98. R.G. Frey responds to this and related criticisms with a sustained effort to defend the complex, conative cum cognitive analysis of the capacity of having an interest. Here Frey explicitly aims at denying that non-human

animals can have interests (because it is not reasonable to believe that they have either desires or beliefs in the requisite senses), and thus can qualify, on an interest theory such as that provided by Feinberg, for rights ascription. See R.G. Frey, *Interests and Rights* (Oxford: Clarendon Press, 1980), esp. chaps. V and VI. But see Regan's response to Frey in *The Case for Animal Rights* (Berkeley: Univ. of California Press, 1983), chap. 2.

29. Feinberg, "The Rights of Animals and Unborn Generations," p.168 (emphasis in original). But Feinberg forgets his own point when he claims that because babies can feel pain, "this alone may be sufficient ground for ascribing both an interest and a right to them" (p. 178). Unless the capacity to feel pain is assumed to be accompanied by the more complex psychological capacities implied by the possession of a transitive due, the capacity of a baby to feel pain is at best only a necessary condition of rights ascription.
30. The capacity for cruel treatment should be distinguished from the capacity to be cruel to another. The latter implies, at minimum, an indifference to the suffering of another and, at maximum, a satisfaction in inflicting such suffering. So one can be cruel to a being that does not have a right not to be treated cruelly. Of course such conduct can be morally wrong, but not because it is a violation of a right.
31. We sometimes look for a single qualifying property in an attempt to determine whether someone is completely qualified for the attribution of a particular right because, in certain circumstances, a dispute arises regarding the evidential issue of whether that specific property is present or absent. But in such situations, we assume a backdrop of other properties or characteristics which, should the contentious property be added, would suffice for complete attribution of the right.
32. Wesley N. Hohfeld, in Cook (ed.), *Fundamental Legal Conceptions*, pp. 32-35. Hohfeld seems to have accepted without question that parties to legal rights relationships are adult human beings; but nothing in his analysis seems to require that. Indeed, given his commitment to legal realism, it seems consistent with his theory that non-human beings and certain entities could qualify for a full range of legal rights.
33. 410 U.S. 113 (1973).

George E. Panichas
Department of Philosophy
Lafayette College, Pennsylvania
panichag@lafayette.edu