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ABSTRACT

Carl Cohen's arguments against animal rights are shown to be unsound. His strategy entails that animals have rights, that humans do not, the negations of those conclusions, and other false and inconsistent implications. His main premise seems to imply that one can fail all tests and assignments in a class and yet easily pass if one's peers are passing and that one can become a convicted criminal merely by setting foot in a prison. However, since his moral principles imply that nearly all exploitive uses of animals are wrong anyway, foes of animal rights are advised to seek philosophical consolations elsewhere. I note that some other philosophers' arguments are subject to similar objections.

1. Introduction

Carl Cohen is one of the most prominent philosophical advocates of the view that nonhuman sentient animals (hereafter, 'animals'), do not, and cannot, have moral rights. Many who enjoy and profit from the infliction of pain, suffering and death on animals, especially those in the vivisection industry, strongly applaud his efforts at attempting to defend the moral propriety of their outlook and deeds [1].

Any plausible argument against animal rights must provide an explanation why humans with mental lives less sophisticated than animals' mental lives have rights. Very few are willing to argue that it would be (and, in historical cases, has been) morally permissible to subject these humans to experiments that animals are subject to (e.g., drowning, suffocating, starving, burning; blinding them and destroying their ability to hear; damaging their brains, severing their limbs, crushing their organs; inducing heart attacks, ulcers, paralysis, seizures; forcing them to inhale tobacco smoke, drink alcohol, and ingest various drugs, such as heroine and cocaine, etc.) [2].

Cohen agrees that these humans (regrettably, often called 'marginal' humans) have rights. I will argue that his explanation why these humans have rights entails, surprisingly (and contrary to his intentions), that *animals* have rights as well. His strategy also has the surprising consequence that *no humans have rights*. Furthermore, his strategy supports the negations of these conclusions, so it has inconsistent and other false implications. Rescuing these arguments depends on, among other things, solving a seemingly intractable problem in probability theory and metaphysics, so it is highly doubtful that they can be salvaged. A number of other philosophers' arguments are similar to Cohen's and are subject to similar objections.

These conclusions will probably be upsetting for those who see Cohen as their moral advocate. What might be more upsetting for them, however, is that Cohen's stated moral principles imply that nearly all uses of animals are wrong anyway. Thus, his position provides, in a certain sense, a moral *defence* of animals: his views are fundamentally contrary to the views of those who appeal to him to try to defend their harmful uses of animals [3].

2. Moral Rights

Some philosophers reject talk of 'rights,' but here I will presume that the true morality includes moral rights. What does Cohen mean by 'rights'? This must be understood in order to evaluate his arguments that humans have rights but animals have none. Cohen briefly explains his concept:

A right, properly understood, is a claim, or potential claim, that one party may exercise against another. The target against whom such a claim may be registered can be a single person, a group, a community, or (perhaps) all humankind [4].

Here, the question is whether animals have a claim to their most fundamental interests—in not being subject to pain and suffering, in retaining bodily and mental integrity, and in life itself [5], — being respected, even if failing to respect those interests would benefit humans. As Cohen puts it, the question is whether animals have “the right not to be used like inanimate tools to advance human interests . . . no matter how important we think those human interests to be” [6].

Cohen's conception of rights is consistent with Tom Regan's brief explanation of what it is to have rights:

To have a right is to be in a position to claim, or to have *claimed on one's behalf*, that something is due or owed, and that the claim that is made is a claim against somebody, to do or forbear what is claimed as due [7].

Here what is 'due' or 'owed' is respectful treatment. Cohen and Regan agree that if animals are due this respect, then all industries and practices that exploit animals for their instrumental value ought to be abolished, and the individuals involved in this exploitation should be stopped. And this is true, regardless of the possible losses to the exploiters: they have no right to ill-gotten gains. Thus, the picture of rights is that of invisible 'No Trespassing' signs and moral 'trump' cards, an exceedingly non-utilitarian and non-aggregative moral outlook. Rights impose the duty that justice is done, as the saying goes, 'though the heavens fall.'

These characterizations are rough and raise many difficult theoretical questions about the nature of rights [8] but are sufficient for our purposes.

3. An Understandable Misinterpretation of Cohen's Argument

Let us agree that humans have moral rights in the sense that Cohen specifies. If humans have rights and animals have none, this must be explained by some difference between humans and animals. Cohen must hold that there is some necessary condition for having rights that humans meet but that all animals fail to satisfy.

To identify this condition, Cohen seems to make an important set of observations about humans [9]. He notes that only humans are able to conceive of their actions using moral concepts; only we are able to believe that we can do right and wrong and choose to act in accordance with (or in violation of) the moral law: only we can freely restrict our own behaviour out of respect for others. These remarks strongly suggest that, on Cohen's view, whether an individual has rights *depends* on whether that individual has

these properties, which he calls the 'capacity for free moral judgment' [10]. This seems especially clear since he claims that, 'holders of rights *must* have the capacity to comprehend rules of duty, governing all including themselves . . . [H]olders of rights *must* recognize possible conflicts between what is in their own interest and what is just' [11].

Although there is some controversy on these empirical matters, let us agree with Cohen that only humans possess the capacity for moral judgment. This forms the basis of a common interpretation of Cohen's argument that animals have no rights. It proceeds as follows:

- (i) If an individual lacks the capacity for free moral judgment, then he or she does not have moral rights.
- (ii) All animals lack the capacity for free moral judgment.
- (iii) Therefore, animals do not have moral rights.

Given Cohen's words, this is a plausible interpretation. However, a critic will quickly point out that premise (i) has a false implication that shows it to be false. Cohen fairly states the critics' objection:

If having rights requires being able to make moral claims, to grasp and apply moral laws, then many humans — the brain-damaged, the comatose, the senile — who plainly lack those capacities must be without rights. But that is absurd. This proves (the critic concludes) that rights do not depend on the presence of moral capacities [12].

Cohen agrees that it is 'absurd,' or, at least, mistaken, to think that the brain-damaged, the (presumably, non-permanently) comatose, and the senile do not have rights. He agrees that this objection refutes premise (i) above and shows this argument to be unsound.

4. The 'Kind' Interpretation of Cohen's Arguments

But Cohen can reply that the above argument is not his argument. He explicitly announced that the 'core' of his argument against animals' having rights is this:

Animals (that is, nonhuman animals, the ordinary sense of that word) lack this capacity for free moral judgment. They are not beings *of a kind* capable of exercising or responding to moral claims. Animals therefore have no rights, and they can have none [13].

The critics' objection addresses only the first sentence in this quotation, which, if taken to suggest a necessary condition for having rights, is mistaken (and Cohen agrees). But the critics' objection overlooks the second sentence. Cohen's argument, therefore, is this:

- (1) If an individual is *of a kind* that lacks the capacity for free moral judgment, then he or she does not have moral rights.
- (2) Each animal is *of a kind* that lacks the capacity for free moral judgment.
- (3) Therefore, animals do not have moral rights.

Call this 'the "kind" argument against animal rights.' Cohen's remark suggests a separate argument for the bolder conclusion that animals not only *do not* have rights, but that they *cannot* have rights, but that argument is worth serious attention only if Cohen shows that, as things actually are, animals do not have rights.

These arguments are improvements over the *Understandable Misinterpretation* in that, at least, they do not obviously appear to be subject to objections from cases of 'marginal' humans. But Cohen's case against animals can succeed only if he is able to show why these humans have rights, despite their

lacking the capacity for moral judgment and (apparently) failing to meet his stated necessary condition for rights. Cohen thus has another 'kind' argument to attempt to circumvent that objection:

(1*) If an individual is *of a kind* that possesses the capacity for free moral judgment, then he or she has moral rights.

(2*) Each 'marginal' human is *of a kind* that possesses the capacity for free moral judgment.

(3*) Therefore, 'marginal' humans have moral rights.

Cohen's 'kind' arguments are not easy to evaluate since Cohen does not explain his premises. In particular, he does not explain what he means by his use of the term 'kind.' What 'kinds' are and what it is to be 'of a kind' is not obvious or clear. Since his arguments depend on 'marginal' humans being of a kind that animals are not of (and could not be of) and moral principles that appeal to 'kinds', it is doubly unfortunate that he does not explain what he means.

Thus, some interpretation is necessary. I will first attempt to understand why the second premises of the 'kind' arguments, (2) and (2*), might be true: why are we supposed to think that animals *are not* of a kind that has the capacity for free moral judgment but that marginal humans *are*, even though they are unable to make moral judgments? After some discussion of the problematic nature of these premises (including an argument that [2*] is necessarily false), I settle on an interpretation that allows for them to be true. But I then argue that, given Cohen's moral principles (1) and (1*), this interpretation has implications that are surprising: first, that animals *have* rights, and, second, the false and inconsistent implications that humans *do* and *do not* have rights and that even *everything* does and does not have rights. These consequences show that Cohen's strategy is seriously and irredeemably flawed.

For the sake of this first set of arguments I accept Cohen's moral principles (1) and (1*) as true. I later argue, however, that they are false because they are instances of an obviously false general principle.

5. An Unkind Objection: 'Kinds' Lack Moral Properties

Let me first present a perhaps unkind objection. Cohen claims that animals are not of a kind capable of exercising or responding to moral claims and that 'marginal' humans are. To me, these are odd claims because, strictly speaking, *kinds* are never capable of exercising or responding to moral claims anyway. 'Kinds' are abstract objects, classificatory devices, or metaphysical entities. Individuals are members of kinds in virtue of what properties they have. Perhaps all *individuals* of a particular kind can respond to moral claims, but the kind *itself* does not. To see this, consider this case:

Benjamin, Jennifer and Joshua encounter a mother in financial distress who desperately needs money to buy medicine for her sick child: she makes a 'moral claim' for their financial assistance. They go with her to buy the medicine and split the cost three ways.

Here the three *individuals* responded to the moral claim: although though they are of that kind 'beings able to respond to moral claims,' the kind itself provided no financial assistance. Since there are no kinds capable of responding to moral claims, nothing can be of such a kind. So premise (2) is true: each animal is of a kind that lacks the capacity for moral judgment. But it's true since *all kinds* lack this capacity. But since all kinds lack this capacity, Cohen's premise (2*) — that 'marginal' humans are *of a kind* that possesses the capacity for free moral judgment — is false. Furthermore, that premise would seem to be necessarily false since there probably is no possible world where kinds, as abstract objects, have moral capacities. Thus, Cohen's argument's dependence on kinds in this way results in it being either unsound or necessarily unsound: it fails to show that 'marginal' humans have rights.

But perhaps I've been too uncharitable (or dense) in failing to understand what a kind is. Let us then overlook this possible refutation. Cohen needs to retain some interpretation of what it is to be of a kind that might allow him to respond to the objection from cases of 'marginal' humans. I will develop a number of responses and show that they all fail for Cohen's purposes.

6. What *Kind* Are You? What *Kind* Are Animals?

To see why premise (2) might be true, i.e., why animals are not of a kind that possesses the capacity for free moral judgment, it might be helpful to see why (2*), the analogous premise, is supposedly true for 'marginal' humans.

Let us then consider a case: suppose scientists were, in secret, to perform painful and lethal experiments on some orphaned and permanently severely mentally challenged human infants, experiments which they know will greatly improve the lives of many other humans. Cohen is no utilitarian and he denies that anyone has a 'right' to his or her life's being improved at the serious expense of others. So, as far as I can tell, he would judge this experiment as seriously wrong because it would greatly violate these infants' rights.

Let us agree, but ask why. Again, Cohen says this is so because these humans are of a kind that possesses the capacity for free moral judgment. That's just premise (2*). He explains:

Persons who are unable, because of some disability [or age], to perform the full moral functions natural to human beings are certainly not for that reason ejected from the moral community. The issue is one of *kind*. Humans are of such a *kind* that they may be the subjects of experiments only with their voluntary consent . . . Animals are of such a *kind* that it is impossible for them, in principle, to give or withhold voluntary consent or make a moral choice. What humans retain when disabled, animals never had [14].

Although interesting, these remarks still do not explain *why* 'marginal' humans are of such a rights-conferring kind and animals are not. We are not told what it is *about them* that determines their kind-memberships. We must, therefore, speculate on what these reasons might be.

6.1. *Kinds Depend on What's 'Normal'?*

First, it might be said that (2*) is true because since 'normal' human beings (i.e., adults) are of the kind 'possesses moral capacities,' 'marginal' humans are also of that kind. Roger Scruton might endorse this suggestion when he writes, "Infants and imbeciles belong to the same *kind* as you or me: the kind whose *normal* instances are also moral beings" [15].

Here 'normal' seems to be understood in a statistical sense: if most human beings have some characteristic, then it's normal. But this defence of (2*) succeeds only if this general principle is true: if 'normal' human beings are of some kind *K*, then 'marginal' humans are of that kind *K* as well. But this principle seems clearly false: 'normal' human beings are of the kinds 'able to make pasta', 'able to reproduce', and 'able to solve maths problems and drive cars' but 'marginal' humans can do none of these: they are not of the *kind* 'pasta-maker' or 'equation solver.' Most 'normal' human beings are also of the kind 'over four feet tall', but most 'marginal' humans (i.e., infants) are quite short: they are not of that kind.

Thus, *in general*, that fact that it is normal for some humans to be of some kind (or have some property) does not entail that non-normal humans are also of that kind (or have that property). So these

considerations provide no straightforward reason to think that humans who are statistically *abnormal* have the capacity for moral judgment or are of that kind [16].

6.2. Kinds Depend on What's 'Natural'?

Similar responses would also be directed to the charge that since it's 'natural' for humans to have some specific capacities or abilities, 'marginal' humans have them as well and so are of the corresponding kind. (Below we will see that Cohen uses the term 'natural', perhaps to suggest just this).

While the meaning of 'natural' is often obscure, this principle is refuted by the fact that although it's 'natural' for humans to have two arms and IQ scores greater than 90, obviously, there are humans without two arms or with quite low IQ scores. These humans are, of course, of the kind 'human,' but they are obviously not of the kinds 'having two arms' or 'having average IQ.' So the fact that some characteristic is 'natural' does not entail that all humans (including 'marginal' humans) have it. So appeals to what's 'natural' again provide no reason to think that marginal humans are of the kind 'possess moral capacities.'

6.3. Kinds Depend on 'Potentials' and Logical Possibilities?

A third suggestion for thinking that 'marginal' humans are of a kind that possesses the capacity for moral judgment is to (apparently) *disagree* with Cohen and argue that 'marginal' humans *do*, in fact, possess the capacity for moral judgment and, therefore, they are of that 'kind.' It might be said that they have this capacity because they are *potential* moral agents, or *could be* moral agents, and so are of that kind. This response has some initial plausibility, perhaps, since there are unrealized capacities, i.e., abilities that are never exercised: maybe even though 'marginal' humans do not make moral judgments, in some sense they *could*, so they are of that kind.

This response is problematic in many ways: first, given moral principle (1*), it implies that human fetuses are also of that kind, so all abortions violate their rights, as does any 'terminal' experimentation on human cells or tissues that *could* become moral agents. This would include not just fertilized eggs and (frozen or fresh) embryos, but any other (human or non-human) cells that *could* be cultivated into moral agents were certain technologies (eventually) applied to them. It also might imply that contraception and even abstinence violate rights if, like a table-and-set-of-chairs can be considered one thing, an egg-and-a-sperm-that-*could*-fertilize-it is one thing as well, since that sum of those parts has the potential to become a moral agent (as it often does). If this case against animal rights entails that all abortions, contraception, and all other activities that prevent potential moral agents from existing violate rights, then at least some of these consequences might rightly be seen as a *reductio* of this response.

Second, this response doesn't seem to cover all actual 'marginal' humans since, for some who are very seriously damaged or incapacitated, a medical professional might truly judge (and Cohen would agree) that they even lack the *potential* to become moral agents since, given their biological condition, that is *medically impossible* for them: in their lives they will never make moral judgments. One might respond, however, that there is a broader sense of 'potential' that applies to these humans. Alan White suggests this response; he says that 'marginal' humans "may be for various reasons empirically unable to fulfil the full role of a rights-holder. But . . . they are *logically possible* subjects of rights to whom the full language of rights can significantly, however falsely, be used" [17]. While advocates of 'marginal' humans do not want to agree that these rights ascriptions are *false*, if the suggestion is that since it's *logically possible* for these humans to be moral agents, they are of that kind and thereby have rights, then since it's also logically possible for animals to be moral agents (i.e., that's not formally contradictory), then animals are

of that kind and have rights as well. So I presume that the foe of animal rights does not endorse this defence of (2*).

Finally, it's not at all clear what motivates this response anyway. Although it doesn't seem to presume the false principle 'if something potentially or could have property P, then it has property P *now*', it's not clear how it works. Some moral agents are mass murderers: does that mean that all 'marginal' humans are *potential* mass murderers and so are of the kind 'mass murderer'? Some are firefighters: are all humans thereby of the kind 'firefighter'? Or does this response apply only to 'normal' or 'natural' characteristic and so only these are ones that 'marginal' humans have as 'potentials'? If so, then this response seems subject to the objection above. Either way, given this response's problematic implications and its obscure motivations, it is clear that this appeal to potential is not the way to make a strong case that 'marginal' humans have rights and animals do not.

6.4. *Kinds and the Grouping Response*

Finally, it might be said that (2*) is true — 'marginal' humans are of a kind that possesses the capacity for moral judgment — *simply* because they are human. Many people, especially non-philosophers, would think that this is the *obvious* reason why they have rights. Cohen, in fact, says this: 'Human children, like elderly adults have rights *because they are human*' [18]. I aim to show that the most plausible defence of this claim has disastrous implications for Cohen's perspective.

Recall that the claim isn't that being human is sufficient for having moral capacities (since Cohen agrees that there are humans who lack these capacities); rather it is that being human is sufficient for being of a *kind* that possesses the capacity for moral judgment. But 'being human' is multiply ambiguous: on the one hand, it might mean 'biologically human,' 'being of the species *homo sapiens*,' or 'having human DNA.' But on that meaning, human cells and tissues are of that kind and so have rights. Cohen doesn't appear to think this, so I presume that when he says that 'marginals' are human, he means something like that they are human organisms who are living, intact, and have achieved sufficient development to be sometimes conscious. This description is imperfect, but the question *still* remains: how is it that all beings like that are of a kind that possesses the capacity for moral judgment?

Cohen never asks or answers a question like this, but I suspect his complete answer would be something like this:

To have rights, something (or someone) must be of a kind that possesses moral capacities: being of a kind that possesses moral agency is necessary for having rights. 'Marginal' humans are of a kind that possesses moral capacities *because* they are human. Being human *makes* them a member of the kind that possesses moral capacities. This is *because* all moral agents are of that kind: all moral agents are human. *Since moral agents and 'marginal' humans are both of the kind 'human'* [19] — they share a property — *'marginals' are also of a kind that possesses moral capacities as well.* Therefore, they have moral rights.

If this is Cohen's strategy (and it seems that this, or something very much like it, is), then the animal rights advocate can play that game to 'demonstrate' that, *pace* Cohen, animals are also of the kind that has moral capacities and, therefore, have rights.

Why are animals of such a rights-generating kind? For Cohen-esque reasons *exactly parallel* to those given in defence of 'marginal' humans. The reasoning will run like this: first, most humans are moral agents and so, on Cohen's view, have rights; second, there is a kind that both moral agents *and* animals are members of, e.g. the kind 'sentient being,' 'conscious being,' 'subject of a life', or 'being with

preferences' (in fact, there are many kinds that animals and humans share membership in); and third; since animals and moral agents are both of a kind, e.g. the kind 'sentient being' — i.e. they share a property — animals are *also* of a kind that possesses moral capacities and, therefore, they have rights.

This method of reasoning can also be used to 'demonstrate' falsely that, from Cohen's perspective, humans have no rights. Consider all the various objects on earth: most of them are of the kind 'lacking moral capacities' and so, on Cohen's view, they don't have rights. But humans are of a kind with these various objects, e.g. the kind 'thing on earth' or 'earthly specimen' or an 'object quite far from the sun.' Since most members of these kinds lack the capacity for free moral judgments and humans are members of these kinds, this fact and Cohen's premise (1) — if an individual is *of a kind* that lacks the capacity for free moral judgment then it does not have moral rights — imply that humans do not have rights. But, perhaps I've got it backwards: since all these non-conscious material objects are of a kind with normal humans since they share properties with these humans, they all have rights too. Since all these inconsistent conclusions (and more) are warranted on Cohen-esque reasoning, these are devastating implications.

Cohen might object and claim that not just any old shared property will do the trick to get an individual into a kind that possesses moral capacities. He might claim that the only relevant shared property, or common kind, is biological: only that can provide the proper, rights-conferring relation to moral agents [20]. But he provides no reason why this is so. He can pick biological or genetic kinds to try to suit his purposes, but the defender of animal rights can grant Cohen's strategy and just pick other relations and shared properties to justify her contrary conclusions. Different kinds of properties are equally shared between animals, 'marginal' humans and moral agents. And, as we've seen, Cohen's strategy can be adopted to support any conclusion and its negation. Cohen provides no reason to side with any perspective on this issue: they are all equally plausible on his account and, thus his account is highly implausible.

Making the issue 'one of kind' is highly problematic since humans and animals are all members of infinitely many kinds or classes: we are all 'tokens' of many 'types.' It is very difficult (if not impossible) to identify what *kind* one is in a non-arbitrary manner since no one group or kind can reasonably be said to be *'the'* group or kind that someone is a member of. Most who work in probability theory and metaphysics concede that this problem, sometimes called the 'reference problem,' is a highly intractable. Cohen does not explain how one picks what kind of thing something is or which kind, of the many kinds any one thing is, best suits that thing. On the one hand, he claims that being of the kind 'possesses moral capacities' is necessary for having rights, but on the other hand he claims that being of the kind 'human' is sufficient for being of a kind that possesses moral capacities. Any attempt to get from the former to the latter kind is going to require an arbitrary and indefensible pick of the kind.

In sum, to return to the 'kind' arguments, if we grant that (2) and (2*) *are* true, on what I have suggested is the best explanation for why they are true, animals are also of a kind that *possess* the capacity for moral judgments and humans are of kinds that *lack* it. This is because animals are members of groups where some (or most) of the members have moral capacities and humans ('marginal' or not) are members of groups where none (or few) of the members have moral capacities. Given Cohen's moral principles (1) and (1*), this implies that animals and humans both *have* and *don't have* rights, as well as other obviously false and inconsistent conclusions. Cohen's arguments are clearly deeply flawed. Perhaps there is another way to interpret them, but nothing suggests itself in Cohen's writings.

8. Partners in 'Kind'

Cohen's 'getting-rights-by-association-in-a-kind' strategy is not unique. As mentioned above, Scruton seems to invoke it. Michael Allen Fox suggested it: he claimed that that "human beings have basic moral

rights *because* they are beings of the requisite *kind*, that is, autonomous beings, persons, or moral agents.” In response to the objection that some humans aren’t autonomous moral agents, he claimed that “membership in our own species ought to count for something” [21]. But explaining how human biology might, in itself, ‘count’ for being of the kind ‘moral agent’ is obviously difficult. And it’s not clear why our memberships in the kinds ‘sentient-being’ or ‘subject-of-alife’ aren’t more obviously rights-relevant anyway. Fox agrees; he later rejected his original position against animals calling it arrogant, complacent and arbitrary.

David Schmidtz suggests that a speciesist could respond to objections from ‘marginal’ cases in this way:

Of course, some chimpanzees lack the characteristic features in virtue of which chimpanzees command respect as a species, just as some humans lack the characteristic features in virtue of which humans command respect as a species. It is equally obvious that some chimpanzees have cognitive capacities (for example) that are superior to the cognitive capacities of some humans. But whether every human being is superior to every chimpanzee is beside the point. The point is that we can, we do, and we should make decisions on the basis of our recognition that mice, chimpanzees, and humans are *relevantly different types*. We can have it both ways after all [22].

While mice, chimpanzees, and humans *are* of different types, they are also of some same types since they share many properties. The problem for this speciesist would be specifying, in a plausible and defensible manner, why being of the *type* ‘biologically human’ is, in itself, a morally relevant type. It appears not to be, since human biology seems neither necessary nor sufficient for having rights: friendly space aliens could have rights and dead, human cells in a Petri dish do not. This speciesist would also need to explain why a psychological *type* such as sentience or being-the-subject-of-a-life is not relevant (or is not as relevant). She cannot have it both ways: either she has a theory of rights that appeals to plausible, psychological types as the basis for rights (which overlap between species), or she appeals to types that are not in themselves morally relevant, like DNA possession.

Leslie Pickering Francis and Richard Norman might provide some help: they suggest that “what are important are the relations in which human beings stand to one another” [23]. They base these relations on shared biological properties, but no reason is given why shared psychological properties are not the basis of an equally, or at least very, important relation. Finally, Robert Wennberg suggests that, “a fundamental difference in *kind* [between humans and animals] can be found in the religious capacity possessed by humans” [24]. True, some humans have these capacities, but not all. And if ‘marginal’ humans’ rights depends on these capacities, any attempts to secure them by a relation are probably subject to Cohen-esque objections all over again.

So, Cohen is not alone in his kind arguments, but other philosophers’ attempts are as unsuccessful as his are. ‘Kind’ strategies are often suggested, but never carefully developed or defended.

9. Cohen’s False Moral Principles

Until now, my focus has been on premises (2) and (2*). I will now argue that Cohen’s moral principles (1) and (1*) are instances of a false principle, although one we might sometimes (and sometimes not) wish were true. I will call it the ‘Getting a Property by Association Principle.’ Much of my discussion has already alluded to it: it is a more general formulation of the motivating idea behind Cohen’s moral principles:

If (1) an individual A is a member of some kind K and (2) some, most or all of the other members of that kind K have some property C and (3), on the basis of having property C,

they have property R, then individual A has property R as well, even though A lacks property C.

Something like this principle seems to be the driving force behind Cohen's response to the argument from marginal cases: even though each marginal human (A) lacks moral capacities (C), since each is a member of a group or kind (K) where the other members possess moral capacities (C) and so have rights (R) because of their moral capacities (C), marginal humans have rights (R), roughly, by association.

Consider a case where you'd wish this principle were true: you are a student (A) in a class who has failed the exams and done none of the homework so, on your own merits, you are failing. However, fortunately for you, the rest of the students have the properties of 'passing the exams and done well on the homework' (C) and, on that basis, have the property (R), passing the course.' If Cohen's principle were true, you too would have the property of passing the class as well because you are a member of the kind (K) 'students taking this class' and the properties from the majority transfer to you. Unfortunately for you, this property you would possess only on your own merits (which you lack since you have failed the exams and have done none of the work), so Cohen's principle is false.

A case where you'd be glad that this principle were false would be one where you (A) visit a friend who has been convicted of a heinous crime (C) and, on that basis, is now serving a life sentence in prison (R). Let's suppose that most people in this prison have these two properties. However, upon entering the prison as a visitor you become a member of the *kind* (K) 'a person who is physically located in the prison' and you are part of this kind or group along with the prisoners. However, fortunately for you, even though you are now of that *kind*, their properties of (C) 'being convicted of a heinous crime' and (R) 'now serving a life sentence' do not transfer to you. Now you are glad that Cohen's principle is false and that you can't get these properties by association.

Since Cohen's moral premises (1) and (1*) rely on the false 'Getting a Property by Association Principle,' this is yet another reason to reject Cohen's arguments.

10. Cohen's Other Arguments

Cohen offers suggestions for other arguments against animal rights. Most are not ideally clear and are underdeveloped, but they deserve comment. He claims that,

Rights arise, and can be intelligibly defended, only among beings who actually do, or can, make moral claims against one another. Whatever else rights may be, therefore, they are necessarily human; their possessors are persons, human beings [25].

To reply roughly in reverse order of the quote; first, from the fact that human persons possess rights it does not follow that animals do not; second, since rights themselves clearly are *not* human, they are not 'necessarily human.' Perhaps Cohen means to point out the obvious truth that the *concept* of rights is a concept that, as far as we know, only humans have. Maybe he wanted to make the bold suggestion that, necessarily, only humans have that concept. But even if those claims were true, that does not show that animals don't have rights: animals not having the concept of *p* does not entail that they lack the property of *p*. Animals lack the concept of 'being an animal', but they still are animals: like us they have many properties for which they lack related concepts.

To continue, third; the only beings who will 'intelligibly defend' rights will be beings who are intellectually sophisticated enough to grasp the concept of rights: they will likely have rights themselves, but this implies nothing for beings who cannot defend their rights; fourth, animal advocates *agree* with Cohen that animals have rights only against moral agents: were there no moral agents then no one, including

animals, would have rights; and, fifth, again while the *concept* of rights was developed by, or 'arose' among, intelligent moral agents, this does not show that animals don't have the property of having rights: the concept of 'DNA' arose among moral agents, but animals have a genetic code. Thus, nothing here gives any plausible reason to think animals do not or cannot have rights.

Cohen also claims that,

Animals cannot be the bearers of rights because the concept of rights is essentially *human*; it is rooted in, and has force within, a human moral world [26].

There is much unclear about these claims. What it is for a *concept* to be 'essentially human' is not said. But if the *concept* of rights is 'essentially *human*' and so animals therefore cannot have the *property* of having rights, then since the *concept* of humane treatment seems to be as 'essentially human' as the concept of rights is, it would seem that Cohen should think animals cannot have the *property* of being such that we're obligated to treat them humanely either [27]. Since Cohen does think that animals should be treated humanely [28], he can't think that animals need to have that concept in order for us to be obligated to treat them that way. So, on Cohen's own view, the fact that animals lack the concept of rights is irrelevant to whether they might have rights. If the suggestion is that something can have a *property* only if it (or things of its kind, to muddy the waters) possesses the correlated concept, this is clearly false since we all have properties for which we lack the related concepts [29]. Again, the fact that the concept of rights applies to humans and is 'rooted in' and has 'force within' human communities again does not imply that animals do not or cannot have rights.

Cohen also suggests that having rights is an 'essential' property of humans: this would correspond to his 'kind' conclusion that it's *impossible* for animals to have rights [30]. On a common view, if an individual has a property 'essentially' then is it metaphysically impossible for that individual to exist without that property. Since Cohen's suggestion raises too many deep metaphysical questions, which he has not yet addressed, I will not speculate on what the arguments that might be developed from this suggestion would look like. However, even if it were true that humans (or all

rights-bearers in the actual world) essentially, or necessarily, have rights (which seems to be false, given the logical possibility of a *Planet of the Apes*-like scenario where humans have the mental sophistication of apes and so, on Cohen's view, do not and cannot have rights), that wouldn't imply that animals can't have rights either.

11. Is Cohen's Position an Animal Rights Position?

While others have shown that Cohen's arguments are defective, I hope that I have shown that they are even worse than anyone suspected since, for one thing, any argument against animal rights that can be converted to an argument *for* animal rights and *against* human rights (and other false and inconsistent conclusions) is a great blunder. While critics often claim that animal advocates care more about animals than humans, and are sometimes even called 'human haters', if Cohen-esque arguments imply that humans don't have rights, these critics have missed their true target.

To defend his arguments, Cohen will have to solve the 'kind' problem I have identified above: for deep reasons beyond moral philosophy, this is likely to be very difficult, if not impossible. To respond to the objection from 'marginal' humans, he will have to adequately explain what properties humans possess that makes them have rights. It isn't the relation that he suggests, since, if it is, there are other relations that defeat his position and his strategy results in stalemate. He will have to explain why the presumption, which he rejects, that 'rights are tied to some *identifiable individual* abilities or sensibilities' [31] is mistaken even though the denial of this claim led first a vicious regress (since if an individual's rights

aren't tied to her abilities and sensibilities, but are tied to another individual's, but hers are tied to someone else's, whose are tied to someone else's, *ad infinitum*, then there is no basis for rights); and led, secondly, to epistemological skepticism about rights (if they're not tied to *identifiable* abilities, are they tied to *unidentifiable* abilities? If so, we can't identify them).

Of course, to refute Cohen's arguments is not to show that the conclusions he advocates — that animals do not and cannot have rights — are not true: it is only to show that Cohen has provided no rational support for them whatsoever. Anyone who accepts Cohen's conclusions can concede his defeat: to rationally retain his or her view, however, she need only then base her belief that animals do not have rights on stronger reasons than those Cohen offers. If she has these reasons, then she should not be troubled; if not, she needs to develop them or find someone who can, if she wishes to rationally maintain her view. Thus, the animal exploitation industries and community need to find a new philosophical defender of the moral propriety of their practices. The likelihood that their search will be successful is very low [32].

Were Cohen's arguments salvageable, however, that would not really help animal exploiters defend themselves. After all, Cohen also claims that "We have a universal obligation to act humanely, and this means that we must refrain from imposing pain on sentient creatures so far as we reasonably can," and he states that animals "ought not be made to suffer needlessly" (whether he would allow for animals to have a *right* not to be made to suffer needlessly is unclear) [33]. But all, or nearly all, uses of animals for food, fashion, education, entertainment and product 'testing' cause pain and suffering that we can reasonably refrain from imposing since we don't need any of the products from this exploitation in order to have meaningful and healthy lives. So these uses of animals are morally condemnable on Cohen's view [34]. Cohen also expresses 'repugnance for the hunting of animals for mere amusement' [35], but, ultimately, nearly all other uses of animals come to mere amusement as well since they're only for the merely *aesthetic* pleasures of experiencing certain tastes, wearing certain clothing, being entertained in certain ways and using certain cosmetics and personal and household products (all of which can be experienced in cruelty-free manners or easily gone without). Thus, given what follows from the empirical facts and Cohen's own moral principles, his views are, in a certain sense and concerning the issues that affect most animals, those of an animal rights advocate after all.

As for vivisection, neither Cohen nor anyone else has shown that it is 'necessary' for medical progress: nobody has shown that some specified amount of vivisection is (probably) indispensable for bringing about the greatest possible overall medical benefits. Nobody has argued that, despite *all* the other research methods available (and, more generally, methods of improving people's health, most of which are just the implementation and distribution of existing medical knowledge anyway, not new research), no other possible use of funds, time and talent could (or likely would) bring about a greater improvement in health for humans than animal research [36].

Few advocates of vivisection accept utilitarianism, but they often they appeal to it to try to justify their actions [37]. But, again, no one has done anything close to the conceptual and empirical work that would be needed to make a *serious* attempt as justify any animal research on utilitarian grounds: no advocate of vivisection has provided any method for calculating and comparing (actual) animal harms to (merely possible) human benefits, calculated direct human harms that are consequence of vivisection, calculated indirect harms and opportunity costs that result from funds being directed towards vivisection and not towards producing other benefits (and utilitarianism has no bias for medical benefits), and somehow added it all up to conclude reasonably that the calculation favours using animals. Even if *some* benefits were lost were some or all vivisection stopped, that would not be enough to justify it on utilitarian grounds, since one has to show that there is no alternative course of action that would yield greater benefits.

Perhaps this case can be made, but nobody has tried. Until this is done, the most reasonable attitude might be a skeptical one.

12. What Kind We Are

In conclusion, it is sometimes said that we should first look after or take care of 'our own kind.' It used to be thought that 'our kind' was our race, or sex, or ethnic group, or social class. Outsiders were judged 'not of our kind' and that justified inconsiderate, often exploitive, treatment. Fortunately, those responses are now seen as the unjustified prejudices they were. But we are of many kinds and the pressing challenge is to identify the morally relevant ones. Since it seems that 'marginal' humans have rights, moral agency is not necessary for rights: to think we are responsible only to other moral agents — that they are our unique kind and due preferential treatment — would be another unjustifiable prejudice. But since being of the kind 'biologically human' is neither logically sufficient nor conceptually necessary for having rights, biological kinds are not in themselves morally relevant either. Furthermore, we share little, morally, with human cells in flasks or organs in an icepack: bare biology doesn't count for much. Insofar as Cohen's case appeals to both those kinds, it is flawed.

So, if Cohen is mistaken, what kind is morally relevant? If it were true that we should take care of our own kind, what kind would that be? The simplest answer, with the most explanatory power, is that the boundary of our kind is not marked by species or moral agency. What kind are we? We are conscious, sentient beings, and many human and non-human animals are like us in that. Being of that kind is what's fundamentally morally relevant, vast practical consequences follow from this, and Cohen provides no reason to think otherwise [38].

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NOTES

[1] David DeGrazia reports that Cohen's arguments against animal rights and in favour of speciesism, not giving animals' interests even *serious* (not necessarily equal) consideration and the human utility of vivisection have been 'much praised by the medical community but severely criticized by philosophers.' D. DeGrazia (1996) *Taking Animals Seriously: Mental Life and Moral Status* (Cambridge, Cambridge University Press), p. 36, footnote 2. He references some articles that contain such praise and comments that "It is a sad statement about prevailing levels of intellectual integrity that uncomprehending, automatic dismissal of the possibility of equal consideration [of animals' interests] is deemed worthy of publication in many medical journals" (p. 49, footnote 21). Casual perusal of the World Wide Web reveals animal agribusiness, hunters, and trappers expressing praise for Cohen's arguments as well.

[2] For a contrary view, see R. G. F□□□□ (2001) Justifying animal experimentation: the starting point in E. F. Paul and J. Paul (eds.) *Why Animal Experimentation Matters: The Use of Animals in Medical Research* (London, Transaction Publishers), pp. 197–214. This list of experimental procedures is from T. Regan (2002) Empty cages: animal rights and vivisection, in Ryder, R., Matfield, M., Derbyshire, D. and Regan, T. *Animal Experimentation: Good or Bad?* (London, Hodder & Stoughton Educational). Michael Allan Fox provides a similar catalogue of procedures, noting that anaesthesia is often not used, in M. A. Fox (1986) *The Case for Animal Experimentation: An Evolutionary and Ethical Perspectives* (Berkeley, University of California Press), p. 97.

[3] For clarity, animal advocates have no quarrel with research that does not harm animals at all (e.g. observational studies in the wild), research with non-conscious, non-sentient animals, and therapeutic research where the individual animal subjects also benefit (or will probably benefit) from the research. It,

of course, is inadequate to claim that since 'the species' benefits, some vivisection is justified: 'the species' of humans, i.e. *some* humans, might benefit from human vivisection, but that presumably wouldn't justify it. For discussion, see D. DeGrazia (1999) The ethics of animal research: what are the prospects for agreement? *Cambridge Quarterly of Healthcare Ethics* 8, pp. 23–34.

[4] C. Cohen (1986). The case for the use of animals in biomedical research, *The New England Journal of Medicine*, 315, 14, October 2, pp. 865–870, p. 865.

[5] Since being alive is a necessary condition for the satisfaction of interests, animals who have interests have, at least derivatively, an interest in their lives continuing.

[6] Cohen (2001), p. 22, in C. Cohen and T. Regan (2001) *The Animal Rights Debate* (Lanham, MD, Rowman and Littlefield).

[7] T. Regan, pp. 19–20, footnote 1, in Cohen, C. and Regan, T. (2001) op. cit. Emphasis mine.

[8] For example, one theoretical concern is what rights views (for animals and humans) imply for cases of conflict, e.g. 'lifeboat' cases. These puzzles are philosophically challenging, but, they no more need to be solved to answer many current practical questions concerning animals than they need to be solved to address analogous questions concerning humans: e.g. despite controversies and unsatisfactorily answered questions about rights (and ethical theory in general), few are skeptical about (or practically paralyzed by the question of) whether humans ('marginal' or not) should be vivisected or not. For discussion of lifeboat problems, see A. Taylor (2003) *Ethics and Animals* (Calgary, Broadview Press), pp. 134–135.

[9] Cohen, C. (1986) op. cit., p. 866; C. Cohen (1997) Do animals have rights? *Ethics & Behavior*, 7, 2, 91–102, pp. 94–98; Cohen, C. (2001) op. cit., pp. 30–40. Cohen's arguments are quite similar in all his writings: more recent discussions are not more developed.

[10] Although Cohen's discussion strongly suggests that possession of rights depends on moral agency, it is not completely clear that he thinks this, since he says that he will not even attempt to explain the foundations of rights: see Cohen, C. (2001) op. cit. DeGrazia reports that Cohen 'never really argues that humans have rights, instead [he relies on] appealing to the authority of philosophical tradition' to support his claim that humans have rights. D. DeGrazia (2003) Review of Cohen, Carl and Regan, Tom. *The Animal Rights Debate*, *Ethics* 113, 3, pp. 692–695, p. 692. Regan argues that Cohen "fails to offer any explanation [of] what makes claims to rights valid . . . Why we should accept his assertion that rights are valid claims, and what he means when he says that they are, thus are and, in his hands, must remain matters of pure conjecture, lacking anything by way of requisite explanation let alone thoughtful justification," Regan in Cohen and regan (2001) op. cit., p. 273.

[11] Cohen (1986) op. cit., p. 866, emphasis mine.

[12] Cohen (1986) op. cit., p. 866. This response is also in Cohen (2001) op. cit., pp. 36–37 in Cohen and Regan (2001) op. cit.

[13] Cohen (1986) op. cit., p. 866. This response is also in Cohen, C. (2001), pp. 36–37, in Cohen and Regan (2001) op. cit.

[14] Cohen, C. (1986) op. cit., p. 866. Emphasis mine.

[15] Scruton continues, "It is this that causes us to extend to them the shield that we consciously extend to each other and which is built collectively through our moral dialogue." Note the conflation between what

might *cause* us to believe that such 'marginal' humans have such rights and the moral justification for such rights. R. Scruton (2000) *Animal Rights and Wrongs* (London, Demos), p. 55.

[16] James Rachels interprets Cohen's claim that 'the issue is one of kind' as the claim that what's morally relevant is what's statistically normal for most individuals of a species. He then argues that this approach is mistaken since it falsely implies that a statistically abnormal intelligent, thoughtful chimp who could engage us in conversation couldn't have rights. J. Rachels (1990) *Created from Animals: The Moral Implications of Darwinism* (Oxford, Oxford University Press), pp. 186–187.

[17] A. White (1984) *Rights* (Oxford, Oxford University Press). The quotation is reprinted in T. Regan and P. Singer (1989) *Animal Rights and Human Obligations* (Englewood Cliffs, NJ, Prentice Hall), pp. 119–121, p. 120. Emphasis mine.

[18] Cohen (2001) *op. cit.*, p. 37.

[19] Although he does not quite say so, presumably the kind that Cohen has in mind is the biological kind *homo sapiens*, since he does advocate 'speciesism.' See C. Cohen (2001) The moral inequality of species: why 'speciesism' is right, pp. 59–68 in Cohen, C. and Regan, T. (2001) *op. cit.* I should note that Cohen misunderstands what is typically meant by 'speciesism.' He mistakenly thinks that if one rejects speciesism then one will treat all animals exactly the same, irrespective of their different needs and dispositions. But those who reject speciesism reject the view that for comparable harms to a human and a non-human, the harms to a human are, *considered in themselves, necessarily* morally worse. But of course they think animals should be treated according to their different interests.

[20] James Rachels objects to Cohen's denying 'moral individualism,' the thesis that how an individual should be treated depends on his or her *own* characteristics, not others' characteristics or what groups that individual is a member. This objection isn't quite successful since one's *own* characteristics include one's relations to others and group or kind memberships. Rachels surely thinks that the fact that 'marginal' humans and animals are members of the 'group' or 'kind' sentient being is morally relevant (although we would typically just say that it's because they are sentient, rather than the wordier, but equivalent, claim that they are of that group or kind). So there is nothing necessarily problematic in appealing to kinds or groups: the problem is appealing to morally irrelevant ones and failing to defend one's views. See Rachels, J. (1990) *op. cit.*, pp. 173–174, 187.

[21] Fox (1986) *op. cit.*, pp. 56, 60, emphases mine; M. A. Fox (1987) Animal experimentation: a philosopher's changing views' *Between the Species* 3, 55–60, 75, 80, 82.

[22] D. Schmidtz (1998) Are all species equal? *Journal of Applied Philosophy* 15, 1, pp. 57–76, p. 61. Emphasis mine.