Note

Using Metaright Theory to Ascribe Kantian Rights to Animals Within Nozick's Minimal State

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Efforts in moral and social philosophy[1] to establish a consistent moral theory frequently avoid the issue of the status to be accorded to nonhuman animals.[2] Similarly, efforts to deal with animals in the legal realm rarely, if ever, address the issue of the moral concern to be directed toward animals.[3] Such theoretical lacunae serve to highlight philosophical as well as legal inconsistencies repugnant to any rationally based system of law. Robert Nozick addresses animal rights in his work, *Anarchy, State, and Utopia.*[4] However, Nozick attempts no solution of the issue, and leaves it unsettled since it is peripheral to the main thrust of his work.[5] Only by piercing such periphery can

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1. It is with sincere regret but considered discretion that this Note shall be restricted to the European tradition, excluding other applicable philosophies such as those found in Hindu custom and Hebraic dietary laws. Sheer weight of documentation provides sufficient reason for this limitation.

2. The term "animals," as used in this Note, shall be restricted to its legal sense, which includes "all living creatures not human or rational and endowed with the power of . . . self-motion." Tillery v. Crook, 297 S.W.2d 9, 13 (Mo. 1957) (*citing* 3 C.J.S. *Animals* § 1 (1915)).

"Many philosophers and other writers have proposed the principle of equal consideration of interests, in some form or other, as a basic moral principle; but not many of them have recognized that this principle applies to members of other species as well as to our own." P. SINGER, ANIMAL LIBERATION 8 (1975).

3. Legal scholarship expounds on the property status of animals with scant weight placed on animals as creatures of ethical regard. Stassinopoulos, Book Review, 20 ST. LOUIS U.L.J. 576 (1976). *But see* Burr, *Toward Legal Rights for Animals,* 4 ENVT'L AFF. 205 (1975); Friend, *Animal Cruelty Laws: The Case for Reform,* 8 U. RICHMOND L. REV. 201 (1974).

4. R. NOZICK, ANARCHY, STATE, AND UTOPIA 35-42 (1974).

5. The segment on animals in Nozick's book does not function as an integral part of the theory. Rather, the references to animals serve to embellish the propositions set forth regarding political theory. Nozick sets forth the goals of the section concerning

the core of Nozick's work be discovered. It is possible to generate different exteriors from the one basic structure. To pursue the nucleus of Nozick's universe, a grasp of his philosophical foundation is critical.

Nozick's logical primitive is that individuals have certain rights which no person or group may violate.[6] In substance these rights mirror John Locke's list of rights: life, liberty, property, and the right to punish transgressors.[7] The sole purpose for a system of government, according to Nozick, is to acknowledge and guard these rights.[8] Accordingly, individual freedom is maximized, limited only by the boundaries of the rights of others.[9] Thus, a "night watchman" state is created. In this situation of minimal government control, people are allowed to engage in whatever activities they please—provided they do not violate specific limitations established to safeguard others' rights. Nozick denominates such a limitation upon an individual's conduct as a "side constraint."[10] Side constraints are conceptual devices constricting human activity to the extent that rights are protected from violation.[11] The focus is the means with which an objective is achieved.[12] A side constraint functions as the mode of the inviolability of individual rights.[13] This principle is contrasted with the goal-oriented "end-state" view of political theory,[14] which justifies the use of individuals as a means while seeking to maximize the attainment of particular ends.[15] Under Nozick's formulation, state imposed constraints upon one's actions only prohibit violations of the rights of others. Accordingly, Nozick attempts to render the minimal state compatible with a side-constraint model.

Nozick asserts that "[a]nimals count for something."[16] In at-

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animals in this way: "My purpose here . . . is to pursue the notion of moral side constraints, not the issue of eating animals." *Id.* at 38.

6. *Id.* at ix.

7. *Id.* at 10; *see* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 6, 8 (T. Peardon ed. 1952).

8. R. NOZICK, *supra* note 4, at ix.

9. The heart of Nozick's doctrine can be captured by the principle of inviolability of the separate existence of the person. *See id.* at 32-33. This concept serves as Nozick's point of departure from John Rawls' important work, *A Theory of Justice*, in which Rawls argues that governmental order includes the opportunities for the satisfaction of goals that are properly within societal bounds. J. RAWLS, A THEORY OF JUSTICE 31 (1971). For Nozick, inviolability of the person prohibits a system of government sponsored "opportunities" to the extent that one individual forfeits rights to provide another with the "means of satisfaction" to pursue these opportunities. R. NOZICK, *supra* note 4, at 27-32.

10. R. NOZICK, *supra* note 4, at 29.

11. *Id.* at 30.

12. *Id.* at 29.

13. *Id.* at 32.

14. *See* J. RAWLS, *supra* note 9, at 32.

15. R. NOZICK, *supra* note 4, at 32.

16. *Id.* at 35. Few philosophers would disagree. Nozick's statement is accurate to the extent that moral philosophers and public opinion now agree that needless suffering

tempting to account for the present-day moral status of animals, Nozick suggests the slogan "utilitarianism for animals, Kantianism for people."[17] Under this proposal, the welfare of all living beings will be maximized. Human beings, however, are granted a loftier moral position, their rights being protected by strict, Kantian-inviolable side constraints. In this scheme as hypothesized, an animal may be used as a means to another animal's, or human's end if the overall happiness quotient is thereby increased.[18] In sharp contrast, no human can be penalized for any abuse inflicted upon an animal due to the shield of inviolability afforded humanity through side constraints. The consequence of such a view is that no harm, sacrifice, or inconvenience may be inflicted upon persons for the benefit of animals.[19] The logical corollary is that criminal sanctions for cruelty to animals could not be exacted.[20] Yet, criminal sanctions for cruelty to animals are common in the modern legal system.[21] Such statutes support Nozick's observation that utilitarianism for animals and Kantianism for people is insufficient to account for our moral views of animals.[22] Animals are more than a mere means to humanity's ends.[23]

This Note will attempt to answer the question of how much more animals count in a moral calculus. Nozick never comprehensively probes the issue of the rights of animals vis-à-vis human beings. Indeed, it might be difficult to do so within the rubric of Nozick's position, since he fails to advance a theory of rights.[24] Such a theory would have made possible a determination of whether animals are properly included in the class of right-bearers. This Note will first examine the nature

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may not be inflicted on nonhuman animals. Passmore, *The Treatment of Animals*, 36 J. HIST. IDEAS 195, 195 (1975).

17. R. NOZICK, *supra* note 4, at 39. Under this view, humans are treated as ends in themselves, while animals may be treated as means to arrive at the result producing the greatest human happiness. *Id.*

The term "Kantian" is applied to the kind of rights which are characterized by the second formulation of the categorical imperative: that one never treat others only as a means. However, the term "Kantian" is not limited to the moral philosophy of Immanuel Kant. Rather, it represents the focus of Kantian rights—the inviolability of the right-bearer. This inviolability principle is demonstrated by Rawls as the principle of justice as fairness, which rejects maximizing the good of some while denying the freedom of others. J. RAWLS, *supra* note 9, at 28. Justice is prior to anything else, for interests which require the violation of justice have no value. *Id.* at 31.

18. R. NOZICK, *supra* note 4, at 39.

19. *Id.* at 40-41.

20. *Id.* at 41.

21. *See* text & notes 193-201 *infra*. *See generally* Friend, *supra* note 3.

22. Nozick concludes at various points throughout the segment on animals that the principle of utility in its application to animals and exclusion of people is incorrect. *See* R. NOZICK, *supra* note 4, at 39, 41-42.

23. *See* Broadie & Pybus, *Kant's Treatment of Animals*, 49 PHILOSOPHY 375 (1974), where the Kantian radicalism of allowing all that is nonhuman to be used as a means for humanity's ends is shown to oppose prevailing moral views and to be internally inconsistent with the remainder of Kant's system.

24. *See* Lyons, *Rights Against Humanity*, 85 PHILOSOPHY REV. 208, 213 (1976).

and function of rights. Then, with this foundation, the moral status of animals may be determined.

Nozick's ethically provocative appraisal of the position of animals provides the genesis for this Note's proposal, "Kantian rights for animals."[25] This maxim informs the following goals of this Note. A consideration of the possible sources of rights will provide the necessary support for the construction of a metaright[26] theory which establishes the theoretical foundation for this article. The second half of this Note applies the principles of the metaright theory to determine the class of right-bearers. The Anglo-American legal perspective of animals is then contrasted with the operative effect of the metaright theory followed by an examination of the meaning of Kantian rights for animals.[27]

SOURCES OF RIGHTS

The assertion of a right typically is accompanied by a reference to the source from which such right is derived—tradition, a body of law, or some notion of "a concept of ordered liberty."[28] The process of legal analysis typically is a resort to a legitimate collection of rights.[29] For example, the United States derives its basic individual guarantees from the Constitution.[30] The rights which emanate from the Consti-

25. The description of animals' rights as Kantian entails only the inviolability of rights. This use of Kantianism diverts the focus of analysis from the possessor of the right to the right itself. This requires analysis of the interest that is to be protected and, as a necessary corollary, that the creature be capable of such an interest. The major fault with this procedure is that it may recognize necessary elements, but not provide sufficient explanation of all the elements which give rise to interests.

26. The term "metaright" is used in this Note in reference to the question of why there are rights rather than no rights at all, as well as the way in which the language of rights functions.

27. The judgments levied in this Note primarily are restricted to the theoretical consonance and jurisprudential merit of the philosophical arguments encountered. Nonetheless, perhaps moral judgments ought to be allowed concerning the manner in which people treat animals: "And a time would seem coming, when we shall hear of 'the rights of the beast' . . . . Why is the beast not a subject of right, civil at least, if not political? But this is for our emancipators of the future." F.H. BRADLEY, ETHICAL STUDIES 32 n.2 (1927).

28. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). The majority opinion in *Griswold*, a case which dealt with the right of individuals to make fundamental decisions regarding the use of contraceptives within marriage, illustrates reliance upon these three sources. The body of law utilized was the Bill of Rights. The concept of emanating penumbras which made these specific guarantees meaningful is analogous to the "ordered liberty" concept which seeks to determine those features of our system of justice deemed "fundamental." *Id.* at 384-86; *see* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). Finally, the tradition relied upon by the Court was the sacrosanct nature of marital life. 381 U.S. at 482-86.

29. For example, the monumental work by Professor Schwartz on the Bill of Rights presents a table entitled, "Sources of Bill of Rights" in which the author traces the guarantees afforded by the Bill of Rights to previously existing charters, documents, or laws. 2 B. SCHWARTZ, THE BILL OF RIGHTS 1204 (1971).

30. *See, e.g.*, Rochin v. California, 342 U.S. 165, 170-71, 173 (1952); Powell v. Alabama, 287 U.S. 45, 67-68 (1932); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). In

tution are accepted by the legitimizing body as inhering in a recognized right-holder.[31] Legal consideration of the sources of those constitutional rights generally refers to an identifiable body of rights; such inquiries inform what rights shall be accorded, but fail to establish who shall possess these rights.[32] The analysis emphasizes the recognition of a right rather than a determination of the class of right-bearers. This level of analysis indicates a source for rights in the sense of the derivation of those rights. The present inquiry seeks not the derivation but the cause of the concept of rights, to the extent such cause is manifested in legally and philosophically analyzable terms.[33] Accordingly, the primary consideration is no longer a legitimate collection of rights, but an examination of the characteristics which establish the conditions which generate the conferral of rights.[34]

Nozick avoids the issue of the basis of rights by summarily affirming that individuals have rights.[35] An investigation of the basis of rights entails an inquiry into the characteristics which justify the conferral of rights. This type of inquiry is classified as metaright analysis, because it seeks to determine why individuals have rights and how the concept of a right functions.[36] Despite Nozick's avoidance of the foundation of rights, he provides the framework for such analysis by listing the characteristics that traditionally have been offered as determinative of who will be protected by moral constraints.[37]

Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court recognized that a right of privacy would have to be extracted from the language of the Constitution: "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Id.* at 152.

31. "[M]any of our rights are inherent and essential, agreed on as maxims, and established as preliminaries even before a parliament existed." 3 J. ADAMS, THE WORKS OF JOHN ADAMS 463 (1851).

32. Nevertheless, the extension of rights to previously rightless entities is a rarity in the law and consequently appears to be somewhat of an oddity to the legal scholar. *See* C.D. STONE, SHOULD TREES HAVE STANDING? 6 (1974).

33. The use of the word "cause" need not provoke metaphysical nor psychological concern as to its propriety here. "Cause" only establishes that if a certain set of conditions are met, it is highly probable that a certain result will follow. With regard to the ascription of rights, if certain conditions for right-bearing are met, it is highly probable (but not necessary) that the accordance of rights will follow. The source for rights is tantamount to that set of conditions which makes rights probable.

34. The reasoning applied in the emancipation of the blacks in the nineteenth century is illustrative of the approach used to extend rights: "As we are men, we should be admitted to partake of the liberties and inalienable rights [the Bill of Rights] held forth." Petition of the People of Colour, Dec. 30, 1799, 6A 61.1 (House Records), National Archives, *quoted in* T. MORRIS, FREE MEN ALL 31 (1974). The argument predicates the common characteristic between the right-holders and the non-right-holders (in this case, humanity), and asserts that no relevant difference justifies the denial of equality in the possession of rights. *See also* P. SINGER, *supra* note 2, at 1-26; C.D. STONE, *supra* note 32, at 12-34.

35. R. NOZICK, *supra* note 4, at ix. "This book does not present a precise theory of the moral basis of individual rights." *Id.* at xiv.

36. *See* text & note 26 *supra.*

37. *See* R. NOZICK, *supra* note 4, at 48.

The characteristics offered by Nozick include rationality, free will, moral agency, and sentience.[38] These characteristics are presented as the rationale for observing constraints upon our behavior toward others.[39] Although the characteristics are not presented specifically in reference to rights, characteristics connected with side constraints are also applicable to rights, since side constraints and rights appear to be coextensive for Nozick.[40] According to Nozick, "[t]he rights of others determine the constraints upon your actions."[41] The side constraint notion is merely the converse of a right, somewhat akin to a duty, with the exception that side constraints must be absolute[42] in order for Nozick's system to function.[43] If constraints were not absolute, rights would be violated—a result abhorrent to Nozick. It may therefore be concluded that the characteristics of side constraints may be used to identify the right-holders in a society.[44] Acknowledging the significance of these features to the philosophical tradition, they shall be considered individually for their role in metaright theory.

Rationality

Immanuel Kant is the paradigm proponent of rationality as a basis for rights[45] and the rational being as the holder of those rights.[46]

38. *Id.* After indicating the inadequacies of the traditional characteristics, Nozick combines them to form a being that lives in accordance with some overall plan—striving for a meaningful life. However, the term "meaningful life" is not very clear. It apparently is related to the traditional characteristics of free will, rationality, and moral agency. *See id.* at 48-51. Nozick persists in his reliance on the traditional characteristics, while maintaining that they must be viewed conjunctively. *Id.* at 49.

39. *Id.* at 48.

40. *See* Scheffler, *Natural Rights, Equality and the Minimal State*, 6 CANADIAN J. PHILOSOPHY 59, 61 (1976). Nozick characterizes limitations on rights as being "specified by the moral side constraints on the behavior of others." R. NOZICK, *supra* note 4, at 293.

41. R. NOZICK, *supra* note 4, at 29.

42. The term "duty" does not necessarily convey absolute adherence to the imperatives it seeks. For example, Nozick forwards his implicitly absolute right theory through comparison with a "utilitarianism of rights," a structure in which duties would be less than absolute. *Id.* at 28.

43. There is no explicit admission of the absolute nature of rights in Nozick's work. Indeed, the question of whether side constraints are absolute is one Nozick hopes to avoid. *Id.* at 29-30. However, the structure proposed by Nozick carries a dilemma which may be avoided, but cannot be concealed. If rights are not absolute, they must be sacrificed in certain instances for a greater overall end. The existence of such a "telos" is logically inconsistent with the concept of side constraints. Therefore, to proffer a side constraint model is to proffer a view of rights which calls for inviolability.

44. *Id.* at 48, 50.

45. *See* R. WOLFF, THE AUTONOMY OF REASON 94-212 (1973). Within this concept of self-legislation is the crucial capacity to "will a universal" moral law such that to act morally towards others is to be moral towards oneself. If the action is subsumed under the universalization principle, then fairness requires that one's duties become the justified claims of others. Other ends, therefore, have a right to the treatment conferred upon them out of one's moral legislation. While Kant dealt specifically with one's duty, this principle is implicit within the Kantian system although never expressed. The condition that rights and duties can be in many cases the flip-sides of the same coin is a conceptual device similar to the assertion that a parent necessarily requires the existence of offspring. *See* Lyons, *The Correlativity of Rights and Duties*, 4 NOUS 45, 47 (1970).

46. "[M]orality serves as a law for us only because we are rational beings . . . ."

However, Kant's "rational being" is an explanatory model rather than a descriptive statement about humans.[47] The cornerstone of Kant's moral theory is the concept of "what the rational being would do."[48] Only creatures that are rational can apply this principle, since only rational creatures can "will a universal" law.[49] By acting in accordance with a universal law, such creatures are justified in claiming the right to have other rational beings treat them similarly.[50] Justification stems from the universality of the moral imperative such that all rational creatures would will similar treatment. The strength of the imperative is that it affords to others the claim to that particular kind of moral action occurring as a result of "self-legislating" the morally correct course. The consequence of this line of reasoning is that to lose the capacity for legislating a universal is to lose the justified claim to a certain type of treatment.

However, when it is considered how we use the word "rights,"[51] it is clear that a valid claim may exist without reference to a universal law. For example, contract law reveals that one need not will a universal or share in such a capacity in order to possess a valid claim arising out of arms-length bargaining.[52] Legal claims upon the actions of others may thus not be dependent on a rational capacity to will a universal. Contract rights thus conflict with Kant's requirement that one will a universal before he has a justified claim to something. Such

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I. KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 64 (T.K. Abbott ed. 1949). Nozick implies that to a great degree Kant underlies the traditional proposal for rights since the characteristics set forth by Nozick comport with those upon which Kant relies. *See* R. NOZICK, *supra* note 4, at 48; Kateb, Book Review, 45 AM. SCHOLAR 818 (1975-76).

47. J. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 45 (1970).

48. *Id.*

49. "There is therefore but one categorical imperative, namely this: act only on that maxim whereby thou canst at the same time will that it should become universal law." I. KANT, *supra* note 39, at 38. The concept of willing a universal is disappointingly obscure. As used here, it refers to the process of constructing a principle for behavior upon which any rational agent could act in a moral way. *See generally* R. WOLFF, *supra* note 45, at 93-181.

50. "I must recognize myself as an intelligence, as subject to the law of the world of understanding as imperatives for me, and the actions which conform to them as duties." I. KANT, *supra* note 46, at 71.

51. The notion that "the meaning of a word is its use in the language" constitutes the heart of Ludwig Wittgenstein's later philosophy. This theory of meaning contrasts with the view that the meaning of a word can be found in an object. The application of Wittgenstein's theory here seeks to dissolve the philosophical problem of right analysis by defining "right" in terms of its use in the language. Only when "right" is used correctly can its meaning be understood. *See* G. HALLET, WITTGENSTEIN'S DEFINITION OF MEANING AND USE 1-7 (1967).

52. A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties . . . . If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held . . . .

Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911); *see* Pan American World Air., Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1003 (2d Cir. 1974); Krawez v. Stans, 306 F. Supp. 1230, 1234 (E.D.N.Y. 1969).

universalization governs only the morality of the claim. The validity of the claim—a right arising out of contract—is largely independent of its morality. Thus, in the above contract situation, the promisee may have no intention of universalizing the claim. The promisee might not be willing to fulfill the terms of the contract were he in the position of the promisor.[53] However, the promisee's claim to have the promisor carry out the bargain is legally valid and enforceable.[54]

Two further examples argue against the proposition that rationality is the determinative characteristic for rights. *In re Quinlan*[55] provides a manifest instance of the extension of rights without the requirement of rationality. For uncertain medical reasons, Karen Ann Quinlan lapsed into a comatose condition described as a "persistent vegetative state."[56] Acknowledging that Karen was not presently in, and, in all probability, would never be returned to a "cognitive, sapient state," the New Jersey Supreme Court agreed that her father might assert Karen's right to privacy as her guardian.[57] The court indicated that under normal circumstances Karen would assert the right of privacy in her behalf.[58] However, the absence of the capacity[59] to make an individual determination did not require negation of the right of privacy, since she still possessed legally recognized interests:[60] "If a putative decision by Karen to permit this non-cognitive, vegetative existence to terminate by natural forces is regarded as a valuable incident of her right to privacy . . . then it should not be discarded solely on the basis that her condition prevents her conscious exercise of the

53. The issue is not whether the promisee (the one that chooses not to will any universal) will suffer the sanctions for breach of contract. The Kantian position would then be reduced to a right arising out of the compulsion of the parties through the use of sanctions. The rational agent then becomes intelligent calculator comparing penalties for fulfillment or breach of contract. This is hardly the willing of the universal for which Kant calls. In examining the intentions of Kant in the *Groundwork of the Metaphysic of Morals*, Patrick Hutchings writes: "Morals are not a matter of keeping universal rules for the rules' sake . . . . What is 'on the inside' gives point to morality itself." P. HUTCHINGS, KANT ON ABSOLUTE VALUE 331 (1972). Thus it must be emphasized that Kant speaks to the morality of the right, not its validity in the legal sense.

54. "In effect, it is not the real intent but the intent expressed . . . that controls." Corn Exch. Nat'l Bank & Trust Co. v. Taubel, 113 N.J.L. 605, 609, 175 A. 55, 58 (1934); *see* J. MURRAY, MURRAY ON CONTRACTS 227 (1974).

55. 70 N.J. 10, 355 A.2d 647 (1976).

56. *Id.* at 24, 355 A.2d at 654.

57. *Id.* at 55, 355 A.2d at 671.

58. *Id.* at 41, 355 A.2d at 664.

59. The presence of such capacity for rationality is critical to the Kantian moralist: "Capacity for membership of a Kingdom of Ends makes anyone actually a member." P. HUTCHINGS, *supra* note 53, at 341.

60. 70 N.J.L. at 41, 355 A.2d at 664. The competing interests in *Quinlan* were the sanctity of human life and the individual's right to decide. The New Jersey court recognized the primacy of the individual right of choice in matters which concern physical intrusion into the body, in the absence of any overriding interest of the state. *Id. See generally*, Note, *The Right to Decide—Individual Liberty Versus State Police Power*, 18 ARIZ. L. REV. 207 (1976).

choice."[61] The court conceded that rationality plays a significant role in the exercise of the right of privacy, but ruled that rationality is not a necessary condition for the possession of a right.[62] This right of decisionmaking encompassed within the right of privacy is considered of such importance by the *Quinlan* court that it cannot be denied even when the capacity for decisionmaking is absent.[63] This reasoning consequently demonstrates that rationality is not an essential feature for possessing rights.

Moreover, it is equally clear that the status of rational being does not guarantee conferral of rights. In the nineteenth century, black slaves were acknowledged to be rational beings,[64] however, they were denied rights possessed by the white members of the community. Underlying the status of the black slave was a notion that to have a valid claim of a right, there must be some recognition of that claim as valuable or worthy of protection.[65] To the southern slaveowner, and to many southern judges, rationality was not valued as giving rise to a valid claim on the behavior of the nonslave population.

A Kantian theory of rights implicitly assumes that rationality is the primary value upon which to base distribution of rights.[66] Nonetheless, the slaveowning South preferred a different characteristic—race—to be the touchstone for according rights. There was no question but that the slave, despite rationality, was incapable of possessing rights.[67] One might be tempted to assert that blacks are entitled to rights precisely because they are rational, and that is the reason rights were eventually accorded them. However, the conferral of rights

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61. 70 N.J. at 41, 355 A.2d at 664.

62. "Nevertheless we have concluded that Karen's right of privacy may be asserted on her behalf by her guardian under the peculiar circumstances here present." *Id.*

63. The court declared that the state's police power interest in the preservation of health is in inverse proportion to the interest of the individual in privacy when the extent of bodily invasion increases and the prognosis for recovery dims. The state's interest is reduced until the point is reached at which the individual's rights outweigh the state interest. *Id.*

64. "[A] slave, being a moral and intelligent being, is usually as capable of self preservation as other persons." Heathcock v. Pennington, 33 N.C. (11 Ired.) 640, 643 (1850).

65. What makes a claim valued by the recognizing body is unclear both philosophically and legally. *See* R. NOZICK, *supra* note 4, at 50. The insight to be gleaned is not why the claims of blacks were valued, but the fact that their claims were not deemed worthy of protection. The claim of equality may well have been valued in an aesthetic sense, but the legal machinery blocked its satisfaction. At a minimum, the data of southern slave-ownership reveals that rationality was not sufficiently valued as an analogical feature among humans that its presence required the conferral of rights.

66. *See* Murphy, *Rights and Borderline Cases*, 19 ARIZ. L. REV. 228, 230-31 (1977).

67. "[A] slave can invoke neither magna charta nor common law. As is well said in Kinloch v. Harvey, Harp. 514, 'every endeavor to extend to him positive rights, is an attempt to reconcile inherent contradictions.' In the very nature of things, he is subject to despotism." *Ex parte* Boylston, 33 S.C.L. (2 Strob.) 41, 43 (1847). *See also* Bryan v. Walton, 14 Ga. 185 (1853).

upon the blacks does not signify that rationality was the characteristic relied upon. Perhaps there are other reasons for granting rights.[68] Such reasons may have been more obvious when applied to human beings than to other beings. If the South could have erred with regard to creating distinctions based on race, then rationality may be generally suspect as a characteristic for granting rights.[69] For the aforementioned reasons, it is apparent that rationality cannot be the ultimate determinent of rights, and that additional characteristics are valued sufficiently to warrant the conferral of rights.

Free Will

Nozick suggests a second characteristic as a possible basis for granting rights—free will.[70] Free will has been the subject of tumultuous philosophical debate.[71] For purposes of this discussion, free will theory will be considered in the manner in which the term has been used by proponents of rights for humans.[72] Whether or not not human beings are agents of free choice, people at least act as if they had free choice—they engage in a deliberative process, reach decisions based upon such a process, and act upon those decisions. Of equal importance is how such decisions are regarded by other people. One is treated as an agent of free choice if one's choices are respected—valued by others as the desires of the individual.[73]

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68. The fourteenth amendment to the Constitution which conferred rights upon the blacks was passed for a variety of reasons, which highlights the uncertainty of rationality as a basis. Brown v. Board of Educ., 347 U.S. 483, 489 (1954). *See generally* Bickel, *The Original Understanding and the Segregation Decision.* 69 HARV. L. REV. 1 (1955).

69. The racist violates the principle of equality by giving greater weight to the interests of members of his own race. . . . The sexist violates the principle of equality by favoring the interests of his own sex. Similarly the speciesist allows the interests of his own species to override the greater interests of members of other species. The pattern is identical in each case.

P. SINGER, *supra* note 2, at 9. Nozick queries whether the domestication of animals is, in reality, the enslavement of animals. *See* R. NOZICK, *supra* note 4, at 42.

70. R. NOZICK, *supra* note 4, at 48.

71. The debate centers on the conflict between two theories of behavior: determinism—which holds that every event has a cause; and free will—which claims that moral behavior is contra-causal. Under a contra-causal theory, the agent acts without any inducing force. The concern for ethical theory is the effect such accounts of behavior have on the notion of responsibility, the central concept of moral consideration. *See* PROBLEMS OF MORAL PHILOSOPHY 277-346 (P. Taylor ed. 1972).

72. Fee will does not entail a contra-causal dualism. Kant, for whom free will is a vital notion, chooses to "adopt this method of assuming freedom merely *as an idea* which rational beings suppose in their actions, in order to avoid the necessity of proving it in its theoretical aspect also." I. KANT, *supra* note 46, at 65 n.2 (emphasis in original).

73. "We treat a human being as a person provided: first, we permit the person to make the choices that will determine what happens to him and second, when our responses to the person are responses respecting the person's choices." Morris, *Persons and Punishment*, 32 THE MONIST 475, 492 (1968).

This interpretation of free will shifts the emphasis from some vague metaphysical concept to a consideration of the responses of people toward each other. If people value the idea of voluntary behavior, then that regard shall influence their actions, and the

For practical reasons, the issue of free will should be divorced from metaphysical considerations and, instead, should turn on whether people treat each other as if their actions were governed by free choice. The determinative factor as to whether one is capable of free choice is not how the decisions are made, but how these decisions are treated by other people.[74] This shifts the argument away from anything characteristic in humanity and conditions the conferral of a right on how other people regard an individual (including how that individual regards himself). Thus, all the evidence reveals is that people value the *idea* of free will in human beings and desire to treat them in accordance with such value.[75] The above principle does not prove that free will is the only thing which people value, nor that free will is the only criterion for conferring rights.

A second formulation of the thesis that free will provides a foundation for right-bearing is that an individual must have a decision-making capacity which affords the potential for altering one's behavior based on a process involving a choice. One who is incapable of choosing to alter his behavior can be coerced into changing but cannot be commanded. For others to claim specified behavior (demanding one's rights), the claim must be levied upon one who can respond in the form of that behavior. In the absence of any demonstration that a creature is capable of limiting its behavior, there could be no corresponding concept of a claim to a certain type of conduct.[76] Without a doctrine of self-determination, the concept of a right would be altered drastically.[77]

The purpose of a claim is to assert a right to limit another's conduct.[78] This indicates that type of being against whom a claim may be asserted: one with the capacity to limit its conduct. Such a conclusion does not determine who may assert a claim. At a minimum, any notion of a system of rights implies the existence of creatures with

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abstract idea of free will becomes grounded in reality. This theory does not seek to address the problem of whether or not the individual's attitudes are determinatively shaped to value such ideas as free will. The choice to value free will may or may not be caused but the role free will plays in shaping our lives retains empirical validity.

74. "[W]hen we 'look upon' a person as less than a person or not a person, we consider the person as incapable of a rational choice." Morris, *supra* note 73, at 490. What ultimately matters is how the person is viewed from external data.

75. "[H]uman beings pride themselves in having capacities that animals do not . . . . [W]e have thought of ourselves as capable where animals are not of making, of creating, among other things, ourselves." *Id.* at 486.

76. *Id.* at 500.

77. The significance of decisionmaking capacity to right theory does not mean, however, that one must have free will in order to possess a right. It does mean that the way in which the term "right" is used requires that some party have this capacity to make meaningful responses (particularly in compliance with the claim) to another's claim of a right.

78. *See* W. ROSS, THE RIGHT AND THE GOOD 50 (1930).

the capacity to limit their behavior in accordance with a claim asserted against them.[79] However, this does not provide grounds for excluding from a system of rights those entities which cannot engage in self-willed behavior limitation.[80] The result of this analysis is that it has yet to be demonstrated why there is an inextricable link between free will and the possession of rights. An entity may have interests which do not indicate the presence of free will, but may require the possession of rights.[81]

Moral Agency

Nozick's third characteristic offered as a possible source of rights is moral agency.[82] Two questions present themselves for analysis: first, what is a moral agent? and, second, in what sense does this characteristic give rise to a claim of right? The former question requires a consideration of the words used. The term "moral agent" centers on a concept of agency—a capacity possessed by the individual. A moral agent is one with the capabilities of being moral. A moral agent cannot be moral in a vacuum.[83] Moral agency may give rise to a right in the sense that one's acts with regard to others may be claimed as a right by others.[84] Consequently, a duty to be moral gives rise to a right of others to receive moral treatment. A moral agency theory for right-bearing holds that duties and rights are inextricably bound together.[85]

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79. "Implied, then, in any conception of rights is the existence of individuals capable of choosing on the basis of considerations with respect to rules." Morris, *supra* note 73, at 500.

80. Analyzing rights theory requires that the entire class of right-bearers be considered. If a right is a claim, then a system of rights requires creatures capable of responding to the claim with the behavior sought. Second, if a right protects against improper intrusion, then all entities who share in the feature of having a domain of sanctity may possess the claim to inviolability whether or not they themselves can limit their own behavior to accord with others' claims.

81. Another objection to the notion that free will provides the basis for according rights is the obvious one offered by determinist and behaviorist theory. *See generally*, B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971); Taylor, *Determinism*, 2 ENCYCLOPEDIA OF PHILOSOPHY 359 (1967). These theories do not refute the value-oriented concept of free will espoused by philosophers who desire to sustain the idea of free will and its effect on how we treat people. *See* Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968). However, a determinist view of human behavior denies free will as an empirical reality. If free will were the source of rights, then a denial of free will is tantamount to a denial of rights. But it is evident that entities may possess rights notwithstanding the possible scientific veracity of behaviorist theory. The essential feature about right-holding is that it is valued as a good, not that rights have some basis in empirical reality.

82. R. NOZICK, *supra* note 4, at 48.

83. Being moral is following rules designed to overrule self-interest whenever it is in the interest of everyone alike that everyone should set aside his interest. K. BAIER, THE MORAL POINT OF VIEW 208 (1958).

84. *See* H.L.A. Hart, *Are There Any Natural Rights?* in POLITICAL PHILOSOPHY 53, 60 (A. Quinton ed. 1967).

85. *See* F. BRADLEY, ETHICAL STUDIES 208 (1927); Macklin, *Moral Concerns and Appeals to Rights and Duties*, 6 HASTINGS CENTER REP. 31, 35 (No. 5, Oct. 1976).

Seemingly, the concept of moral agency means that only entities that can limit their behavior by some principle of duty may be accorded rights.[86] However, the rules regarding third-party beneficiaries in the law of contracts provide a clear counter-example to this precept. In a third-party beneficiary contract, the promisee exacts a promise from the promisor for the benefit of some other entity, who has an enforceable right to the promisor's performance.[87] Such a third party may not have any duties in relation to the rights which arise out of the contract.[88] Thus, an entity may have a valid claim of right without becoming an agent with duties with respect to that right. A second counter-example may be discovered in the function of unilateral contracts. In a unilateral contract situation, there is one promisor, who, consequently, is the only party with a legally enforceable duty.[89] The other party, the promisee, possesses a legally enforceable right,[90] once he completes that which was requested by the offeror.[91] At the point of formation, the situation arises in which the promisee has a right without a corresponding duty. Through these counter-examples, it is clear that one need not have the ability to limit behavior in accordance with duty in order to be a holder of rights. Of course, in the unilateral contract example, it may be pointed out that the promisee does have the ability to limit his behavior. The counter-example serves to show that such ability is immaterial to being the holder of the right in the particular contract situation. Consequently, acting in accord with one's duty to be moral— moral agency—is neither a necessary nor a sufficient condition for possessing rights.

Sentience

Sentience is the fourth characteristic that Nozick offers as a basis

86. "Rights and duties do not exist outside the moral world and that world does not exist where there is not a sphere of inner morality . . . ." F. BRADLEY, *supra* note 85, at 209.

87. *See, e.g.*, Mutual Benefit Health & Accident Ass'n v. Bullard, 270 Ala. 558, 563, 120 So. 2d 714, 719 (1960); Lawrence v. Fox, 20 N.Y. 268, 271 (1859); RESTATEMENT (SECOND) OF CONTRACTS § 133 (Tent. Draft No. 4, 1968).

The legal effect of a testator's manifest intent to bequeath a certain sum to an animal, such as a pet, in order to insure its welfare, presents a unique case for the rights of those who do not share the capacity for duty. Unfortunately, the legal question whether the pet has an enforceable right to its share of the bequest has never been resolved by the courts. *See* Schwartz, *Estate Planning for Animals*, 113 TRUST & ESTATES 376, 411 (1974).

88. Chapman v. First Ins. Co., 255 F. Supp. 710 (D. Hawaii 1966).

89. Hollidge v. Gussow, Kahn & Co., 67 F.2d 459, 460-61 (1st Cir. 1933); City Stores Co. v. Ammerman, 266 F. Supp. 766, 792 (D.D.C. 1967); Humble Oil & Ref. Co. v. Cox, 207 Va. 197, 203, 148 S.E.2d 756, 760 (1966); J. MURRAY, MURRAY ON CONTRACTS § 6 (1974).

90. See cases cited note 89 *supra.*

91. See cases cited note 89 *supra.*

for rights.[92] Sentience, as it will be used here, means "the readiness to receive sensation, idea[s] or image[s]."[93] Sentience is a possession of the most rudimentary of mental capacities.[94] One of the strongest indicators of sentience is the ability to feel pain.[95] The argument for bestowing rights maintains that if suffering is morally relevant, then all creatures disposed to suffering are morally relevant.[96] Sentience is thought to be of such significance that it gives rise to a right not to have pain inflicted upon the individual.

The argument is valid as far as it goes, but it is clear that sentience is not a sufficient condition for right-bearing. A clear case in which sentience has no bearing on right-holding is the right to vote in governmental elections.[97] The exercise of the right of franchise depends not on one's capacity to feel pain, but on one's ability to engage in a rational decisionmaking process.[98] Statutory provisions precluding insane persons from voting are indicative of the necessity for one's mental faculties to be of such a nature as to permit the exercise of the franchise.[99] Sentience has no bearing in determining who shall have the right to vote. Sentience, thus, also appears to lack the breadth to be considered the sole source for according rights. The preceding analysis indicates the insufficiency of the four characteristics Nozick sets forth as sources of rights: rationality, free will, moral agency, and sentience. These features may very well provide the rationale for certain rights to be conferred, but they are not the exclusive source of rights.[100] Thus, a more comprehensive theory of rights must be ascertained.

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92. Sentience is the utilitarian's standard for determining the possession of rights. Jeremy Bentham, one of the leading utilitarian thinkers of the nineteenth century, wrote: "The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny . . . The question is not, Can they *reason*? nor Can they *talk*? but, *Can they suffer*?" J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION § 1, at 310-11, n.1 (1879) (emphasis in original). Sentience is the scale by which pleasure is measured against pain. Utilitarian doctrine maintains that pleasure and pain are dispositive as to moral questions: that which is conducive to the most pleasure for the greatest number is the morally correct action. A. FLEW, AN INTRODUCTION TO WESTERN PHILOSOPHY 116-17 (1971). Although no philosophical school of thought has held that sentience is the sole source for conferring rights, it shall be treated separately here to demonstrate its inadequacy to comprehend every instance of right-bearing.

93. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2069 (1961).

94. *See id.*

95. P. SINGER, *supra* note 2, at 9.

96. *Id.*

97. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966).

98. Dunn v. Blumstein, 405 U.S. 330, 337 (1972).

99. *See Developments in the Law—Civil Commitment*, 87 HARV. L. REV. 1190, 1198-99 (1974).

100. Nozick questions the fairness of treating these characteristics separately. If, as Nozick desires, the traits were blended together with an additional ingredient of "an overall conception of life," then rights could be derived from some capacity to live a meaningful existence. R. NOZICK, *supra* note 4, at 49-50. Again one must examine the

PRINCIPLES OF A METARIGHT THEORY

The previous analysis sought to explain rights in terms of their source—examining the characteristics suggested by Nozick of those who have rights.[101] That analysis sought to determine the source of rights. Such analysis is merely a narrow formulation of the task of a metaright theory.[102] Metaright theory seeks to determine why a right exists[103] and what function a right has in a moral scheme.[104]

Why Are There Rights Rather Than No Rights?

There are functions that the concept of a right can perform that similar notions are incapable of performing. The heart of the concept of a right is the activity of claiming.[105] In a world with duties, but without rights, there could be no demand for one's due.[106] In such a world, entities could aid one another gratuitously, but there could be no complaint if the gratuities were distributed unequally or discontinued altogether.[107] However, the claim-making capacity, an integral element of any system of rights,[108] offers a preferable explanation of reality.[109]

The factor which underlies the consideration accorded the claim-making capacity is the precept that everyone should get what he deserves morally.[110] It is this principal of fairness which compels individuals to seek a redress of felt injustices through a claim-making mechanism.

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connection between rights and the "capacity for meaningful life." It appears that such a capacity is no more a source for conferring rights than the other traits already mentioned. Relying on such counter-examples as *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), the capacity for meaningful life is clearly not dispositive as a source for rights. See text & notes 55-63 *supra*.

101. R. NOZICK, *supra* note 4, at 48.

102. The reference here is to the definition of "metatheory" which has been described as a "theory of theory." Hubbard, *"One Man's Theory . . .": A Metatheoretical Analysis of H.L.A. Hart's Model of Law*, 36 MD. L. REV. 39, 40 (1976).

103. This is analogous to Heidegger's question designed to engender the fundamental analysis in metaphysics: "Why is there something rather than nothing?" M. HEIDEGGER, AN INTRODUCTION TO METAPHYSICS 1 (1954).

104. In discussing the function of a word, Wittgenstein suggests that one look at its use and learn from that. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 340 (1968). This Note will use examples from law and philosphy to discern the use of the term "right."

105. *See* Feinberg, *The Nature and Value of Rights*, 4 J. OF VALUE INQUIRY 243, 249 (1970).

106. *See id.* at 243-50.

107. *Id.* at 247.

108. It is necessary to emphasize that, in light of the prior discussion regarding the connection between possessing rights and certain characteristics, it is obvious that one need not have a claim-making capacity in order to possess rights. Thus, the entire category of right-bearers must be considered. A metaright theory deals with the concept of right, not with individual cases. In other words, the idea of rights is considered rather than a specific case of a right in its practical capacity.

109. Feinberg, *supra* note 105.

110. For Nozick, that which one morally deserves is what he already possesses—life, liberty, and property. *See* R. NOZICK, *supra* note 4, at 27-32.

A second rationale for needing the concept of rights is that it offers the most effective means of ordering social relationships. Within a legal community, the concept of a right is of great significance in achieving the positions sought by those asserting rights.[111] Reflection upon groups which have been accorded rights indicates that rights have liberated groups in a way that duties could not.[112] Thus, on a pragmatic level, the status of a right-bearer is more highly regarded than the status of entities to which only a duty is owed.[113] Based on utilitarian considerations, societal goals will be achieved more effectively with the notion of rights than without such a notion.[114] By recognizing rights, a society maximizes utility.[115]

The Function of the Concept of Right

When society recognizes a right, it protects the given set of activities included under the right. With limited possible activities capable of being pursued, some activities will be chosen to the exclusion of others. Constraints of space and time mandate that certain activities be engaged in while other activities are neglected. The determinative factor in selecting the activities to be performed is the concept of "interest."[116] When one engages in certain activities to the exclusion of other

111. H. SALT, ANIMAL RIGHTS 16 (1894).

112. The blacks in the slave South offer an example of the image transition which rights precipitate. Certain protected areas of the right-bearer (such as life, liberty, and property) are inviolable because a right belongs to and works on behalf of the autonomy and worth of the right-holder. A duty, on the other hand, may exist for numerous reasons. The southern slaveowner may have felt a duty to feed, clothe, and house the slave because such acts would enhance his work product. *See* C. STONE, *supra* note 32, at 9.

113. "[T]he *pragmatic* consequences of using a language of rights seems to have been a reduction in suffering and an enhancement of the dignity and self-esteem of many people through the official recognition of their presumed rights." Macklin, *supra* note 85, at 31-32 (emphasis in original).

114. Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39, 52 n.45 (1974).

115. In contrast, the specific rights themselves, as listed by Nozick, are deontological. A deontological perspective of rights considers behavior good or bad in and of itself. The good actions must be done out of a sense of duty for them to have moral worth. *See* I. KANT, *supra* note 46, at 37-39. In effect, there seem to be two ways of justifying rights within Nozick's system. In order to verify the need for the concept of a right, a utilitarian approach is taken. An appeal to deontology provides a ground for Nozick's particular list of rights. *See* R. NOZICK, *supra* note 4, at 10-11. The analysis here is neatly subsumed under John Rawls' two concepts of rules. Rawls speaks of distinguishing between justifying a practice and justifying a particular action falling under it. The two justifications need not rely on the same theory, as in the present case with rights. *See* Rawls, *Two Concepts of Rules*, 64 PHILOSOPHICAL REV. 3 (1955).

116. As used in this Note, the term "interest" represents an entity's "good." *See* Feinberg, *The Rights of Animals and Unborn Generations*, in PHILOSOPHY & ENVT'L CRISIS 43, 50 (W. Blackstone ed. 1974). However, the term requires extensive elucidation before it can be understood in the context of this Note. The term is a construct, the meaning of which shall be postulated for its specific use in the following analysis. See text & notes 117-22 *infra*.

activities, he is manifesting an interest in the activity. The first step in examining interests is to ascertain epistemologically how interests are known. An interest entails concern which can be represented by the notion of conation.[117] Inanimate objects, therefore, can have no interests, for they have no conative life expressed by urges, desires, or impulses.[118] If conation represents interests, then such conations must be examined to determine those features which constitute evidence of conation.

The essential characteristic of conation is a drive.[119] One indication of conation is sentience[120] which is evidenced by aversive behavior.[121] Although sentience is a manifestation of interests, interest may not be explained exclusively in terms of it.[122] Sentience is sufficient to show an interest in the avoidance of pain but no more.[123] To demonstrate the active attraction toward a target requires preference, another aspect of conation. Just as aversive behavior is the simplest indication of sentience, preference is the most persuasive proof that targeted conative action can rise to the level of an interest.[124] A conative urge, such as the search for food, could possibly be construed as simple aversion to hunger, prompting the reaction necessary to alleviate the suffering. Conduct geared toward alleviation of suffering indicates an interest in avoiding unpleasurable experiences. Conduct which denotes a preference with regard to how such suffering shall be avoided indicates an interest in experiences beyond the mere alleviation of pain. If one prefers to engage in certain activities instead of others, he manifests an interest in how his life is lived.[125] Three methods of demonstrating the existence of preferences are offered: ordinary language analy-

117. *Id.* at 49-50. "Conation" is defined as "the conscious drive to perform apparently volitional acts with or without knowledge of the origin of the drive." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 468 (1961).

118. Feinberg, *supra* note 116, at 49.

119. It is clear that conation covers a broad spectrum of activities. *See id.* at 49-50. However, the underlying core of "conation" can be seen as stimulated movement in a specified direction. See definition in note 117 *supra.*

120. See text & notes 92-100 *supra.*

121. See text & notes 153-54 *infra.* It is necessary to emphasize at this point that the concept of interest is not being reduced to the notion of sentience. Rather, the essential evidentiary elements which signify that an interest is present will be enumerated.

122. Sentience produces aversive behavior as a result of the conative urge to avoid pain. See text & notes 153-54 *infra.*

123. Any sentient activity can be explained in terms of the avoidance of pain.

124. See text & notes 118-22 *supra.*

125. Preference, as a conative activity, must be distinguished from a metaphysical capacity to exercise free will. Aversive behavior may be caused. Positive targeted conative drives may be caused. Even the preferring process that decides how to alleviate complex suffering, or determines which pleasures to enjoy, may be caused, but preference still takes place. For example, a person who has been reared by parents who are members of a symphony and thus has been trained to appreciate classical music, can still validly say that he or she prefers Mozart to Hayden. The notion of preference fills the gap between reaction to stimuli and contra-causal free will.

sis;[126] the ability to quantify preferences; and a hypothetical "experience machine" offered by Nozick.[127]

The initial argument is an appeal to the ordinary usage of the term "preference." The word indicates a positive interest in *how* a life is lived. When a creature with a capacity for conation is placed in a situation in which a conative urge would be satisfied by either of two means, and such a creature consistently selects one manner of satisfaction over another, it may be properly said that such a creature prefers one means over another. To one not swayed by ordinary language analysis, or to one who thinks that preferences are of a metaphysical nature, it is possible to counter with a theory of measuring beliefs.[128] This theory presents an objective and quantitative mechanism for measuring the degree of a belief, distinct from the process of ordinary language analysis. A quantitative theory takes any "magic" out of having a preference by reducing all beliefs to measurable mathematical formulae.[129]

The third manifestation of the existence of preferences is Nozick's parable of the "experience machine."[130] In his hypothetical, Nozick constructs a machine which subjectively[131] differentiates between an interest in one's experiences, and that which matters beyond experience.[132] In order to prove that there is more to life than what experiences feel like "from the inside,"[133] Nozick offers the option of plugging into this machine, which is capable of simulating whatever experience is desired, just as if it were actually being experienced. Nozick concludes that people would choose not to be plugged in because, basically, people care about who they are, in addition to what they feel.[134] They simply prefer not to have a machine live their lives for them.

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126. The legitimacy of ordinary language analysis has been clearly established by Ludwig Wittgenstein. *See* L. WITTGENSTEIN, *supra* note 104, §§ 494-505.

127. *See* R. NOZICK, *supra* note 4, at 42-45.

128. *See* F. RAMSEY, THE FOUNDATIONS OF MATHEMATICS 176-84 (1950).

129. F. P. Ramsey begins his preference-measuring scheme by supposing that the subject already possesses certain beliefs. The subject acts so that the consequences will be the best possible. To test preferences, options are offered to the subject so that they may be placed in order of merit. Using this format, degrees of preference can be measured quantitatively. *See id.*

130. *See* R. NOZICK, *supra* note 4, at 42-45.

131. The quest for evidence of interest (preferences) in this epistemology have been on an objective level—dealing with neutral terms such as conations, aversive behavior, and sentience. The use of preference in a behaviorist sense involves no introspection. Nozick, on the other hand, appeals to one's subjective inclinations to prove his point.

132. R. NOZICK, *supra* note 4, at 43.

133. *Id.* at 42.

134. *Id.* at 43. The reasons are twofold: We want to *do*, not just feel, certain things, and we want to *be* a certain way. *Id.* But the concern with what we are can also be satisfied by a machine—a transformation machine. This machine would transform one into any sort of person desired. Nozick speculates that people would still not be content to plug in. *Id.* at 44.

Preference is demonstrated by the act of not plugging in. It is of no moment that this preference may be caused.[135] Consequently, preference demonstrates that an entity does more than just respond to stimuli and that it has interests beyond mere experience.

The preceding exposition concerned the ascertainment of interests. Once interests are established, they will be protected by an entity from outside interference, or some claim to protection will be manifested by that entity.[136] Thus, assuming that a right is a claim,[137] then a claim of protection for a certain interest gives rise, prima facie, to a right. However, other factors must be considered for a comprehensive picture of a notion of rights. Another feature in a concept of rights is that there must be a duty owed to the right-holder. The right-holder then may assert a claim against the duty-bearer.[138] This becomes clear in considering that one has no right not to be struck by lightning. In such an instance, no claim can be made upon the physical phenomenon due to its lack of capacity for duty. The presence of a duty-bearer requires that the duty is acknowledged. This correlative feature gives rise to a critical feature of a metaright theory; that the asserted interest be recognized as worthy of protection.[139] A right is considered recognized if some general body of laws or the common moral values of a society perceive the interest as valuable and the right important enough to require its protection. Typically, the moral values of a society dictate which rights shall be recognized by law.[140] If an interest is deemed of

135. See discussion note 125 *supra.*

136. "According to the principle of personal dignity, every being that has interests, in other words, every person, has a claim to respect for his interests." L. NELSON, SYSTEM OF ETHICS 99 (N. Gutermen trans. 1956). Interestingly, Nelson includes under the concept of "person" any being that is capable of experiencing pain and pleasure. *Id.* at 100.

137. It has been an undisputed axiom throughout the discourse on rights that a right is a claim. This notion is the dominant view philosophically and legally. "[A] 'right' is well defined as a capacity residing in one man of controlling, with the assent and assistance of the State, the action of others." BLACK'S LAW DICTIONARY 1486 (Rev. 4th ed. 1968). "To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles." Feinberg, *supra* note 105, at 257.

138. The necessity of the presence of a duty-bearer in a system of rights corroborates Herbert Morris' description of a right theory as requiring the presence of creatures that are capable of limiting their own behavior in accordance with principles of morality. *See* Morris, *supra* note 73, at 500. The common error is to assert the converse of the above statement: that a system of rights only includes those capable of acting out of regard for duty. *See* Feinberg, *supra* note 116, at 46-48, who exposes the error in this line of reasoning.

139. Identifying who must do the recognizing is unnecessary to the theory. Feinberg observes the recognition of rights through "legal rules or, in the case of moral rights, by the principles of an enlightened conscience." Feinberg, *supra* note 116, at 43. Leonard Nelson deals with the recognition factor in terms of whether the right represents an interest worthy of respect under the moral law. An interest is worthy of respect if it is compatible with the dignity of other beings—a respect for their interests. *See* L. NELSON, *supra* note 136, at 97-100.

140. *See* Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32, 33 (1974).

little importance within society's hierarchy of values it will not be considered a legitimate claim.[141]

However, a claim's legitimacy does not imply that the claim will be cognizable. The demand that one's interests be protected can only be made through some mechanism for claim-making. If the interest is recognized as a right, the claim-making mechanism must be utilized to effectuate that right. In the Anglo-American legal system, a guardian asserts rights on behalf of individuals unable to do so themselves.[142] Clearly, this allows for rights to be conferred upon even those who lack the capacity for claim-making.

Engaging in an interest-based right analysis eventually leads to the task of delineating which interests are worthy of protection by society. One interest which has already been discussed is sentience[143]—the interest in the avoidance of pain. Sentience is broader in scope than other interests since it applies to a greater number of entities. Sentience is faulty, however, in terms of its epistemic problems,[144] and its lack of vertical depth—life is more than a summation of experiences. Sentience, therefore, as an interest, is one that is recognized by society as worthy of protection simply because the members of society are sentient and wish to avoid pain. However, sentience cannot be the source from which all other interests are derived due to the epistemic problems and lack of vertical depth. Consequently, the concept of preference rescues interests from epistemic dilemmas. Preference is limited as a source and indication of interest to that which the individual entity prefers. Since the avoidance of pain is the most universal preference, yet insufficient as a source for interests, a positivistic[145] approach must be adopted to describe those interests deemed worthy of protection as a right.

Since the focus of analysis centers on Nozick's system, the interests which he lists as inviolable in his minimal state will be used here. Basically, the interests with which Nozick is concerned are captured in the slogan, "the right to keep what you have" limited to one's life,

141. Hart offers an analogous theory in the rules of recognition which prescribe the characteristics for validity within a legal system. H.L.A. HART, THE CONCEPT OF LAW 92 (1961). Under Hart's view, recognition is necessary for a valid law. *Id.* In a similar manner, rights need to be recognized in order for the corresponding interest to be protected.

142. For a discussion of the guardian concept in regard to animal rights, see text & notes 175-83 *infra.*

143. See text & notes 92-100 *supra.*

144. The philosophy of mind problem which presents itself is the unanswered question of knowledge that other creatures feel pain.

145. The justification for positive rights, as opposed to natural rights, lies not in a transcendental realm, but rather in the dominant political authority, and are thus determined by society, not the state of nature. *See* G. CHRISTIE, JURISPRUDENCE 292 (1973).

liberty, and possessions.[146] Although Nozick adopts John Locke's list of interests, the justification for their recognition as worthy of protection by the concept of a right is not Locke's theistic natural rights theory.[147] Nozick's justification for this limited list of rights is that the sole legitimate function of the ultra-minimal state is to protect rights from violation, and any more extensive functions would violate rather than protect rights.[148]

This metaright theory has demonstrated that an interest, in the nature of a conation, which is recognized as valuable by society or a moral community, should be granted protection. This act of societal protection creates a legitimate claim in the interest-carrier. When the claim is asserted through some effective societal mechanism, a right is created.

KANTIAN RIGHTS FOR ANIMALS

The previous analysis has presented criticisms of the traditional characteristics offered by Nozick as explanations for right-bearing,[149] and in place of those characteristics, a metaright theory has been proposed, which establishes a functional concept of a right. Application of the concept of a right to animals will accordingly determine whether animals have the capacity for right-bearing. This position will be contrasted with that accorded animals in the Anglo-American legal system. Finally, the proposition that animals should be ascribed Kantian rights will be presented within the context of Nozick's minimal state.

Applying Metaright Theory to Animals

To accord rights to animals, it must first be demonstrated that they are capable of having interests. The epistemic problem concerning

146. R. NOZICK, *supra* note 4, at 10. An excellent example which explains this slogan may be found in Nozick's discussion on the right to life. That right does not grant one the right to those things needed to live, since that may violate another's rights. Rather, it is a right to have, or strive for, those things needed to live, as long as the rights of others are not violated. Thus, a theory of property rights—a right to keep that which you already have—is the foundation for a right to life. *Id.* at 179 n.

147. Though Nozick does not specify a rejection of theistic natural rights theory, he is unable to adhere to Locke's notion that one has no right to commit suicide. R. NOZICK, *supra* note 4, at 58. Locke holds that just as people are not allowed to harm others in their life, health, liberty, or possessions, they cannot harm themselves, "for men being all the workmanship of one omnipotent and infinitely wise Maker—all the servants of one sovereign master . . . they are his property whose workmanship they are, made to last during his not one another's pleasure." J. LOCKE, *supra* note 7, at § 6. Nozick states that it is his nonpaternalistic nature which prohibits an acceptance of Locke's position. R. NOZICK, *supra*. Therefore, if the concept of God entails paternalism, it can certainly be said that Nozick's source of interests which are worthy of being rights does not emanate from a theistic natural rights theory.

148. *See* R. NOZICK, *supra* note 4, at 27.

149. See text & notes 28-100 *supra*.

how to ascertain whether animals have interests will be approached in two ways. Initially, objective proof will be offered, using evidence of aversive behavior to demonstrate sentience, along with appeals to ordinary language analysis, studies of territoriality, and a value-measuring scheme to indicate that animals have preferences.[150] The second approach will be of a subjective nature—derived from Nozick's experience machine.[151]

Animals have a sentient interest, which corresponds with the interest shared by human beings. A substantial amount of empirical evidence has proven that all life forms exhibit aversive behavior.[152] Aversive behavior is indicative of a capacity for sentience,[153] and demonstrates an interest in the avoidance of suffering.[154] However, as noted above, the problems implicit in utilizing sentience as the sole evidence of interest-bearing demonstrates the need for other objective criteria upon which interests may be based.[155] Thus, the concept of preferences will be utilized.[156] It can hardly be disputed that within the context of ordinary language usage, statements are made regarding the preferences an animal has for certain foods or environmental conditions.[157] The

150. See text & notes 117-29 *supra.*

151. R. NOZICK, *supra* note 4, at 42-45; see text & notes 130-37.

152. Of all the attributes of living things the one that most fascinates me is the ability of organisms to detect a stimulus and respond to it by moving—what is called irritability or, in a precise sense of the word, behavior. *Such behavior is a universal property of biological systems. . . .*

Adler, *The Sensing of Chemicals by Bacteria,* SCIENTIFIC AMERICAN, April, 1976, at 40 (emphasis added); See also Lawrence, *Plants Have Feelings Too. . . . ,* ORGANIC GARDENING & FARMING, April, 1971 at 64; Woodlief, Royster, & Huang, *Effect of Random Noise on Plant Growth,* 46 J. ACOUSTICAL SOC. AM. 481 (1969).

153. See text & notes 93-96, 120-22 *supra.* Scientists have found strong evidence that the higher mammalian vertebrates experience pain sensations as acute as those of humans. R. SERJEANT, THE SPECTRUM OF PAIN 72 (1969).

The distinguishing feature of man lies in the more developed cerebral cortex which relates to rational functions. This difference is not relevant to sentience, however. In fact, mammals and birds have nervous systems much like ours; their impulses, emotions, and feelings are located in the well developed diencephalon—the posterior subdivision of the forebrain. Lord Brain, *Presidential Address,* in THE ASSESSMENT OF PAIN IN MEN AND ANIMALS 10-11 (C. Keele & R. Smith eds. 1962). The eminent neurologist, Lord Brain, refuses to dismiss the idea that animals have the capacity for sentience. He has stated: "I at least cannot doubt that the interests and activities of animals are correlated with awareness and feeling in the same way as my own, and which may be, for might I know, just as vivid." *Id.* at 11.

154. See text & note 153 *supra.* This capacity for suffering is a "*prerequisite for having interests at all,* a condition that must be satisfied before we can speak of interests in a meaningful way." P. SINGER, *supra* note 2, at 9 (emphasis in original). Bentham also found the interest in sentience to be dispositive when determining to whom rights should be accorded. *See* text & note 92 *supra.*

155. See text & notes 92-100 *supra.*

156. See text & notes 123-34 *supra.*

157. A simple example is when having placed a dish of Alpo dog food alongside a dish of Purina dog food, and a dog in between the two, and he or she chooses only one to eat, we experience no reticence in saying that the dog prefers one over the other upon observing his or her behavior in response to such a choice. This is not to say that the dog necessarily prefers one brand over the other in a consistent manner. Nor does it point towards a right of a dog to have his or her particular taste satiated. The

verb "prefers" is used correctly in the ordinary fashion when an animal is the subject. Thus the concept of animals having preferences becomes legitimate. This expression of preference demonstrates an interest on the part of animals to have the options afforded by life. This accordingly gives rise to the recognition of an interest worth protecting.

Another objective route to demonstrate the capacity of interest-bearing by animals is through behavioral studies which prove that some species have territorial interests.[158] By expressing the territorial interest, particular preferences are necessarily exhibited.[159] The demonstration of aversive behavior on the part of animals, coupled with the accepted notion that they do have preferences, as indicated by ordinary language analysis, territorial behavior, and quantitative value-measuring mechanisms, overcome epistemic problems regarding their interest-bearing capacities.

The subjective approach to proving that animals have interests also involves the notion of preference, derived from Nozick's "experience machine."[160] If, as Nozick suggests, people are concerned with more than what experiences feel like "from the inside,"[161] then perhaps it can be demonstrated that animals also have interests beyond their experiences.[162] Nozick states in the experience machine section that

example from an ordinary language analysis perspective simply indicates that animals do have preferences.

158. *See* S. DIAMOND, THE SOCIAL BEHAVIOR OF ANIMALS 144-54 (1970); K. LORENZ, ON AGGRESSION 33-39 (1966).

159. Though it may be argued that an animal's territorality is but a biological drive, preferences are expressed by the manner in which that drive is executed. For example, when four fish of the same species are placed in an aquarium, the strongest male claims the whole tank as his territory. K. LORENZ, *supra* note 158, at 36-37. In addition to ordinary language analysis and behavioral studies, a quantitative value-measuring mechanism can also demonstrate that animals have preferences. *See* F. RAMSEY, *supra* note 128. This device was constructed for the purpose of evaluating preferences of people, who complicate accurate measurement with their capacity to doubt. *Id.* at 177. If the preferences of people can thus be measured quantitatively, then a fortiori, an objective evaluation can be made of the preferences of animals, who lack such an ability to doubt. The experiment would consist of giving the subject animal various options in food or weather conditions, and then analyzing the behavior response to determine those it prefers. The formulae provided by Ramsey would put in order of merit the preferences the animal selects. *Id.* at 176-84.

160. R. NOZICK, *supra* note 4, at 42-45. See text & notes 130-34 *supra.*

161. R. NOZICK, *supra* note 4, at 42.

162. To prove animals have interests beyond that which they experience, an argument from analogy can be made. A similar argument has been used to infer the existence of other minds. Mill concludes that other humans have feelings like the ones he has because they have bodies like his own and they exhibit behavior similar to his. Since his outward behavior is caused by inner feelings, the induction is that similar behavior exhibited by similar bodies is thus caused by similar feelings. J.S. MILL, AN EXAMINATION OF SIR WILLIAM HAMILTON'S PHILOSOPHY 243-44 (6th ed. 1889). *See also* W. STANCE, THE THEORY OF KNOWLEDGE AND EXISTENCE 196 (1932). Stance is a proponent of the analogical argument, but he does admit that it cannot yield certainty, only a probable conclusion. *Id.* The argument, as applied to animals, would be that since they are sentient and have preferences, they have an interest in how their lives are lived. Thus, animals may be concerned about more than just how those lives are experienced. Just as a person would refuse to hook up to an experience machine, R. NOZICK, *supra*

until it is determined what matters for people other than their experiences, and it is shown that the answer does not apply to animals, then the experiences which animals feel may not limit what is done to them.[163] The above epistemology of interests with regard to animals demonstrates that they are capable of having interests. However, interest-bearing is only the first element necessary to have a right. The second feature of the metaright theory is that the interest must be recognized by society as worthy of protection.[164] Accordingly, for animals to have rights within Nozick's minimal state, it must be shown that animals possess the same interests which Nozick recognized as rights.

The interests with which Nozick is concerned are very basic ones: liberty, possessions, and life.[165] To discover which species of animals have liberty interests, behavior experiments testing different species' preferences can be performed. A particular animal could be given the choice whether to roam free or be domesticated, as it is easily conceivable that some animals would relinquish liberty for security.[166] Territoriality in animals may be analogized to man's possessory interests,[167] thus such animals who exhibit a territorial interest would have a right, which might conceivably be protected.

A much greater difficulty is encountered, however, in attempting to establish that animals have an interest in life.[168] At common law,[169] and under most existing cruelty statutes,[170] the painless killing of animals is not "cruelty."[171] The rationale inherent in the denial of a right to life for animals is that animals allegedly do not possess an interest in the future, whereas the premature death of a person destroys the future plans, projects, and opportunities that person had possibly envisioned.[172]

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at 43, an animal confined in a zoo, with all the necessary comforts of food, drink, and security, may nonetheless escape at the first opportunity.

163. R. NOZICK, *supra* note 4, at 45.

164. See text & notes 139-41 *supra*.

165. R. NOZICK, *supra* note 4, at 10.

166. *Cf.* T. HOBBES, LEVIATHAN 87 (A.D. Lindsay ed. 1914) (people who naturally love liberty restrain themselves in the form of Commonwealths for their own preservation).

167. For instance, males of many species of songbirds restrict their singing activities to certain trees. Whereas other animals have a mobile territory, the individual distance which the animal maintains between itself and others varies with the animal. *See* S. DIAMOND, *supra* note 158; K. LORENZ, *supra* note 158.

168. For a discussion of what the right to life means to Nozick, see text & note 146 *supra*.

169. Horton v. State, 124 Ala. 80, 81-82, 27 So. 468, 468 (1900); State v. Neal, 120 N.C. 613, 621-22, 27 S.E. 81, 85 (1897); Commonwealth v. Lewis, 140 Pa. 261, 267 21 A. 396, 397 (1891).

170. *See, e.g.*, ALA. CODE tit. 3, § 11 (1958); ARIZ. REV. STAT. ANN. § 13-951.01 (Supp. 1976-77); N.C. GEN. STAT. § 14-360 (1969).

171. Friend, *supra* note 3, at 207.

172. The argument that animals do not have an interest in life is justified by distin-

Nevertheless, to permit the painless killing of an animal because its interest in the avoidance of suffering or the future is not violated ignores the animal's interest in *how* its life is presently being lived. Killing an animal violates the animal's interests in the fundamental enjoyments of life, such as sex and food.[173] Therefore, only by recognizing a right to life may an animal's interest in how its life is led be protected.

Demonstrating that animals are interest-bearers,[174] and that they possess the interests recognized in Nozick's system as worthy of pro-

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guishing the death of an animal, which is merely the extinction of an organism, from the death of a person, which represents the ending of a conscious history and prevents interests in the future from ever being carried out. Murphy, *Rationality and the Fear of Death*, 59 MONIST 187, 196-97 (1976).

173. The use of the concept "preference" as an epistemological tool demonstrates that animals have other interests beyond the avoidance of suffering. Rather, they have preferences regarding how the suffering is to be avoided. If a dog did not care how its hunger pains were to be alleviated, and two comparable brands of dog food are presented, then the avoidance of suffering would offer no explanation for a consistent choice of one brand over the other. As it seems to be a matter of widespread assumption that domestic animals do exhibit such taste preferences, it can be said that they have an interest in how their lives are carried out.

174. Two objections can be raised to refute the argument that animals have interests. First, the argument for interests only presents the type of criteria which determine who has interests. Thus, we are no further ahead unless it can be determined to whom the criteria apply. The second objection is that by using the criteria set forth, it may be empirically determined someday that plants have preferences and therefore, have interests. If no rational person would be willing to grant plants rights, then this reductio argument proves the theory to be invalid: it is based upon supposedly true premises which yield unacceptable conclusions, and thus fails the test for formal validity. S. TOULMIN, THE USES OF ARGUMENT 118 (1964).

In reply to the first objection, it should be noted that all of the criteria suggested for interest-bearing are empirically ascertainable. As shown above, sentience and preferences can be determined by neurophysiological tests, behavioral studies, and quantitative theory. See text & notes 128-29 *supra*. The objection that the presentation of such criteria does not clearly define who has interests is one which weighs even heavier against the position that rationality and free will are dispositive as to who should have rights. At what age does a being become a rational, responsible, and competent adult? This problem was addressed by the United States Supreme Court in a case presenting the issue whether a minor had a right to an abortion without parental consent. Finding that a minor did have such a right, the Court stated: "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976). The criteria which establish interests in the metaright theory are empirically demonstrable, while the class of creatures who are rational and have free will is more speculative.

The second objection maintains that if interests are the touchstone of rights, and plants share in the characteristics determinative of interest-bearing, then plants should also acquire rights. The apparent threat that man might become extinct because of moral regard for the rights of plants is avoided by the "ought implies can" principle. People can live without eating those animals that have an interest in living. R. NOZICK, *supra* note 4, at 36. The problem then is to distinguish plants from animals even if they were to share the capacity to have interests. The "ought implies can" principle—that one cannot be required to do that which he cannot do, is a Kantian dictum "often taken as an axiom by contemporary moralists." Brouser, *A Difficulty With "Ought Implies Can"*, 7 S.J. PHILOSOPHY 45 (1969). The practical task of the "ought implies can" maxim is primarily negative: "What I cannot do now is not my duty to do now." *Id.* at 50. This functions to prevent excessive rigor in morality which results in unwarranted guilt feelings. *Id.* Since humanity must eat to survive, it is excused from complying with the "ought" of according plants rights. This argument presumes that plants could be determined to have interests of sufficient value to deserve protection by the state.

tection, only satisfies two necessary conditions of the metaright theory. The third element necessary to be accorded a right is a mechanism to assert that right.[175] Animals can have their rights asserted through a guardian. The guardianship is a trust relationship in which an individual is appointed by the court to act for another—the ward—whom the law finds to be incapable of managing his or her own affairs.[176] It is the guardian's duty, in the protection of the ward's person, property, or legal rights, to assert the rights of his or her ward.[177] It is therefore unnecessary that an entity itself be capable of asserting its own rights, as long as there is a mechanism available such as a guardianship relationship, by which claims can be prosecuted.[178]

C. D. Stone has proposed that a guardian system be established for the representation of natural objects in the same manner that a guardian speaks for a corporation or an incompetent.[179] He notes that there would be no lack of "friends" who would be guardians for the environment.[180] Justice William O. Douglas, dissenting in *Sierra Club v. Morton*,[181] agreed that natural objects ought to have standing and be represented by the "friends" of the object who have a meaningful relationship to it.[182] Thus, any natural object or animal could allege an injury through its guardian.[183] Recognition of this guardian concept accordingly would place animals within the metaright theory and provide a justification for societal protection.

An example of what rights for animals actually entails is demon-

175. For an entity to effectuate a claim for infringement of a protected interest, there must exist some mechanism by which that claim may be asserted. Just as it would make no sense to have a right unless there were someone against whom it could be asserted, there is correspondingly no sense to having a right without a means to enforce it.

176. *E.g.*, Snyder v. United States, 134 F. Supp. 319, 322 (W.D.N.C. 1955); National Sur. Co. v. State, 181 Ind. 54, 61, 103 N.E. 105, 108 (1913); Harrison v. Harrison, 21 N.M. 372, 379, 155 P. 356, 357 (1916).

177. *E.g.*, United States v. Phillips, 92 F.2d 849, 851 (7th Cir. 1937), *cert. denied*, 303 U.S. 649 (1938); *In re* Sheehan's Estate, 290 Ill. App. 551, 555, 9 N.E.2d 63, 65 (1937); Cleveland C.C. & St. L. Ry. v. Moneyhun, 146 Ind. 147, 151, 44 N.E. 1106, 1107 (1896).

178. See cases cited note 177 *supra*. Animals, even though they are inherently incapable of asserting rights, could be analogized to children who are retarded at birth.

179. C. STONE, *supra* note 32, at 17.

180. Just as "friends" of natural objects, like the Sierra Club, Environmental Defense Fund, Friends of the Earth, Natural Resources Defense Council, and the Izaak Walton League, would sue on behalf of natural objects, *id.* at 19, the Society for Prevention of Cruelty to Animals and the Humane Society would conceivably provide legal aid to animals for the protection of their rights.

181. 405 U.S. 727 (1972).

182. *Id.* at 743 (Douglas, J., dissenting).

183. Since the decision of *Sierra Club*, a natural object has been listed as a plaintiff in at least one suit. In Byram River v. Village of Port Chester, 394 F. Supp. 618 (S.D. N.Y. 1975), the Byram River, along with the Byram River Pollution Abatement Association—a corporation designed to protect the river and its quality, the town of Greenwich, Connecticut, and an individual who resided on the shore of the river, sued to stop the dumping of inadequately treated sewage into the river. *Id.* at 620-21. The standing of the Byram River was not challenged.

strated by the court's opinion in *Committee for Humane Legislation, Inc. v. Richardson*,[184] which involved the killing of vast numbers of dolphins because of the tuna fishing industry's practice of trapping dolphins along with the tuna.[185] The dolphin's interest in life arguably was recognized by the United States government through the Marine Mammal Protection Act of 1972,[186] and various environmental groups sought to protect the interest. The court determined the purpose of this statute was the protection of the mammals themselves, and not for an ulterior motive, such as preserving the mammals for later exploitation.[187] The various environmental groups who brought this action were recognized as invoking a valid claim-making mechanism for the interest of the dolphins, although the animals actually lost.[188]

This decision demonstrates the symbiotic relationship the law has with respect to animals. The environmental groups had standing to sue on behalf of the porpoises. Nonetheless, the disposition of the case was in favor of the fishing industry. It thus exemplifies Nozick's slogan—utilitarianism for animals, Kantianism for people.[189] The interests of animals are considered as long as they serve a utilitarian

184. 540 F.2d 1141 (D.C. Cir. 1976). The opinion resulted from the consolidation of five suits brought by various environmental organizations who were challenging the issuance by the National Marine Fisheries Service [NMFS] of a permit allowing purse-seine fishing for yellowfin tuna "on porpoise." *Id.* at 1141; *see* discussion note 185 *infra*. The district court, in Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297 (D.D.C. 1976), *modified*, 540 F.2d 1141 (D.C. Cir. 1976), held that the NMFS had violated the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (Supp. V 1975), by issuing such a permit.

185. 540 F.2d at 1143-44. In the late 1950's, fishermen discovered that yellowfin tuna travel below certain species of dolphin (known commonly as the "porpoise"), and they developed a means of catching the tuna by encircling them, along with the porpoise, in a cup-like "purse-seine" net. *Id.* at 1143. The open bottom of the net is drawn closed, trapping both the porpoise and the tuna. *Id.* Efforts are made to free the dolphins used in this "on porpoise" method of catching tuna by having speedboats stretch the net open at top to allow the porpoise to swim over without becoming entangled. *Id.* at 1143 n.4; *see* 40 C.F.R. § 216.24(d)(2)(vi) (1975), *as amended*, 40 Fed. Reg. 56899 (Dec. 5, 1975). Despite these efforts, approximately 130,000 incidental porpoise deaths occurred as a result of this method of fishing. 540 F.2d at 1144.

186. 16 U.S.C. §§ 1361-1407 (Supp. V 1975). The statute states: "In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate." *Id.* § 1371 (a)(2).

187. 540 F.2d at 1148. The House report on the Marine Mammal Protection Act stated: "The primary objective of this management must be to maintain the health and stability of the marine ecosystem; this in turn indicates that the animals must be managed for their benefit and not for the benefit of commercial exploitation." H.R. REP. No. 92-707, 92d Cong., 1st Sess. 22 (1971).

188. However, the D.C. Court of Appeals defeated the ultimate purpose of the action by staying the injunction instituted by the district court. 540 F.2d at 1151. The court refused to enforce the injunction due to the prospective disastrous effect on the commercial fishermen and for the continuance of studies as to the other fishing techniques. *Id.* This balancing process by the court demonstrates the failure of American law to consider the interest of animals in life as being sufficient to counter the economic interests of private business.

189. R. NOZICK, *supra* note 4, at 39. See text & notes 17-19 *supra*.

purpose for man and beast. However, homocentric interests will not be forsaken if in conflict with those of the animals, at which point the latter must give way. This view is predominant in the present perspective of the Anglo-American legal system regarding the scope of animal protection.

To facilitate understanding of what Kantian rights for animals entails, an overview of the present Anglo-American legal view will be presented. After analysis of this utilitarian perspective, a foundation will be laid to justify the nonutilitarian view towards the concept of a right. This will form the bridge by which animals may make the leap from having rights in the utilitarian frame to the point of being ascribed Kantian rights within Nozick's minimal state.

The Anglo-American Legal Perspective of Animals

Basically, domestic animals under the law have had the status of private property.[190] The property rights of people in domestic animals are as absolute as that in inanimate objects.[191] Additionally, any non-domesticated animals within the borders of a state are owned by the state in its sovereign capacity as trustee—for the use and benefit of the state's populace.[192] Despite the predominant societal view of animals as mere pieces of property, concern for the plight of animals subjected to cruel treatment became the basis for legislation in the early nineteenth century.[193] England was in the forefront by enacting legislation which regarded animals as something other than property.[194]

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190. *See, e.g.*, Thiele v. Denver, 135 Colo. 442, 447, 312 P.2d 786, 789 (1957); State v. Moresi, 209 La. 180, 182, 24 So.2d 370, 371 (1946); Helsel v. Fletcher, 98 Okla. 285, 286, 225 P. 514, 515 (1924); ARIZ. REV. STAT. ANN. § 24-274 (Supp. 1976-77); COLO. REV. STAT. § 38-20-102 (1974); LA. CONST. art. 10, § 4(3).

191. *See, e.g.*, Thiele v. Denver, 135 Colo. 442, 447, 312 P.2d 786, 789 (1957); State v. Sumner, 2 Ind. 377, 378 (1850); Helsel v. Fletcher, 98 Okla. 285, 286, 225 P. 514, 515 (1924).

192. Lacoste v. Department of Conservation, 263 U.S. 545, 549 (1924).

The Biblical perception of animals being dominated by man was reinforced by Judaic and Roman law. *Genesis* 1:26; *see* Coggins & Smith, *The Emerging Law of Wildlife: A Narrative Bibliography*, 6 ENVT'L LAW 583, 597 (1975). *See also* J. LOCKE, TWO TREATISES OF GOVERNMENT 247 (Laslett ed. 1963) (First Treatise). This can be contrasted with the perception of animals in ancient Egypt and India, where animals were considered as coequal inhabitants of the earth. Browne, *Animals as Offenders and as Victims*, 21 ALBANY L.J. 265, 265 (1880). As an example, the law of ancient Egypt executed one who killed an animal wilfully, and issued a fine if it was an accidental death. *Id.*

193. Coggins & Smith, *supra* note 192. However, the first anti-cruelty statute in the western world was enacted in 1641 by the Puritans of the Massachusetts Bay Colony. Burr, *supra* note 4, at 212. It provided that "[n]o man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use." G. CARSON, MEN, BEASTS AND GODS 71 (1972).

194. In 1822, England passed An Act to Prevent the Cruel and Improper Treatment of Cattle, 1822, 3 Geo. 4, c.71, § 1, which conferred a form of legislative protection on cattle. Also known as "Martin's Act," it was the first instance of Anglo-American

The State of New York passed a staute in 1828 proscribing the malicious killing or torture of an animal.[195] Although the bulk of animal protective legislation has been anti-cruelty statutes,[196] some federal legislation[197] has called for the humane treatment of animals while in transport,[198] in the slaughterhouse,[199] and in the research laboratory.[200] However, even at this "advanced" stage of animal protection, nonhuman animals have not acquired rights to be spared from slaughter or experimentation.[201]

In fact, there is considerable debate regarding the rationale behind these anti-cruelty statutes—whether it is a homocentric one,[202] or for the sake of the creatures themselves.[203] There are two prongs to the

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law where animals were considered as other than "mere property". H. SALT, *supra* note 111, at 6. The next legislative step was England's Cruelty to Animals Act of 1876, 39-40 Vict., c.77, which required that any experiment on an animal have a discernible scientific purpose and also required the use of anesthesia. *Id.* § 3. If the animal's pain were to continue after the experiment, the animal had to be killed before the anesthetic wore off. *Id.*

195. Leavitt, *The Evolution of Anti-Cruelty Laws in the United States*, in ANIMALS AND THEIR LEGAL RIGHTS 15 (2d ed. E. Leavitt 1970). Other states quickly followed until animal abuse was finally made criminal throughout the country. *Id.* at 17.

196. Burr, *supra* note 3, at 224.

197. *Id.* at 220.

198. 45 U.S.C. §§ 71-74 (1970), requires the maintenance of way stations where animals could be rested while being transported by railway. The law is woefully inadequate in its present form, and efforts to amend the act to include the carriage of animals over highways have failed. Burr, *supra* note 3, at 220.

199. 7 U.S.C. §§ 1901-1906 (1970), prohibits the federal government from buying meat processed at slaughterhouses which kill animals inhumanely. *Id.* § 1903.

200. As a result of mounting concern regarding the conditions provided for laboratory animals, the Animal Welfare Act of 1970, §§ 2-23, 7 U.S.C. §§ 2131-2155 (1970), requires that certain humane standards be met, *id.* § 2143. Legislative history of the act expressed the view that "animals should be accorded the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter from extremes of weather and temperatures, and adequate veterinary care including the appropriate use of pain-killing drugs." H. R. REP. No. 91-1651, 91st Cong., 2d Sess. 2 (1970), *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 5103, 5104.

201. The Animal Welfare Act of 1970, 7 U.S.C. §§ 2131-2155 (1970) though espousing a humane ethic, was not intended to be an anti-vivisectionist statute. Scientific research and experimentation were guaranteed preservation. H.R. REP. No. 91-1651, *supra* note 200.

202. For example, in the National Environmental Policy Act of 1965 [NEPA], § 101(b), 42 U.S.C. § 4331(b) (1970), Congress defined the goals of national environmental policy as follows:

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.

203. *See, e.g.*, 7 U.S.C. §§ 2131-2155 (1970); 16 U.S.C. §§ 668aa to 668cc-5 (1970); 18 U.S.C. § 42(c) (1970). For example, the final statute dictates that the Secretary of the Treasury shall prescribe requirements for humane and healthful conditions under which animals may be transported into the United States. These three enactments are isolated examples of federal law proscribing conduct to protect nonhuman interests. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1343 (1974).

homocentric rationale.[204] One prong centers on the notion that cruelty to animals brutalizes people and thus destroys the moral fiber upon which government is founded.[205] The other prong is the protection of animal lovers from the pain of knowing that animals have suffered.[206] However, the reasoning that such legislation is only for the animal lovers may arguably be erroneous, since people have empathy because they believe that animals should be protected for the animal's sake.[207] Just as there were two prongs to the argument that a homocentric rationale underlies the anti-cruelty statutes, there are two lines of argument that the statutes are for the benefit of the animals themselves: a disinction between duties *regarding* animals and duties *to* animals.[208] The former view treats animals solely as beneficiaries of duties, while the latter would grant rights correlative to such duties.[209] Many individuals who argue that anti-cruelty statutes are for the sake of the animals would not confer rights upon them because they lack the capacity for moral agency.[210]

Present legislation regarding animals[211] falls in the first category, since animals are only the beneficiaries of duties *regarding* them, and are not entitled to rights correlative to those duties.[212] For example, Arizona's anti-cruelty statute makes it a misdemeanor to inflict unnecessary cruelty upon an animal or to kill it maliciously.[213] However, to

204. See text & notes 205-06 *infra*.

205. Quinlan, *Have Animals Rights?*, 38 CENT. L.J. 160, 162 (1894). Nozick's counterargument to the rationale that cruelty to animals creates an "undesirable moral spillover" in the form of brutalizing people is that those who enjoy hitting baseballs (or butchering meat) do not necessarily have a propensity to bash or slice the heads of humans. As long as those persons who torture animals keep in mind a clear line between the human and the nonhuman (and between baseballs and heads), then such a spillover should not occur. R. NOZICK, *supra* note 4, at 36.

206. *See* Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 676 (1963).

207. *See* Feinberg, *supra* note 116, at 45-46. This may be countered, however, by the argument that just because some animal lovers really think that animals have rights, we need not alter our homocentric rationale for protecting animals. The majority can still legislate protective laws simply for the sake of these people.

208. *Id.* at 45.

209. *Id.*

210. *See* J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 43 (2d ed. 1938). Animals cannot be moral agents because they lack the capacity to execute a free will which conforms their behavior to the performance of duties. A moral agent can reciprocate, whereas an animal cannot return a duty for the receipt of a right. *See* text & notes 83-86 *supra*.

211. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-951 (Supp. 1976-77); MD. ANN. CODE art. 27, § 59 (1976); VA. CODE ANN. § 18.2-392 (Cum. Supp. 1977).

212. At best, the animals do enjoy a right correlative to such duties in the form of a "social contract right." Murphy, *supra* note 66, at 235-36. This right is to be distinguished from the autonomy rights that are enjoyed by rational, competent human beings. The decent treatment owed to animals is obligatory under this "social contract right," and is not a duty performed solely out of charity. However, the creatures do not share in all of the rights in the same manner that humans do. *Id.* at 231, 235-37.

213. ARIZ. REV. STAT. ANN. § 13-951(A)(1) (Supp. 1976-77). Every state has passed an anti-cruelty statute prohibiting "unnecessary" cruelty, and the wording of Arizona's statute is typical. *See* Friend, *supra* note 3, at 205.

convict one of killing an animal, even for a misdemeanor charge, "actual malice" must be shown.[214] On the other hand, people are protected from any kind of culpable homicide. There is a duty to your fellow human being to not be causally responsible for his or her death.[215] To say that an animal has a right not to be maliciously killed, necessarily implies an interest in animals not to be killed with actual malice. This, however, is absurd; an animal simply wishes not to be extinguished. Unlike people, who distinguish in their laws between different degrees of murder,[216] it is only the extermination of life, not the state of mind of the exterminator, in which a nonhuman animal is interested. Hence, animals are only beneifciaries of duties *regarding* them, not duties owed *to* them, since they are not ascribed rights correlative to those duties.[217]

Despite the foregoing analysis of anti-cruelty statutes, some courts have stated that animals do have some rights.[218] The language used in these cases has been sympathetic to animals as being right-holders.[219]

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214. *See* Fears v. State, 33 Ariz. 432, 436, 265 P. 600, 601 (1928). "Malice in fact" is defined as the actual state of mind of the defendant which deliberately intends to injure. This is distinguishable from "malice in law" which is inferred from the intentional doing of a wrongful act. *Id.* The defendant in *Fears* did intend to kill the animal, but because he did so pursuant to a regulation promulgated by the Secretary of Agriculture, the court found that he did not intend to injure the animal or its owner. Thus, "actual malice" was not present and he was therefore not guilty of violating the anti-cruelty statute. *Id.* at 439, 265 P. at 602.

215. To hold a person responsible for causing the death of another, the mens rea element must be satisfied. That is, the person's conduct which caused homicide must have been intentional, reckless, or negligent. *See* ARIZ. REV. STAT. ANN. §§ 13-451, -456 (1956); CAL. PENAL CODE §§ 187, 192 (West 1970); 18 PA. CONS. STAT. § 2501(a) (1973).

216. See text & note 215 *supra.*

217. See text & notes 208-09 *supra.*

218. State v. Karstendiek, 49 La. 1621, 22 So. 845 (1897); Stephens v. State, 65 Miss. 329, 3 So. 458 (1888). These two cases have been cited in contemporary animal liberation literature to support the proposition that animals have rights under anti-cruelty statutes. Tribe, *supra* note 203, at 1342 n.127. *See also* Friend, *supra* note 3, at 201, 204.

219. The court in State v. Karstendiek, 49 La. 1621, 22 So. 845 (1897), repeats Bishop's comments in reference to an anti-cruelty statute:

> The statute relating to animals is based on "the theory, unknown to the common law, that animals have rights which, like those of human beings, are to be protected. A horse, under its master's hands, stands in a relation to the master analogous to that of a child to a parent."

Id. at 1624, 22 So. at 847.

Another case cited for the proposition that statutes to prevent cruelty to animals were enacted for the animals' benefit is Stephens v. State, 65 Miss. 329, 3 So. 458 (1888). The court in *Stephens* stated that although the common law recognized no rights of animals, and punished cruelty to them only as it affected the property rights of people, the statutes were designed to remedy this defect. *Id.* at 331, 3 So. at 458-59. In State v. Avery, 44 N.H. 392 (1862), the court upheld a jury verdict finding the defendant guilty of wilfully, maliciously, and cruelly beating and wounding his horse. However, the *Avery* court distinguished a malicious, unnecessary infliction of pain upon a horse from a beating for disciplinary purpose. *Id.* at 396. The latter, although it may be excessive and thus evidence of cruelty, was held not to be like the case of a parent who would be liable for the excessive infliction of chastisement on a child. *Id.* Therefore, as long as the beating of an animal was for training, not torture, the anti-cruelty statute was inapplicable.

The converse of *Avery* occurred in *Karstendiek* and *Stephens* where, despite favor-

However, the holdings have a homocentric rationale and exemplify duties regarding animals rather than duties to animals.[220]

From this analysis, it is apparent that legislation for animals adequately reflects Nozick's slogan—utilitarianism for animals, Kantianism for people.[221] At this point in the progression of Anglo-American law, animals are "intermediate beings," occupying the position between human beings and inanimate property.[222] The location of animals in the "intermediate position" in the perspective of Anglo-American law highlights the *lack* of rights which are presently ascribed to them. It especially demonstrates that whatever rights they may have, they are certainly not of a Kantian nature.[223] However, application of our metaright theory does not, by itself, yield Kantian rights for animals. This Note advocates that animals be ascribed rights of such nature for two reasons. First, we are working within the frame of Nozick's minimal state, which mandates that rights be protected by the side-constraint model. Second, the theoretical basis upon which such a model is grounded is equally applicable to nonhuman animals.

For an exposition of the foundation of Kantian rights, Nozick refers to John Rawls,[224] who provides a justification for the nonutilitarian view towards the concept of a right in a thought experiment construct. Rawls epitomizes the utilitarian perspective by conceptualizing a society governed according to a single principle. This principle is the rational choice of one person—the impartial spectator—who embodies and assigns all wants, wishes, and needs of the entire popu-

able language for animals, the holdings were contra. In State v. Karstendiek, 49 La. 1621, 22 So. 845 (1897), the court concluded that since the city had the legislative authority to prohibit nuisances, and since public cruelty to animals creates an annoyance and violates the rights of the public, the rights of owners of animals are therefore not obstructed by an ordinance proscribing treating animals cruelly in public. *Id.* at 1624, 22 So. at 846-47. The court in Stephens v. State, 65 Miss. 329, 3 So. 458 (1888), declared that the defendant would be exculpated if it were found that he killed the creatures for the prevention of the destruction of his crops, rather than for the purpose of inflicting malicious or unnecessary pain and suffering. *Id.* at 331, 3 So. at 458. Thus, even judges who espouse sympathetic words for the rights of animals establish legal precedent which is contrary to animals' interests.

220. If these cases and statutes did ascribe rights to animals, they would be strange rights indeed. According to the law analyzed above, animals would have the right not to be killed with actual malice. Additionally, animals would have the right not to be beaten for purposes of torture as opposed to training. The net effect of the infliction of pain in each case is the same; the only difference is either the place where the pain is inflicted or the motive behind the infliction.

221. See text & notes 17, 189 *supra.*

222. R. NOZICK, *supra* note 4, at 40.

223. This intermediate position can be seen by examining Nozick's hierarchy under which he has status 1 organisms that cannot be used for any other's end; status 2 beings who may be sacrificed for status 1 beings; and status 3 creatures which can be consumed by any other entity, including other status 3 members. *See* R. NOZICK, *supra* note 4, at 45-47. Though Nozick creates this construct to further exemplify what distinguishes persons from animals, *id.* at 45, 48, such a tripartite structure is not unlike Murphy's bifurcation of rights. Murphy, *supra* note 66.

224. R. NOZICK, *supra* note 4, at 33 n.5.

lace.[225] Thus, it can be determined what is right for the whole by discovering the rational choice of this individual.[226] However, the end result of the thought experiment is a loss of appreciation for individuals as individuals.[227] The same Rawlsian construct applies to animals. An impartial spectator who allocates resources according to the maximization of the principle of utility would obliterate any distinctions between individual animals as individuals. It has been shown that animals do have interests and thus ought to be ascribed rights under a metaright theory. They qualify to have their rights protected by Kantian side constraints because the counter-example to the utilitarian rationale for the concept of a right pertains to human and nonhuman animals alike. Since we are operating within the minimal state, and Nozick adopts Rawls' nonutilitarian justification for rights, those animals which do have interests deemed worthy of protection in that state should be accorded Kantian rights.

OPERATIVE EFFECTS OF KANTIAN RIGHTS FOR ANIMALS WITHIN NOZICK'S MINIMAL STATE

There are two levels from which this discussion may be approached. The first is how animals will function in relation to other individuals, particularly people, once they are accorded Kantian rights. The second level is the interaction of animals with the state. These approaches will not only explore the concept of Kantianism for animals, they will also illuminate what Nozick's minimal state entails in relationships with and between individuals.

Rights of Animals Vis-à-Vis Individuals

An obvious difference between our society and a state in which animals are accorded Kantian rights is that in the latter animals no longer may be raised or hunted for food,[228] nor could they be subjects of experiments. As a result, a currently recognized individual right of human beings would be violated—a property interest in animals.[229] People who presently own cattle would not be able to slaughter them; scientists who have already purchased experimental specimens would

225. J. RAWLS, *supra* note 9, at 26-27.
226. *Id.* at 27.
227. *Id.* Nozick reinforces this by saying that there is no social entity which sacrifices for the social good; there are only individuals sacrificing for other individuals. R. NOZICK, *supra* note 4, at 32-33.
228. The consumption of animals who die a natural death would be allowed, unless it were demonstrated that they have an interest in the respect for the dead and society recognized a right not to have bodies of animals desecrated.
229. See text & notes 190-92 *supra*.

not be permitted to utilize them in experiments. Because Anglo-American law has permited animals to be treated as the legally recognized owner desires,[230] within the constraints of anti-cruelty statutes,[231] the ascription of Kantian rights to animals will impinge upon the freedom these animal owners presently enjoy.

However, even under Nozick's system, granting Kantian rights to animals does not violate fundamental side constraints. Three principles are espoused by Nozick concerning the justice in holdings of private property. Two of these principles are justice in acquisition[232] and justice in transfer.[233] The third principle—the rectification of injustice in holdings—is invoked when one of the first two principles is violated.[234] Since animals have Kantian rights, they were unjustly acquired as property, and unjustly transferred as property. According to Nozick, moral side constraints do not prohibit defensive or retributive action in cases where there was an unjust acquisition or transfer of holdings.[235] Thus, the alleged property "rights" of persons in certain animals would not be infringed, since these rights never existed in the minimal state.

It is clear that the Lockean list of rights[236]—life, liberty, and possessions—in which animals share,[237] cannot be violated by humans, but a problem may arise when animals commit border crossings against people.[238] If punishment is justified only when meted out for responsible action,[239] then animals, who are incapable of moral agency, and who lack free will, cannot rightly be punished under retributive theories.[240] Accordingly, the solution is not punishment, but compensation. Nozick states that any border crossing is permissible, if done when

230. See text & note 191 *supra.*
231. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-951 (Supp. 1976-77); MD. ANN. CODE art. 27, § 59 (1976); VA. CODE ANN. § 18.2-392 (Cum. Supp. 1977).
232. R. NOZICK, *supra* note 4, at 151. This is concerned with the original acquisition or appropriation of previously unheld things, that is, how unowned objects in the world may permissibly be acquired. *Id.*
233. *Id.* Justice in transfer deals with how a person justifiably acquires a holding from another, who has either appropriated it in accordance with the justice in acquisition principle or has previously had it transferred to himself in conformity with this principle. *Id.*
234. *Id.* at 152.
235. *Id.* at 173.
236. J. LOCKE, *supra* note 7, at §§ 6, 8.
237. *See* text accompanying notes 165-73 *supra.*
238. A border crossing occurs when the circumscribed area surrounding an individual (his or her "moral space"), determined by one's Lockean natural rights, is transgressed or encroached upon by another individual. R. NOZICK, *supra* note 4, at 57.
239. *See, e.g.*, H.L.A. HART & A. HONORE, CAUSATION IN THE LAW 59 (1959); R. NOZICK, *supra* note 4, at 130; Benn, *Punishment*, 7 ENCYCLOPEDIA OF PHILOSOPHY 29 (1967).
240. Nozick includes the element of responsibility in his formulae for measuring punishment in retributive theories. R. NOZICK, *supra* note 4, at 60.

prior consent is impossible to obtain (as in cases of accidental or unintentional acts), provided full compensation is paid afterwards.[241] Kantian rights for animals would be compatible with a compensation system.[242] An animal's acts are unintentional and the animal is unable to obtain consent before transgressing another individual's boundary.

There is a problem, however, with the justification of animals paying compensation for the commission of border crossings for which they cannot be held morally responsible. Application of the tort theory which holds infants and lunatics liable for the consequences of their conduct, to animals, should be considered in this situation. All that is required for culpability with respect to infants and lunatics is that they have sufficient state of mind to commit the act, regardless of capacity to recognize its wrongfulness.[243] Therefore, animals, who, like the very young and the insane, are not moral agents, can justifiably be held liable for their torts.

The manner in which compensation payments are made would be analogous to the protective association that protects rights within Nozick's system.[244] Animals could belong to an insurance cooperative[245] that would compensate for the trespasses made by its members.

The animal insurance cooperative, which compensates those against whom the animals have trespassed, will alter the animals' premiums to prevent injured individuals from seeking their own private forms of restitution.[246] A further problem arises in determining how an animal

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241. *Id.* at 72.

242. For a discussion of the compensation system, *see* text & notes 244-52 *infra.*

243. Mullen v. Bruce, 168 Cal. App. 2d 494, 497, 335 P.2d 945, 947-48 (Ct. App. 1959); Seaburg v. Williams, 16 Ill. App. 2d 295, 306, 148 N.E.2d 49, 55 (1968). In *Mullen*, the appellate court upheld the trial court's finding that the defendant had sufficient capacity to intend the violent conduct—an assault. 168 Cal. App. 2d at 497, 335 P.2d at 947-48. The defendant was a sanitarium patient suffering from alcoholism which put her in delirium tremens on the night she assaulted the plaintiff. *Id.* at 495, 335 P.2d at 946. The *Mullen* court applied the rule enunciated in Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (Ct. App. 1953), which held that it was the province of the factfinder to determine whether a 4 year-old boy was capable of intending to commit a battery. *Id.* at 317, 253 P.2d at 678-79. In *Seaburg*, a suit was permitted against a 5 year-old for setting fire to the plaintiff's garage.

244. Nozick contemplates that groups of individuals from the trouble-filled state of nature would form mutual-protection associations which would answer to the call for self-defense, or the enforcement of a right, of any of its members. R. NOZICK, *supra* note 4, at 12-15.

245. For a discussion of how the premiums will be collected by the cooperative, see text & notes 248-52 *infra.*

246. This may seem on its face to be in conflict with Nozick's anti-utilitarian stance, which holds that an individual cannot be sacrificed for the good of the whole, if that person does not receive some counterbalancing good from the sacrifice. R. NOZICK, *supra* note 4, at 33. But this kind of system does exist in Nozick's minimal state when a protective association protects nonpaying members. *See id.* at 110-13. Nozick's rationale behind such charity is that it is cheaper in the long run for the members to pay for protecting nonmembers than to allow these nonclients to seek self-help enforcement. *Id.* at 110-11. The distinction between this form of redistribution, and the utilitarian

pays a premium. Since animals can no longer be owned under this proposed system, their performances for mankind as beasts of burden, suppliers of milk, or family pets, will all be contractual.[247]

Similar to the guardian system established to protect an animal's legal rights,[248] an agency concept will be used to set up contracts between employers and animals. The animal's agent, as a fiduciary,[249] will look out for the animal's best interests and obtain the most favorable contract under the conditions. Just as a guardian, who also is in a fiduciary relationship,[250] is under the supervision of the court,[251] a "watch person" agency can be formed as an arm of the protective association to see that these fiduciaries do not abuse their positions. Persons who wish the services of animals must pay the necessary costs for the agent's fee and the insurance premium.[252] This cost will be in addition to the amount contractually required to keep the animal fed and sheltered.

The agent, acting for and on behalf of its principal—the animal—could even contract it into domestication (slavery) should the fiduciary conclude that its principal's desires and preferences would be most adequately secured thereby. Nozick asserts that any individual may contract into any constraints over itself, even slavery, although

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form, is twofold. First, compensation is owed, to begin with, to these independents when the protective association prohibits nonclients from using self-help enforcement. Independents lose their Lockean right of punishing transgressors if association members can violate their rights with impunity, because a strong protective association will not allow self-help. *Id.* at 110. Second, paying clients do receive some counterbalancing good for their sacrifice: self-help enforcement imposes risks and dangers to members. Thus, paying for the protection of the nonclients is safer than allowing self-help, and is less expensive than paying compensation directly for violating the nonclient's Lockean right to punish. *Id.* at 110-11.

247. Nozick's maxim which permits any border crossing whenever prior consent cannot be obtained allows animals to be used as beasts of burden, provided that they are paid full compensation. *Id.* at 72. An inherent problem with Nozick's compensation scheme in respect to animals is the epistemic question of how to determine whether just compensation has been rendered. Although this is a serious gap even with regard to the system's application to people, Nozick provides no answer. He does, however, recognize the dilemma in the circumstance of trying to rectify past injustices. *Id.* at 152.

248. See text & notes 176-83 *supra.*

249. A "fiduciary" is a person whose duty is, by his undertaking, to act for another's benefit in matters relating to that undertaking. Haluka v. Baker, 66 Ohio App. 308, 312, 34 N.E.2d 68, 70 (1941). The term connotes trust as the basis of a relationship involving the obligation of one for the security of another. Hamby v. St. Paul Mercury Indem. Co., 217 F.2d 78, 80 (4th Cir. 1954).

250. Ryder v. Ryder, 322 Mass. 645, 648, 79 N.E.2d 17, 20 (1948); Hoverson v. Hoverson, 216 Minn. 237, 241, 12 N.W.2d 497, 500 (1943); Ohio Cas. Ins. Co. v. Mallison, 223 Ore. 406, 411, 354 P.2d 800, 802 (1960).

251. *In re* Boyer's Guardianship, 96 Ind. App. 161, 165, 174 N.E. 714, 715 (1931); Hoverson v. Hoverson, 216 Minn. 237, 241, 12 N.W.2d 497, 500 (1943); *In re* Clendenning, 145 Ohio St. 82, 92, 60 N.E.2d 676, 681 (1945).

252. Since Nozick has no problems with Wilt Chamberlain charging an extra quarter for the privilege of seeing him play, the animals would be justified in tacking on this surcharge to preserve their Kantian right status. *See* R. NOZICK, *supra* note 4, at 161-64.

the individual must choose for itself and another cannot choose for it.[253]

Legal fiduciary concepts, such as guardianship and agency, contemplate actions for the best interests of the incompetent and principal.[254] The animal can be said to have chosen through its own subjective preferences,[255] and its agent will have the duty to see that its principal's interests are carried out.

Kantianism for animals is therefore a viable concept in a minimal state by utilizing present Anglo-American legal concepts, and treating as ends those beings who lack rationality, free will, and moral agency. There are, however, other difficulties concerning the rights of individuals within Nozick's concept of the minimal state. An examination of the consequences entailed by such a minimal state will indicate several problems, which perhaps even Nozick might find unpalatable.

Rights of Animals Vis-à-Vis the State

Because the state's sole legitimate function, according to Nozick, is to protect the rights of present possession against violation,[256] its system can be captured in the following slogan: A state is no more than a summation of protection of individual rights. However, there is a question as to whether an individual's rights can ever be violated for the sake of the greater good. Nozick, in characteristic fashion,

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253. *Id.* at 331.

254. *See, e.g.*, United States v. Drumm, 329 F.2d 109, 112 (1st Cir. 1964); Canadian Ingersoll-Rand Co. v. D. Loveman & Sons, Inc., 227 F. Supp. 829, 832 (N.D. Ohio 1964); Omohundro v. Erhart, 228 Ark. 910, 911, 311 S.W. 2d 309, 311 (1958); *In re* Guardianship of Goltry, 140 Ind. App. 76, 79, 222 N.E.2d 407, 408 (1966); RESTATEMENT (SECOND) OF AGENCY § 13, Comment a (1958). The federal government in *Drumm* brought a civil suit against the defendant for an accounting of payments made to him by the very poultry processor whose operations it was his duty to inspect. 329 F.2d at 110. The basis of the suit was that the defendant-inspector breached the fiduciary duty which he owed the government. *Id.* The court held that this dual employment, coupled with the defendant's silence when given an opportunity to disclose the same, constituted sufficient evidence to go to the jury. *Id.* at 113-14. In *Drumm*, the principal itself sued to protect its interests from exploitation by the agent. Since animals would be unable to do this, more than one guardian could be appointed to insure that the fiduciary relationship is upheld. The court in Omohundro v. Erhart, 228 Ark. 910, 311 S.W.2d 309 (1958), affirmed a decision to remove the guardians of a mental incompetent and appoint a successor. *Id.* at 912, 311 S.W.2d at 311. The suit, which was initiated by one of the guardians, alleged that the other was unfit to act as a fiduciary, and that it would be best for the ward to dissolve the guardianship. *Id.* at 911, 311 S.W.2d at 310-11. Animals can thus be protected from an unscrupulous agent who failed in fulfilling his or her fiduciary duty; one guardian would sue the other to enforce the rights of the ward.

255. An animal's agent, as a fiduciary, will have to protect his or her principal's interests. This entails that those interests be discerned, thus employing the methods discussed earlier in the epistemology of animals' interests. See text & notes 150-73 *supra.*

256. R. NOZICK, *supra* note 4, at 26-27.

fails to address this question directly.[257] We will therefore examine three examples of confrontations between the exercise of the rights of individuals and the concept of the state as an entity existing apart from those individuals. The first situation involves catastrophies: a threat to the existence of a whole species. The last two counter-examples challenge the aesthetic and moral efficacy of Nozick's minimal state. By engaging in thought experiments which result in unpalatable consequences (to most morally sensitive people) caused by the "legitimate" exercise of individual rights (that is, no border crossings are committed), we hope to show flaws in Nozick's side-constraint claim, such that his scheme would probably find it necessary to invoke the powers of the state to limit individual freedom for the sake of the society.

Moral catastrophies could occur through the imminent extinction of a whole species such as if couples were permitted to genetically engineer their offspring and create an imbalance of sexes.[258] Nozick considers the problem of whether the state could regulate private genetic engineering[259] to maintain certain important ratios in the society, such as that of males and females.[260] He states that to preserve the human species, the government could require that such genetic manipulation fit a ratio of one to one. This could be done by having hospitals require that for each couple which desires a male child, there be another couple that wishes a female, before those desires are carried out.[261] He quickly admits, however, that such a ratio would be difficult to maintain in a purely libertarian system. Restrictions could not be mandatory; the state would only provide an information service with the latest statistics as to which sex was in shorter supply.[262]

Just as Nozick's system would conceivably let the human race die out should couples not comply with the voluntary standards of male-female ratios, legislation to protect certain species of animals from becoming extinct would also not be allowed. The reasons are twofold. First, it would be an illegitimate intrusion into the lives of the presently living animals, for their rights would be violated, just as the rights of human couples would be infringed if the state dictated the sex of their offspring. Second, the expenditure of funds to save a species that is dying out due to natural consequences, rather than from border cross-

257. *Id.* at 30 n.
258. *Id.* at 315 n.
259. *Id.* This is the situation where biochemical technology serves the free individual by offering a "genetic supermarket," meeting the prospective parents' specifications for their forthcoming offspring. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*

ings, would constitute state action beyond the protection of rights. This second argument would be particularly devastating to present federal legislation which sets out to preserve threatened species.

The objective of the Endangered Species Act of 1973[263] is to establish programs for the conservation of threatened species.[264] Although the cause of the depletion for some of these species has been man,[265] the Act provides for conservation efforts, executed pursuant to various international agreements, that help save animals where no indication is made as to whether or not the threatened extinction is caused by man's activities.[266] The appropriation of state tax dollars[267] for the preservation of animals who may be heading toward extinction due to natural causes is repugnant to Nozick's minimal state and thus could not be permitted.[268]

Despite the fact that legislation cannot be enacted in Nozick's state to save an endangered species, the ascription of Kantian rights to animals would, in at least one instance, prevent extinction. The example is one in which an animal is protected from having its habitat exploited by man. Its Lockean right to territory is protected by the Kantian side constraint which preserves inviolability. This was the situation in a recent case, involving the confrontation between individuals acting in their private capacity as owners of land near Devil's Hole National Monument in Nevada, and a rare species of the pupfish. This particular desert fish, which inhabits a pool located in Devil's Hole, can be found nowhere else in the world.[269] In 1970, the State Engineer of Nevada issued permits allowing the private landowners to change the use of their water from several of their wells, which would have resulted in increased pumping.[270] The federal government then sought to enjoin the pumping, to prevent the water level from dropping to such an extent that it would kill the pupfish.[271] The United States Supreme Court upheld the granting of an injunction, stating that the government had impliedly reserved the water level at Devil's Hole, since the purpose for setting aside the land as a national monument was to preserve its interesting features, one of which was the pupfish.[272]

263. 16 U.S.C. §§ 1531-1543 (Supp. V 1975).
264. *Id.* § 1531(b).
265. *Id.* § 1531(a)(1).
266. *Id.* § 1531(a)(4).
267. *Id.* § 1542.
268. The sole legitimate function of this state is to protect against the violation of rights. R. NOZICK, *supra* note 4, at 27. The animals' rights will not be violated if they die of natural causes. *See id.* at 179 n.
269. Cappaert v. United States, 426 U.S. 128, 132 (1976).
270. *Id.* at 134-35.
271. *Id.* at 135.
272. *Id.* at 140-42. A 1952 Presidential Proclamation, No. 2961, 3 C.F.R. 147

If animals were not granted Kantian rights, then the petitioners in this case, under Nozick's theory, would have been allowed to continue pumping ground water to the point of complete depletion of the pool. Not only was the federal government expending time, money, and effort to save the pupfish, it was interfering with an individual's right to pump ground water and thereby appropriate that unowned commodity. Thus, for the sake of an individual's right to appropriate water, and to prevent tax dollars from being used to save a species, Nozick's minimal state would sacrifice a whole race of fish. The ascription of Kantian rights to animals, however, is compatible with Nozick's state and would prevent this from occurring. No border crossing takes place against the ones pumping the ground water because the water table is not beneath their property, but rather is on federal land—Devil's Hole National Monument. The pupfish territory, and ultimately its existence, would be threatened, though, by continued depletion of the water. Hence, by invoking their Lockean right to territoriality, with the protection the Kantian side constraint gives, the pupfish will be saved.

The loss of a species is an instance of aesthetic catastrophe as well as a moral one. Another example of the lack of aesthetic efficacy[273] in Nozick's system can be found in his discussion of pollution.[274] Although he develops a scheme by which property rights, infringed by even miniscule effects of pollution, can be enforced,[275] he chooses to avoid discussing the more interesting case of the dumping of pollutants on the things which are unowned, such as a clean, beautiful sky.[276] Because no ascertainable property damage is present, no individual rights in Nozick's state are violated. Nevertheless, the aesthetic tastes of a good majority of individuals are offended by the murky atmosphere. In this instance, as in the pupfish case, the ascription of Kantian rights to animals would be advantageous. Animal life is more sensitive to ecological change than are human beings.[277] For example, although pesticide exposure to humans generally presents no immediate danger

(1949-1953), issued pursuant to 16 U.S.C. § 431 (1970) (originally enacted as Act of June 8, 1906, ch. 3060, 34 Stat. 225) reserved Devil's Hole "for the preservation of the unusual features of scenic, scientific and educational interest therein contained," noting that it was the home of the rare pupfish.

273. The "experience-machine" construct indicates Nozick's concentration on the "meaningful life" and how more matters to people than what experiences "feel like inside." See R. NOZICK, *supra* note 4, at 42-45, 48-51. Aesthetic satisfaction would therefore seem to be a desirable end in Nozick's ideal state. His state is thus not aesthetically efficacious if it is not conducive to attaining that end.

274. *Id.* at 79-81.

275. *Id.* at 80.

276. *Id.* at 79.

277. S. BLOOM & S. DEGLER, PESTICIDES AND POLLUTION 4-5 (1969).

to health,[278] pesticides have endangered a variety of wildlife and may therefore indicate future long-range effects in store for people.[279] Kantian rights for animals would require that pesticide pollution be abated. Human beings would thus enjoy the spillover benefit.

We have shown that Nozick's minimal state allows for moral catastrophies, that it would permit the extinction of entire species (including mankind), and that it has no place for the enforcement of aesthetic values. Each of these examples involves the frustration of individuals within the state. The final situation questions the moral efficacy of Nozick's system with regard to nonmembers of the state. It involves the possible occurrence of a resource-rich libertarian state neighboring a nation plagued by natural disasters and a paucity of assets. The populace of the poorer state is poised on the borders of the libertarian state, clamoring for food. Assuming the cost-benefit analysis could be proven to show that the price for killing these people as they come across the line would equal that of feeding them, Nozick's system would provide no answer as to which course to pursue. It would be just as moral for Nozick to shoot these people to punish the boundary crossings as it would be to feed them. Individual rights are his moral primitive: there is no room for governmental beneficence.[280]

Demonstrating the operative effects of Nozick's minimal state, particularly as individual humans and animals relate to that state, shows what the purpose of his theory is: the protection of rights without forsaking those rights. Lockean rights lack aesthetic and moral appeal. Nevertheless, they are of great strength, since they are protected by the Kantian side constraint. However, it is this very strength which creates situations where the moral and aesthetic efficacy of Nozick's state is brought into question. The consequence of inviolable rights can too easily be the extinction of a species, rampant pollution, or the execution rather than the feeding of the poor. The ascription of Kantian rights to animals may save the pupfish and wild burros,[281] but the side-constraint mode of inviolability will persistently cause

278. *Id.* at 4.
279. *Id.* at 5.
280. An illustration of this point is the recent case of the excessive burro population in the Grand Canyon. The federal government originally decided to shoot a large number of the animals to prevent further destruction of the terrain from overgrazing. *See* Ariz. Daily Star, Nov. 28, 1976, § D at 8, col. 1. Because of a public outcry, the United States Bureau of Land Management created an alternative program, whereby burros may be "adopted" for free. *See* Tucson Daily Citizen, Jan. 28, 1977, at 2, col. 4. Under Nozick's minimal state, in the absence of Kantian rights for animals, these burros would just as easily have been exterminated by now.
281. See discussion note 280 *supra.*

such dilemmas. The consistent utilitarian may sacrifice individual rights for the sake of the whole, but the consistent libertarian must sacrifice the moral and aesthetic values of a community for the protection of the individual.

CONCLUSION

The protection of individuals' rights constitutes Nozick's moral and political postulate, yet no justification was offered for the concept's very existence. A metaright theory was devised in this Note to explain why there are rights and how they operate. This rights theory was derivative of a general moral theory aimed at the protection of interests. This form of analysis enables one to determine who ought to have rights by seeking out the interests to be protected, the possessors of these interests, and whether the interests are recognized by society as worthy of being a right. Animals who have demonstrable interests fit this formula, consequently they ought to have rights.

The ascription of Kantian rights to animals was a vehicle for the exploration of how the interest of inviolability was protected in Nozick's minimal state. In relationships between individuals, the side-constraint mode implemented the principle of fairness. However, in cases where the interests of the whole were offended, Nozick's system failed, since it lacked a moral and aesthetic efficacy. This Note attempted to show that animals share a moral space with human beings. More importantly, that moral space, protected by a Kantian side constraint, ought not be used to prevent, rather than promote, morality. An interest analysis of rights, as opposed to a character analysis, will achieve more because it shows that rights protect interests, not characteristics. When characteristics of present right-holders are the source of rights, then such rights cannot be shared. The inviolability of those rights thus prevents the sharing of resources, and constrains man's view of morality to extend only to himself. The foregoing analysis has attempted to broaden man's horizons toward the realization that he shares his moral universe, and Nozick's minimal state, with other beings.