"Oh, reason not the need: rights and other imperfect alternatives for those without voice"


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I. Introduction

Some years ago, when I was teaching a class on Kant, a lone student insisted fiercely and persistently that the abstractions of Kant's categorical imperative could not be discussed without reference to the question of whether animals possessed rationality in any minimal sense. Several of the other students objected strongly to the relevance of animals in the discussion, and in the ensuing dialogue, these objectors eventually won the day and silenced the lone voice.

Helena Silverstein's book on law and the animal rights movement gives comfort to that lone voice. In her study of the efforts of animal rights activism to advance social reform through the deployment of legal language and practices, she has written a book which explores animal rights, rather than animal rights. That is to say, she explores the struggles of animal rights activists as an unusually rich and focused instance of contests about rights and legal meaning generally. The richness of the case lies in its position as a limiting case, both conceptually and practically. Animal rights function as a conceptual limiting case because the activists' claim that animals have rights is not grounded on rationality, in contrast to rights claims made for the variety of human groups over history. The struggle of animal rights activists is a practical limiting case because its significance as a powerful social movement is, on Silverstein's own admission, fairly marginal (p.ix).

Silverstein's interrogation of these two kinds of limits are summed up in her statement of the questions guiding the book as a whole: she pursues "...questions regarding how far rights can be extended without losing their power; how far rights can be altered to advance values of relationship, responsibility, and community; and how rights can be used to mobilize movement activism" (p.24). In her pursuit of these questions, Silverstein explores the implications of the animal rights case at two levels of analysis, each of which makes the most of the status of animal rights as a 'case on the edge', and each of which is linked to broad debates in law and society scholarship. The first level is that of theoretical understandings of the nature of rights; the second is that of the practical impact of legal (especially litigation-based) strategies for social change.

At the first - conceptual and theoretical - level, Silverstein taps into an extensive vein of debate over the relationship between rights and community. This vein surfaces in many places: in those aspects of the liberalism-communitarian debate which contest the merits and substance of atomistic, individualistic conceptions of the liberal subject;1 in disagreements between liberal, feminist and critical race scholars on the extent to which rights talk makes a positive contribution to social change or social order;2 and in

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empirically based interpretive explorations of the social practices of rights claiming or of the relationship between claims for individual justice and social efficiency. Her position in this first level of analysis can be summed up as one of cautious optimism that animal rights claims foster a fruitful connection between rights and community:

[B]y applying rights to non human animals, activists are not simply extending the notion to a previously excluded group. More than that, they are calling into question the long-established meanings of rights. In particular...the call for animal rights seeks to infuse the values of sentience, relationship, caring, responsibility and community into the meaning of rights (p.18).

Silverstein's second level of analysis contributes to the "line of research that focuses on the effectiveness of using law to advance reform" (p.16). This facet of the book maps onto the literature on the empirical impact of legal strategies for social change, which is most familiar to readers of this journal from the debates that have crystallized around Gerald Rosenberg's 1991 book, The Hollow Hope. In referring to two levels of analysis, I do not wish to suggest that there is a necessary divide between the conceptual bases of rights and their concrete impact on social and political relations. Indeed, one of the strengths of Silverstein's book is her insistence on the need not only to pay attention to the discursive resources that shape the terrain of litigation struggles, but also, at the same time, to situate discussion of conceptual dimensions of rights talk in empirical examination of particularistic local practices. She is not alone in her project of combining these two levels of inquiry. The book is, in part, a dialogue with the work of scholars such as Michael McCann and those associated with the Amherst School, and as such, is written primarily in the vein of interpretive social constructionist approaches to law’s 'constitutive power'.

However, Silverstein reaches beyond this framework as well, in two very different directions. One direction, addressed mostly in the first half of the book, is towards purely philosophical interrogation of the conceptual underpinnings of rights talk. The other, pursued primarily in the second half of the book, is towards an assessment of the more instrumental and concrete achievements of the animal rights movement. At the end, she links these two directions in a discussion of ‘constitutive instrumentalism’. In Section 2 of this essay, I lay out a brief overview of the overall structure of the book, summarizing its links to these two broader debates and commenting briefly on her methodological approach of 'constitutive instrumentalism'.

Following this, I will pursue further one of the thresholds she approaches: the interpretive-philosophical threshold. In the direction pursued by Silverstein in the first half of the book, she suggests that the discursive practices of animal rights activists...
destabilize ‘dominant understandings’ of the conceptual underpinnings of rights talk. In Section 3, I describe her argument for this destabilization which rests on linking rights and community. In Sections 4-7, I challenge that link both internally and through a parallel inquiry into an alternative language of claiming attention - that of needs-talk. My purpose is to expose two species of risk that haunt the link between rights and community, and to question whether the discursive practices of animal rights activists evade these risks. I complicate and broaden the inquiry by searching for the same risks in the language of needs, in order to see whether Silverstein's 'cautious optimism' might be justified as apt given a world of imperfect alternatives. In the end, the most important consequence of Silverstein's brand of empirically grounded research into the social practices of rights claiming is this: it foregrounds the contingency and precariousness of the conceptual assumptions undergirding rights talk. I conclude by linking this point to her methodology.

II. Rights talk and litigative strategies: the book as a whole

In giving an overview of the book as a whole, it is perhaps evident already that I read it (and indeed Silverstein presents it - pp.24-26) as something of 'two books-in-one'. In other words, it is both an exploration of "rights language" and an exploration of the "litigative experiences of the animal rights movement" (p25). There are thus two processes under her microscope: the construction of legal meaning, and the use of legal strategies to secure social change. This is not to suggest that the two processes are unrelated: on the contrary Silverstein is interested in their intersection. She aims "to illustrate the construction of legal meaning as it develops along the nexus of language and litigation and as it occurs when political practice and judicial action are interwoven" (p.20, emphasis added). Nonetheless, although both processes contribute, as she argues, to an empirically-based study of legal meaning, it seemed to me that 'legal meaning' in the constitutive sense is hermeneutic or interpretative, and that legal meaning in litigation strategies has the sense of 'causal effect'. Given these disparate senses of legal meaning, and the fact that she presents the two stories in separate sections of the book, it does not do violence to either aspect of the book to pursue its implications with minimal reference to the other. This is the tactic I will take in Sections 3-7, focusing on the first half of the book.

I should emphasize, however, that the second aspect of her book, a consideration of the relationship between litigation and concrete policy reforms on behalf of animals, warrants a full review essay in its own right. My decision not to pursue that route turns partly on my personal interests, and partly on my sense that the weight of her own analysis leans towards the first of the 'two books-in-one'. In reading the book as a whole, I was left with a clear sense that for Silverstein, the most enduring and significant effect of the struggle for animal rights has been its reflexive impact on the meaning of rights

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7 Just as Neil Komesar's book Imperfect Alternatives (Komesar 1994) urges scholars to bear in mind comparative institutional capacity when assessing the efficacy of political institutions such as courts and agencies, so too would I urge a sense of comparative discursive capacity in hermeneutic analysis of discursive and rhetorical resources.
language, rather than the alteration of the "prevailing social conditions" (p.20) surrounding the treatment of animals. Nonetheless, her goal of linking the causal and hermeneutic strands of inquiry through 'constitutive instrumentalism' is an important one, not least because of enduring skepticism about current emphases on the importance of rhetoric and discourse. Thus I do aim in this section to give a nutshell assessment of the 'causal' facet of her inquiry, as well as to sum up what 'constitutive instrumentalism' encompasses.

Silverstein's analysis of the discursive facets of legal meaning is presented in Chapters Two, Three and Four. She explores the language and perceptions of animal rights activists, using a framework derived from a review of the philosophical literature on animal rights and based empirically on content analysis of activist literature, in-depth interviews with activists themselves and participant observation. She begins with an overview of purely philosophical approaches to animal rights, drawing out central tensions between utilitarian and rights-based approaches in the claims made on behalf of animals. She then explores how these tensions emerge in the political practices of animal rights activists, drawing on her empirical material to construct a hermeneutic map of their interpretations of rights.

This map, which I return to in more detail in Section 3, tracks the activists' demands that animals have rights: rights to be free from pain and suffering, to be protected from harm and abuse, to move freely in appropriate habitats, to fulfill the potential of their basic nature (pp.60, 61, 64, 67, 69). In addition to the substantive content of the rights claims are two important structural elements. First, Silverstein argues that animal rights activists' discursive strategies create a conceptual basis for rights that is compatible with the values of care, relationship, responsibility and community (p.24). Secondly, she demonstrates that the deployment of rights is based on strategic and critical political activism, rather than on a naive faith in the 'myth of rights' (p.25). Each of these elements, she argues, challenges dominant understandings of rights, and thus opens up the political possibilities of rights talk in ways that encourage cautious optimism.

8 Recall the guiding questions of the book: "...questions regarding how far rights can be extended without losing their power; how far rights can be altered to advance values of relationship, responsibility, and community; and how rights can be used to mobilize movement activism" (p.24). The evidence presented in the first half of the book bears upon all three questions whereas the second part, in the main, illuminates only the third of the three questions. Even the final synthesising chapter focuses more on "social movement identity" than the impact of animal rights as a social movement.

9 For an example of one recent and lucid expression of this frustration, see Friedman 1998, 4: "The larger problem here, which (in my humble opinion) bedevils history and some branches of social science, is the excessive emphasis on language and rhetoric...Certainly, it is interesting and maybe of some importance to observe the rhetoric used by social groups and their opponents; but is it too antediluvian to think that the motor force behind social change is something greater and more complex than rhetoric or the choice of a 'social language'?" I quote Friedman for illustrative purposes only; he echoes a more widely-felt sentiment (which I do not wholly share). See for a range of views on this and related issues, Law and Society Review 1992.
The 'litigative strategies' of the animal rights movement are explored in Chapters Five, Six and Seven. The central focus of the analysis here is a series of major legal cases brought by the movement to advance the cause of animals. She examines three direct effects of these cases: court victories, favorable precedents, and forcing compliance with existing laws. The outcomes, she finds, are at best a "mixed success" (pp.25,157). Moreover, even where success has occurred, it has mostly been in winning procedural points (in the area of the law of standing and access to the courts) rather than in securing substantively better treatment of animals. For example, a coalition of animal and environmental groups were granted standing to challenge the government's decision to allow seal skins to be imported from South Africa, and the Humane Society of the US was granted standing to challenge the extension of hunting to wildlife refuges (p.139). Neither success, however, necessarily stopped the hunting of seals or refuge wildlife. Limited success has sometimes been achieved in delaying activity that would harm animals, for example by suing scientific researchers under anti-cruelty statutes, or by challenging the environmental impact of hunting, recreation and business ventures that affect animals. Such suits have rarely been successful in the long run, but have delayed research or resulted in the cancellation of one-off events such as hunts. Overall, little in the way of positive systemic policy reform has emerged from litigation.

Nonetheless, Silverstein argues, the indirect effects of litigation brighten this rather bleak picture. By integrating into the court-focused analysis a consideration of the activists' views of their litigative strategies (gleaned from interviews and movement literature, as well as media representations of the key cases), Silverstein explores the impact of litigation on education and publicity, on mobilizing support for the movement, and on gaining political leverage against the opposition. Here, she finds stronger evidence of significant impact, particularly on the internal dynamics of the animal advocacy movement itself (pp.167-183). For example, the ten-year saga of the Silver Springs monkeys litigation in the 1980s, though it failed to preserve the life of any of the monkeys at the center of the case, created enormous publicity and media coverage for the animal rights movement, contributed to mobilization for the 1990 March for the Animals, led to the setting up of a Conscience Camp on the grounds of the National Institute of Health, and sparked investigations by animal rights activists into other research laboratories. Thus the litigation, through directly unsuccessful, bolstered public knowledge about animal rights, the credibility of the animal rights activists and the internal morale of the movement, as well as exposing experimenters to scrutiny (p.172). These indirect effects contribute to a somewhat greater optimism for the causal effects of litigation.

Finally, she considers the effect of 'litigative practices' on the "constitution of meaning" (Chapter 7). This is where she integrates, through 'constitutive instrumentalism' the two senses of 'legal meaning' that have so far been largely explored separately - meaning as interpretation and meaning as causal effect. The integration works something like this: one of the causal effects of litigation is to structure the interpretations (or, in her words, the "understandings, definitions and practices": p.185) which the public in general and animal advocates in particular bring to their consideration of animals. The 'causality'
is complex, however, and should not, as she insists, be viewed as unidirectional. There is, rather, a dialogue of conflicting voices which mutually constitute the 'legal meaning' of (in this case) litigation. Here the 'top-down' voice of formal legal discourse within the courts reinforces dominant understandings of claims made on behalf of animals. But at the same time, the activists' 'bottom-up' interpretations challenge this process by "redefining the meaning of 'successful' litigation and reshaping the 'messages' litigation sends" (p.195). The bottom-up interpretations which Silverstein draws upon here overlap with those she lays out in the early chapters, and in this way the weight of the book remains, as I have suggested, with the consideration of how rights talk is reshaped. It is to a more detailed consideration of that reshaping that I now turn.

III. Expanding the circle of rights: stretching or weakening?

Silverstein's central argument in relation to rights talk is that the practice of claiming rights on behalf of animals alters "dominant understandings" of the conceptual basis of rights. Those dominant understandings consist of two main, overlapping, strands (p.57): the individualism of traditional liberal ideology which "fosters separation and conflict and thereby inhibits appreciation for relationship and community", and the negative conception of rights "that stresses the right to be free from the interference of others and the state [and] [a]s such...undermines the values of responsibility and caring within the community" (p.57).

Silverstein lays out two ways in which the deployment of rights talk, when viewed in the context of the animal advocacy movement, challenges these dominant understandings. First, the extension of rights to animals necessitates a move from reason to sentience as the basis of rights (pp.50,70,74,76-77). Animals suffer and register pain and pleasure, and it is this capacity, rather than any capacity for self-conscious assessment of the motivations and outcomes of their actions, that constitutes animals (or at least mammals) as rights-bearing entities (p.105). Since this capacity to suffer is shared with humans, a conception of rights rooted in sentience is connected, she argues, to values of compassion, caring and responsibility for others (pp.66-71,105). However, rights language invokes these values as a passionate entitlement, rather than as a plea for pity or paternalistic concern.

Secondly, in addition to imbuing rights talk with responsibility and compassion, the focus on sentience, rather than reason, as the fundamental moral characteristic of live beings also broadens the scope of the moral community to which humans belong. The

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10 Her emphasis on context is important: it is part of her project to articulate the meaning of rights by paying attention to the local and particular details of how they work in specific historical contexts. She argues (p.79) that the hegemonic and oppressive face of law is a function not of law's intrinsic character but of the contexts of its use. Thus opportunities for resistance to this hegemony must also be sought in the context of historical particularity. Accordingly, Silverstein's argument about rights talk, which I summarize in the text, is in effect made twice: first abstractly, in relation to philosophical literature on rights talk (Chapter Two), and then again contextually, in relation to the practical and political deployment of rights talk by movement activists (Chapter Three). For similar calls to pay attention to historical detail and local context, see Sarat and Kearns 1995, Harris 1997.
logic of extending rights to animals follows a historical trajectory of a continuous expansion of the 'circle of rights' (pp.44,50-51,68). The status of a rights-bearing entity is one which women, people of color and gays have now claimed and which is also currently being extended (though in a contested arena) to children (Alston, Parker and Seymour 1992) and those with severe intellectual disabilities (Rose 1985). Silverstein argues, however, that animal rights are a special case not quite analogous to civil rights for women and people of color. This is because animals are unable to assert on behalf of themselves that they are rights-bearing entities. Since others must claim these rights for them 'in trust', as it were, the *extension of rights to animals by humans on their behalf* leads in practice, she argues, to an emphasis on the connections and continuities between humans and animals, especially the responsibilities owed by humans to animals as a correlative to the rights of animals (pp.67,106).

In sum, then, Silverstein's argument is as follows. Claiming rights on behalf of animals challenges two key traditional aspects of 'rights talk' - its presumption that we are inherently separate beings unconnected to other beings, and its foregrounding of rationality. This is unexpected, she argues, in light of the prevailing connotations of rights talk – viz., individualism and a negative conception of freedom premised on the *a priori* possession of a rational capacity to chart one's life course for oneself. The strategies and rhetoric of the animal advocacy movement, according to Silverstein, move the conceptual underpinnings of rights away from these 'dominant understandings', towards an appreciation of the moral salience of our shared capacity to suffer, and towards reciprocal responsibilities imbued with compassion and caring. And they do so in a way that *reinvigorates* rights talk, stretches and expands it without weakening it.

The concluding step in this line of argument is critical to Silverstein's position at the theoretical or conceptual level about rights. If rights talk is indeed reinvigorated, then the animal advocacy movement is a case study that persuasively grounds Silverstein's eventual optimism that rights talk can pay adequate attention to collective issues such as social integration and community. But the persuasiveness of her claim for reinvigoration rests on two questions. First, how new and challenging is the link between rights and community that Silverstein mines from the discourse of animal rights activists? Secondly, how benign is the link – what if 'stretching rights' *weakens* the critical challenge they pose? I will address the first question in the remainder of this section, and then move onto the second question in Parts 4-7.

The problem that gives rise to this first question is this: just how pervasive are the ‘dominant understandings’ of rights talk? Is it really the case that the values of autonomy, individualism and independence associated with rights are 'traditionally' regarded as incompatible with connectedness, relationship and community? Such a split is held up by Silverstein as the main weakness of ‘traditional’ or ‘dominant’ understandings of rights talk. Yet there are significant, perhaps equally dominant, perspectives that argue against these limitations of rights talk. Martha Minow, for example, argues that "rights paradoxically operate to invoke the community; rights discourse constructs a system for evaluating action that signals relationship, history and social obligation" (Minow 1990, 410-411). Rights talk fosters a community of interaction where competing claims are
debated, using rights as the "language of a continuing process" and creating a shared context which links the participants in a relationship of reciprocity and interdependence (Minow 1987,1990). More recently, Jeremy Waldron (1996, 97-101) vigorously rebuts precisely the two theses which Silverstein attributes to the 'traditional view' of rights: atomistic individualism and a view that rights express negative demands of non-interference. Clearly, then, the 'dominant understandings' of rights talk are by no means unchallenged.

Yet I confess a degree of confusion here as a reader. For it is quite clear that Silverstein is aware of these various currents of opinion running against the ‘traditional’ grain. Indeed she invokes some of Waldron's earlier work at some length (pp.104-109), and she also acknowledges - and responds to - the wide range of views in the socio-legal community on the subject of how rights are understood (pp.102-114, 120-21, 240-241). Why, then, does she insist on the prevalence of 'dominant understandings' as the basis of her argument that rights are reconstituted' (p.121) by animal rights activism?

The answer lies, I think, in the plurality of possible communities who could be described as holding a collective perspective on the meaning of rights talk. The 'dominant understandings' traced by Silverstein may well be pervasive in popular conceptions of rights, but less so within the community of socio-legal scholars in general, and probably least of all amongst philosophers and political theorists.11 This shifting audience is the bane of any author foraging in interdisciplinary fields. Silverstein's project is best interpreted as one which aims to carry through the insights of more philosophically inclined work into empirically-based contextual fieldwork. Her detailed case study gives empirical flesh to the diverse theoretical strands of argument which have been mounted as defenses against the atomistic individualism of rights talk. This is an important undertaking: it is just here, in the intersection between recording political practices and exploring conceptual innovation that the possibility of uniting abstract normative theory and empirical investigation becomes viable.

The importance of the task is well illustrated by the fact that undertaking it opens up more questions than it answers. And some of these questions challenge the notion that rights talk is invigorated by its invocation in a context which links rights with community. It is often at the moment when rights are contextually explored - when scholars treat them as imbricated in particularistic local practices and concrete contexts - that the real ambivalence of the link between community and individual emerges. This ambivalence is well illustrated in the extant literature of historically or contextually grounded explorations of rights discourse. Various explorations have produced an almost equivalent number of views for rights (Milner 1989; Schneider 1986; Williams 1991) and

11 The Kantian 'kingdom of ends' and Hohfeld's schema of rights and correlative duties are the two philosophical strands running most obviously against the 'traditional' view asserted by Silverstein. Similar implications exist in philosophically inclined socio-legal analyses: see for example the constructivist theories of Dworkin 1977 and 1986, Fiss 1982, and Minow 1990.
against them (Glendon 1991; Tushnet 1984; Gabel and Kennedy 1984), and the contested and open nature of this debate does not dissipate over time.12

Moreover, some defenses of rights have been made precisely because they do erect a bulwark against community (Williams 1991). This last point reminds us of the fact, not new but always important, that community has a dark face, and one which reveals itself too often to marginal or historically oppressed groups. I would argue that the shadow of community presents more risks to Silverstein's reinvigorated 'rights talk' than the book concedes. Recall that her argument depends on two moves: animal rights require one species to speak and act on behalf of another, and animal rights are rooted not in rationality but in sentience. What is to stop the act of speaking on behalf of another from embodying not interdependence but a relationship of passive dependence or even exploitation? And what is to stop the appeal to sentience from fostering utilitarian compromises that pay no account to the agency which rights grounded on rationality presume? It is not difficult to imagine at least some contexts where exploitation or dependence replaces interdependence, and thus the link between community and rights weakens or cripples the latter rather than reinvigorating it.

In response to these questions (though not necessarily providing a definitive answer), what I want to do now is develop an account of the incipient risk that lies within each of Silverstein's two related arguments for the reinvigoration of rights talk. Speaking on behalf of another raises an 'old risk', the 'dark face of community' to which I have already alluded, but which I want to argue runs deeper than contingent context. Moving from rationality to sentience presents a 'new risk': a dilution of rights talk that engenders a possible collapse into utilitarianism. In Sections 4 and 6, I explain these two risks of oppression and dilution in more detail. The idea is to test Silverstein's claim that rights language is strengthened rather than weakened when it is applied to animals. It is to test it in the spirit of her research, paying tribute to her contextual, particularized approach, but asking the (hard) question: *is it possible to construct a plausible account of rights grounded in social practice and concrete experience in such a way as to preserve the urgency - the normative 'trumping' quality - of rights claims?*

In presenting and explaining these incipient risks, both old and new, I will place each of them alongside an examination (in Sections 5 and 7) of an alternative language of claim: that of need. The purpose of weaving parallel inquiries into both rights talk and needs talk is to see if an alternative language would configure the (old) risk of oppression by or of the other in a different way, or whether it might direct our attention to factors which could lessen the (new) risk of collapsing into interest claims. Rights talk may harbor incipient risks, but if these risks turn out to be intrinsic to, or embedded in, other ways of claiming attention, then they do not necessarily undercut Silverstein's case. Indeed, she insists herself several times (pp.82, 96, 114, 228) that competing languages of claim (such as compassion, liberation or equal consideration) offer only imperfect alternatives to rights talk. Her treatment of why this might be so, however, is comparatively brief, and nor do any of her alternatives include needs-talk. I would argue

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12 Sarat and Kearns 1995 is a volume remarkable for the spectrum of attitudes towards rights in this regard.
that needs-talk seems to have at least some potential to ground urgent claims even when a claimant may lack the capacity to articulate a vision of what he or she is due. In other words, needs talk is probably the alternative discourse which would most likely appropriate the terrain for the kinds of rights-bearers (young children, those with severe intellectual disabilities, animals) to whom Silverstein's analysis lends most support (pp.51, 236-239).

IV. Rights and the dark face of community: the 'old risk' of oppressive exclusion

First, then, the 'old risk', of oppression by the other. This risk arises because of a dialectical tension between autonomy and oppression embedded in the concept and practice of rights. On the one hand, rights grant agency and autonomy to rights-holders. At the same time, though, whenever rights-holders articulate their rights they invoke correlative duties on the part of others, and must sometimes depend on external interpretations of the contents of those rights. Thus the autonomy associated with rights is constituted by and through the extent to which others constrain their own actions, a move which raises the specter of oppression.

This specter is most easily apparent in the context of beings (including, but not limited to animals) who cannot themselves demand rights but must have others speak on their behalf. Consider Silverstein's argument as applied to very young children or those with severe intellectual disabilities. These are also beings who are virtually incapable of making claims on their own behalf, and who must stretch the language of rights in order to have their claims articulated within it. They are beings who suffer pain and who lack the capacity to express that suffering in ways that are readily communicable to those who exercise power over them. Yet precisely because of that communicative barrier, any assertion of their rights requires that someone speak on their behalf.

Speaking on someone else’s behalf unavoidably raises at least the risk of paternalistic articulation of the other's needs and wants, and this is so even when the relationship between the speaker and the rights-bearer is cast in terms of reciprocal responsibility. The representation of the rights-bearer by the speaker certainly implies necessary relationship, but not necessarily a relationship that is benevolent, caring or compassionate - not even when the speaker believes in or intends such a relation. Perhaps this risk is less blatant when the rights-bearer has no imaginable voice or access to language, as is the case with animals. Even here, though, the enormity of not knowing just what the animal itself would desire presents a risk of 'constructive silencing' that we could never claim to know for certain was 'caring'. Whether or not 'constructive silencing' is plausible in relation to animals, though, the incipient risk looms much larger when rights are claimed on behalf of someone who could imaginably speak, choose, or plan her life, or once did, or someday will.

The point then, is that if there is a positive intrinsic connection between rights and community embedded in the practice of animal rights activists' use of rights talk, it is probably not generalizable beyond the special case of animals. Indeed, it may not even

\[13\] I owe this point to Ann Lucas.
rest comfortably in that special case, but it is clear that outside the case of animals, the risk of paternalistic silencing another's autonomous expression of their needs and wants becomes much more obvious. Let me illustrate by expanding on one of Silverstein’s examples of how connections between species are enacted in the process of claiming rights on behalf of animals.

She refers (pp.147-152) to the common and often successful practice, when animal rights activists pursue their struggles in courts, of grafting claims of human rights onto claims on behalf of animals (for example, by arguing that refusal to dissect animals constitutes an exercise of the human right to free speech). Now what if this same structure of connection and relationship between different classes of human beings was applied in the context of wardship over a child with severe intellectual disabilities? The analogous argument would be that the guardian's articulation of the content of her ward's rights is an exercise of a right to free speech that intrinsically supports, in a socially integrative and compassionate way, the ward's rights. But this claim is by no means obvious: on the contrary, the potential conflict between the rights of the two parties is clear.

Of course, Silverstein's book is rooted in context, and she would no doubt acknowledge that in some contexts, the practice of articulating rights claims on behalf of others can be oppressive. One of those contexts, she might respond, is where the right is claimed through a spokesperson, and that raises the specter of paternalism just elaborated. But I want to press the argument further, and suggest that this risk of oppression arises from something deeper than a contingently 'dangerous' context such as paternalism. This deeper risk is, like paternalism, linked to the fact that the autonomy associated with rights is constituted by and through the extent to which others constrain their own actions. But unlike the paternalism of claiming rights on behalf of another, there is, I would argue, an exclusionary dimension built into the heart of the claims of rights-bearers. This exclusionary logic is intrinsic to the concept of rights, and not merely contingent on context.

I draw here on Chantal Mouffe's argument against the "false dichotomy between individual liberty and rights on one side and civic activity and political community on the other" (Mouffe 1992, 230-31). This may seem to support Silverstein, since she bases her 'reinvigoration' claim on the fact that animal rights discourse invokes both sides of the dichotomy. But Mouffe's claim is different. She denies the dichotomous logic, rather than the seeming opposition between rights and community. She insists that each is necessary to the basic existence of the other, and necessary at the same time. Rights and community are not separate opposites, nor even polar extremes of a continuum. They are dialectically definitive of each other, 'flip sides' of the same coin. This flows from the inevitability of division and antagonism in social interaction, and the intrinsic impossibility of a fully inclusive political community. She argues that every community has by definition a 'constitutive outside': a dimension of exclusion which is the necessary correlative to the
consensus which makes the existence of the community possible in the first place (Mouffe 1992, 234-35).

Thus although it may be true that rights claims build on community in the way that Silverstein argues, I would contend that it is also simultaneously true that the community invoked has its own 'constitutive outside'. As Mouffe notes, limits to the process of extending the 'circle of rights' are imposed by the fact that "some existing rights have been constituted on the very exclusion or subordination of the rights of [those claiming new rights]" (Mouffe 1992, 236). This is an argument that is familiar in discussions of women’s rights, not only in relation to the rights of women as a whole (e.g. Pateman 1988), but also within the category of women's rights. Ongoing debates within feminist theories of rights have not resolved the contention that liberal conceptions of women's rights are premised on the exclusion of women of color (Hooks 1981), or even of poor women generally (Fraser 1997, Hartmann 1981). It is perhaps apt that much of this debate has centered around who speaks for whom. The very logic which Silverstein invokes in support of a positive, constructive link between rights and community, functions in feminist debates as an indication of the destructive risk of that link.

The point I am arguing, then, is that there is an intrinsic risk of oppression in any link between rights and community. Two more examples in addition to that of women's rights will have to suffice here as illustrations. Michael McCann, in a recent review of historical scholarship on citizenship rights, urges readers and writer not to "ignore how liberal principles, alone or in concert with other norms, often have been used to defend many types of hierarchical relations and exclusionary practices in our history". He gives as an example the exclusion of women, slaves and Native Americans from citizenship on the grounds that they lack capacity for rational self-government (McCann 1998). And Grainne de Burca, documenting the increasing pervasiveness of rights talk in the European Union, cautions that this expansion both integrates and divides European individuals (de Burca 1995).

Hence I do not think Silverstein can escape the negative destabilizing potential of the social practices she has identified within the animal advocacy movement. At the same time, I do not think this is a new risk in using the language of rights; it is simply an important counterpoint to Silverstein's optimism about that language. Before turning to a second risk which I would argue is, in a sense, new, I will briefly mine the alternative language of needs-talk in search of the 'old' risk of oppressing the other.

V. Old risks in other languages?

As I suggested earlier, Silverstein's optimism about rights talk may still be justified if the incipient risks I am identifying are not only familiar but also pervasive. Does the risk of oppressing the other similarly haunt the language of need?

Needs-talk is, first of all, no less urgent than rights talk - it expresses in a peremptory manner the necessity of attention being paid to the claims it expresses. The question of whether or not those claims are in fact substantively absolutely necessary is
of course much more difficult to establish. And this is the point at which needs-talk establishes a particular relation between self and other that differs from the underlying logic of rights talk.

Rights talk is linked to the expression of autonomy, whether it is grounded on rationality as it traditionally is, or on sentience as Silverstein argues it is where animals are concerned. Rights express autonomous claims: it is part of the sense of a right that the claimant defines its content within certain bounds. Although this may be belied in practice, it is part of the ideal conveyed by the notion of rights. The logic of needs-talk, however, assumes a level of objective necessity, a sense that 'true needs' may not coincide with what the claimant wants or feels entitled to. There is thus a much closer link between claims expressed in terms of needs and objective expertise than there is in the case of asserted rights. As Jeremy Waldron puts it:

Talk of the rights of an oppressed people comes most naturally from their own lips, and it will sound disconcerting to those who think it wiser or more politics for the oppressed to keep quiet. Talk of needs has no such connotation: it sounds as natural in the mouth of a detached observer as in that of the needy person" (Waldron 1996,102).

If needs claims typically require expert corroboration, this sets up a relation between the claimant and a corroborator where the latter has greater legitimacy and authority than the person in need. The claimant is believed to stand at a certain distance from true comprehension of her 'real' needs and those who specify and service human needs are accorded greater power (Sarat and Silbey 1989: 491, 495). If, as I have already argued, claiming rights on behalf of the voiceless contains an intrinsic risk of oppression, how much greater must that risk be when the speaker-in-trust is presumptively accorded more authority and legitimacy than the person (or animal) in need? Needs, like rights and perhaps even more so, are premised on a logic that necessarily emphasizes both separateness and connectedness, as a result of this corroborative relationship between claimant and expert. The necessity of both sides of the coin means an ever-present risk of the connectedness overwhelming the expression of separate desires or needs.

So, needs-talk cannot necessarily escape constitutive outsides any more than rights talk, and possibly less. The articulation of the content of needs by 'objective' experts can all too easily slide into paternalism. More fundamentally, where the allegedly 'needy' deny that there is any need at all, the exclusion can go even deeper than paternalism. In such a case, need is constructed by professional experts directly in defiance of the experience or desires of the other. The 'other' is thus wholly negated, whereas in the logic of rights-talk, the excluded other is usually partially differentiated from the identity of the rights claimants (e.g. gay women in the case of women's rights).

The 'old risk', then, of the claims of one group resting on the exclusion of the claims of another group, is pervasive. It does not only haunt rights-talk. As a result, it

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14 For other accounts of the link between objective expertise and needs, see Miller 1976:129; Illich 1978.
need not undermine Silverstein's optimism about the power of reinvigorated rights talk. Indeed, the ineradicability of constitutive outsides may be more than tolerably inevitable, it may constitute positive grounds for optimism. For the specific embodiment of any constitutive outside is always contingent. In other words, the social facts of who or what is defined as 'inside' the community and who or what is 'outside' are continually revisable. Because political identity is "constructed, not empirically given" (Mouffe 1992, 231), the interpretive meaning of political (or legal) identity is always in flux. Provided the relationships of reciprocity which Silverstein celebrates as a reinvigoration of rights are subject to constant challenge, their ineradicable potential to be repressive need not 'dilute the power of rights-talk'.

One implication of this possibility is that the animal advocacy movement would have to accept internal challenges, just as the women's movement has, and there are muted indications of this (e.g. mammalian versus invertebrate rights) at the beginning and end of the book. But constant revisability and challenge, combined with a concern to avoid exclusionary definitions of rights, leads in practice to a seemingly endless trajectory of proliferating categories of rights based on more and more fragmented identities. And this raises acutely the problem of the 'new risk', to which I now turn.

VI. Rights, sentience and 'special interests': the 'new risk' of a collapse into utilitarianism

The 'new risk' is that of a pervasive utilitarianism in social understandings of rights that threatens to dilute the distinctive way in which rights-talk claims urgent attention. This risk arises at the intersection between Silverstein's arguments and the nature of her contextualized methodological approach. She argues that rights have been stretched and expanded in a way that enhances their links with connection and relationship. The stretching arises out of extending the conceptual ground of rights from rationality to sentience, thus including other species in the universe of potential rights-holders. This is, Silverstein argues, a logical continuation of a continuously expanding 'circle of rights': an expansion that extends to ever more numerous categories of claimants.

But there are, I would contend, certain consequences of this expanding logic, especially from the particularized and contextual perspective championed by Silverstein. The proliferation of rights language to a point of ubiquity may signal an incipient utilitarian understanding of this language. Silverstein herself notes that the media no longer place 'quotes' around rights when speaking of animal 'rights' (p.71). Rather than a triumph of the status of animal rights as trumps, might this not just as well reflect an

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15 Near the beginning (p.52), Silverstein adverts to divisions within the ranks of animal rights advocates as to whether, for example, mammals have the same rights as invertebrates. Near the end (p.233), she also invokes external divisions between the rights activists and those who would argue on behalf of animals from different frameworks altogether - eco-feminism, animal welfare, animal liberation etc.
attenuated understanding of rights language as no more than 'another special interest' claim? In what follows, I explain how this could work.

Rights, stretched and expanded in the way Silverstein has described, risk losing their status as 'trumps' (Dworkin 1977). That is, rights claims, particularly when viewed in a local particular context rather than in the abstract, are increasingly losing their sense of urgent assertion, their implied imperative that the claims of the right-holder take absolute or near-absolute priority over competing claims to the common pool of social resources. Whether or not this perspective has yet become a self-consciously held understanding of the meaning of rights, it is plausibly an interpretation of the practice of according recognition to rights. Rights have, particularly in the second half of the twentieth century, increasingly been invoked instrumentally, as a means to vaguely specified ends of 'social change' or 'transformative action' (Schlag 1996).

The mechanism that dilutes the trumping quality of rights is particularly visible when research focuses on the social practices of implementing rights. For rights to mean anything in practice, they must be embodied in rules about who can claim them, when, and under what conditions. Once rules have been specified they must be administered. From a contextualized, empirical perspective, the administration of such rules becomes itself the embodiment of the extent of any rights. Rights, in practice, are legally protected entitlements, albeit ones that 'trump' more weakly protected interests.

Now the further that the 'circle of rights' expands to greater and greater categories of claimants, the more the practice of enforcing and recognizing such rights will require detailed rules to deal with conflicts and trade-offs between rights. And to the extent that each right exist only as the obverse aspect of the effectiveness of its implementing rules, it risks being subordinated to competing rights embedded in that web of rules and thereby collapsing into a mere interest.16

In a recent article which indirectly illustrates this point, Harry Scheiber (Scheiber 1998) undertakes a fascinating exploration of how the rights of whales, indigenous peoples and small coastal (non-indigenous) whaling communities all intersect and compete in an arena where the efficacy of all of their rights is an obverse function of the effectiveness of the background moratorium on whaling. That is to say, commercial utilitarian considerations set the framework (as a matter of historical fact), and the 'rights' of the three groups are considered as part of a process of identifying urgent reasons why each of the three groups' claims should trump that background prohibition.

The above observations describe a risk endemic to rights-talk in general. But the risk is especially acute with regard to those who cannot voice their claims independently. As is obvious by now, those rights-holders are central to the wider implications of Silverstein's book. Since those who have no effective voice need a spokesperson and translator, even more rules will be necessary to specify who exactly will speak for the rights-bearer, when and under what circumstances. And where vulnerable beings are concerned, paucity of power, resources and capacity exposes them to greater than usual

16 As Weber puts it, "all private interests enjoy protection, not as guaranteed rights, but only as the obverse aspect of the effectiveness of...regulations" (Weber 1967, 44).
dependence on the 'obverse aspect of regulation'. The risk they run (of their rights collapsing into utilitarian interests) is proportionately higher than most rights-holders.

In sum, the 'new risk' is that contingent, contextual, flexible rights claims grounded on sentience risk collapsing into what is, in substance, no more than a claim for the adjustment of multiple and conflicting interests. From this viewpoint, the language of rights becomes a convenient political strategy but masks a more fundamental utilitarianism.

This collapse into utilitarianism may run even deeper than a tendency which emerges only at the level of political practice. The dilution of rights-talk may even seep to the level of principle. This is because of the move from rationality to sentience as the ground of rights. To reiterate briefly, Silverstein stresses the challenge to rights talk presented by the fact that sentience, or the capacity to suffer pain and enjoy pleasure, is the ground of claims for animal rights. Sentience, however, is the ground of classical utilitarian theory and the minimal basis not of rights, but of interests. The experience of pain or pleasure forms the basis of interest articulation, but not the framework for a protected space of autonomy which society is expected to respect notwithstanding competing interest claims. The issue of 'trumping' is difficult to avoid, and once again, urgency becomes critical. It is not obvious how, without more, sentience can found a claim to demand urgent and uncompromised attention from society. Can needs talk tell us what that 'more' may be?

VII. Incipient utilitarianism and needs-talk

The question here is whether needs talk directs our attention to factors which might lessen this (new) risk of creeping utilitarianism? Nancy Fraser (1989) observes that needs claims are typically expressed in one of two major (though very different) contexts. In the first context, needs claims are articulated in an attempt to politicize and make visible previously invisible needs. In this context, urgency and refusal to compromise would seem to be more intense than where a new right is being claimed. Because needs-talk depends for its urgency on a persuasive demonstration of sheer necessity, the making of new needs-claims seems not to dilute the power of needs-talk generally, but rather to override the power of previously articulated claims. The need of a freshly articulate group is not, like rights, generalizable by definition. It is specific and contingent, yet urgent. It would therefore seem a ripe resource for combating utilitarian dilution.

But in the second context of needs articulation, the focal issue is the content of needs once their political status has been successfully secured (Fraser 1989,305). And at this point, urgency gives way to compromise and trade-off as a central part of the process of satisfying needs. Indeed, compromise becomes itself an expertly administered 'necessity' for managing needs. For the link between objective expertise and needs results in a series of procedures that redefine the politicized need "as the correlate of a bureaucratically administrable satisfaction" (Fraser 1989, 306). In order to become

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17 See supra Section 5.
'manageable', needs - once bureaucratized and administered - are redefined and often compromised by expert discourses, though the technocratic nature of this redefinition may often obscure the compromise.

Thus at the particularized level of social practice, needs claims are subject to utilitarian trade-offs and nothing in their underlying conceptual grounding provides a bulwark against this process. The urgency of needs-talk in the period of initial politicization is a contingent feature rather than an intrinsic aspect of needs-talk. Indeed, needs even more than rights are grounded in sentience, in "physical/psychological individual processes" that mark the absence of "moral frames that stand outside pragmatism and utilitarianism" (Cobb 1997). Rights that 'trump' provide one such moral frame, but as we have seen, once we begin with social practice (and assuming that we rule out transcendental foundationalism), it is not a sturdy frame. There is still no sense of what, in a framework of sentience-based rights or needs, would ground the urgency of a claim.

The important question, from a contextual perspective, is what sort of considerations does one language select as most relevant to the urgency of a claim? For example, in Scheiber's article on whaling rights mentioned above, he argues that indigenous peoples should have whaling rights where small coastal communities should not because of the fact that indigenous people are 1) ethnically distinct from the rest of the population and 2) have not shared in the benefits of modernization and progress. In other words, a history of ethically specific discriminatory deprivation causes indigenous people's claims to take priority over coastal communities' claims. Literally speaking, though, both arguments 1) and 2) apply to whales themselves, but there is not yet any legitimate practice of claiming rights for whales. This undercuts any tight conceptual connection between the considerations of urgency selected by the language (whether of rights or needs) and the logic of that language. It seems more likely that what is going on here is an implicit cost-benefit analysis of the relative amount of pain and suffering of different claimants, and a resultant prioritization of the claim with the greatest net worth. It is difficult to avoid a utilitarian framework to distinguish one group's pain and suffering from another's.

IX. Conclusion

Let me reiterate the critical question as I asked it earlier. Is it possible to construct a plausible account of rights grounded in social practice and sense experience, in such a way as to preserve the urgency of rights claims? It should be clear from the comparative exploration of needs-talk and rights-talk, that there is no easy answer to this question. In particular, the possibility of reinvigorating rights-talk by infusing it with concepts of relationship and community is by no means obvious. It generates a double risk, an 'old' risk of oppression and a 'new' risk of dilution. Worse, there is a vicious connection between them. In response to the 'old risk', I argued that the endless

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18 See supra Section 3.
variability of context represents hope, because oppressive community boundaries can always be renegotiated. But the implications of this insistence upon contingency and context, when followed, lead to an endemic 'new' risk of rights talk collapsing into interest-based utilitarianism.

I have argued that it is harder and more risky, to reinvigorate rights talk than Silverstein's book conveyed. Silverstein herself acknowledges this by a curious turn at the end of her book when she states that "much of the apparent optimism presented here is misleading" (p.240). She acknowledges dangers (though not specifically the risks of oppression and dilution) but stresses the paucity of alternatives. Perhaps all that I have done is elaborate on this suppressed bleak thread in her book.

Nonetheless, her approach does lay to rest one important aspect of dominant understandings’ of rights talk: its abstraction. Dominant understandings view rights as claims for protected spaces within which to exercise rational autonomy. Such an approach abstracts out from the particular experiences of specific individual beings, positing them instead as equally entitled to make urgent claims by virtue of their common attribute of the capacity to reason. A reconfigured approach premised on sentence takes a different path, where the particular details of the experience of suffering ground the urgent claim. When the concrete experience of physical or psychic domination forms the basis of the claim for protection, rather than the harm done to the abstract possibility of rational choices about one's life, then generalized conceptual frameworks are constantly put in question, and their ambiguity and uncertainty always visible.

Silverstein's approach exposes, at least implicitly, that ambiguity by exploiting the strengths of the genre of charting the social practices of rights-claiming in ways which emphasize history, concrete experience and the effects of socio-economic structures and forces. The promise of such an approach lies in the fact that it elicits particularistic, grounded and localized accounts of the experience of those who claim attention and protection from the wider community. It moves rights talk away from an abstract expression of universal entitlement to a "localised use of [rights] terminology which is anchored in an appeal to the specificity of a subject's location" (Stychin 1995). In doing so, it opens up avenues which put in question any broad conclusions, including Silverstein's own ones about reinvigoration of rights. The dangers always lurking for the marginal and the vulnerable in a reconstruction of any language of protest remain firmly in view. I have done no more here than follow through on the implications of Silverstein's approach.

And it bears repeating that such risks are endemic: all that can be done is to remain ever wary of the perils of reinvention. The dangers of dilution and oppression haunt other languages as well as rights-talk, as we have already seen. In many ways, the 'lesson' is one embodied in the practices of the animal rights activists that Silverstein studied: strategic, pragmatic manipulation of the available resources, with a close eye on the dangers involved, but an appreciation of the constraints of context.

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19 See text and notes at fns 3-6 above. See also the introductory essay in Wilson 1997 for an excellent overview of related approaches in anthropology.
In closing I wish to end with a comment on methodology. This essay has discussed primarily the theoretical implications of language and conceptual logics. In doing so, it has extended only one of the directions in which Silverstein's 'constitutive instrumentalism' points: the philosophical rather than the pragmatic. I have not, as I indicated that I would not, discussed in any detail her exploration of the 'instrumental' effects of litigation on behalf of animals. I do not wish to depart from this review without a reminder of this aspect of the book. For when taken together with Silverstein’s exploration of the linguistic and conceptual openness of rights talk, the result is a blend which Silverstein labels ‘constitutive instrumentalism’. And this blend incorporates into her discursive exploration the instrumentally causal effects of the activists’ legal strategies.

It is not, however, purely instrumental causality which Silverstein presents, an account of how ‘successful’ the activists were in reframing the claims of animals in terms of rights. In other words, rather than focusing on the unidirectional effects of legal strategies on social change, she presents ‘legal meaning’ as simultaneously constitutive of, and constituted by, society. Legal meaning, as I adverted to in Section I, refers both to a hermeneutic exploration of legal language (rights-talk) and to an instrumental assessment of the causal effects of litigation. In blending the two, though, Silverstein describes a complex field of influence and counter-influence, shaping and counter-shaping, where 'law' seems simultaneously to disappear, be everywhere at once, and yet barely alter the status quo. Law, when it is understood as rights-talk, is reconstituted by the activists’ practices: stretched, expanded and reinvigorated. Yet simultaneously, law, when it is understood as official judicial decisions, itself constrains the activists’ practices, largely nullifying or failing to incorporate the challenges they present.20 Law as a structure of power largely constrains law as an agent of resistance.

Ultimately Silverstein’s “cautious optimism” (p.240) privileges the capacity of law to act as an avenue of resistance. Much of my own analysis taking off from Silverstein’s starting point has ended by emphasizing the risks inherent in sidestepping the persistence of structural power. And indeed, the ultimate impression with which the book’s careful study of the social practices of animal rights activists left me was consistent with another author’s recent assessment of work in the interpretive social constructionist tradition more generally:

As particular and evanescent, as always parasitic on that which is resisted, resistance by itself comes from and goes nowhere. It is allowed neither enduring structure nor effective history. So, whilst studies of resistance tell us how it

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20 The nullification is all but complete in terms of direct court successes, but according to Silverstein’s argument not complete when the indirect effects of litigation are taken into account - movement mobilisation and popular consciousness does absorb something of the redefined rights discourse promoted by the activists.
‘shapes’ law as power or structure, it is only able to do this within the constraints of the local or the everyday. Such studies also reveal much about law influencing or shaping or constituting the local and the quotidian. In the result, the dimension of power or structure remains virtually aloof and inviolate in its own terms. Its mysterious force is obliquely confirmed. (Fitzpatrick 1997,156).

And yet I would not, emphatically, wish to deny Silverstein’s perspective, merely to complete it. Optimism is appropriate, but only in tension with pessimism. Both risk and opportunity inherently and necessarily reside in the core meaning of rights talk. Indeed, any mode of claiming attention in a post-transcendental world must acknowledge this as a starting point from which to open out. Gleaning such a starting point from an interpretive map of social practices such as Silverstein has provided, has been a valuable and constructive undertaking.

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