

ON THE MARGINS: PERSONHOOD AND MORAL STATUS IN MARGINAL  
CASES OF HUMAN RIGHTS

by

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A thesis submitted to the University of Birmingham for the degree of DOCTOR OF  
PHILOSOPHY

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June 2020

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## ABSTRACT

Most philosophical accounts of human rights accept that all persons have human rights. Typically, ‘personhood’ is understood as unitary and binary. It is unitary because there is generally supposed to be a single threshold property required for personhood (e.g. agency, rationality, etc.). It is binary because it is all-or-nothing: you are either a person or you are not. A difficulty with binary views is that there will typically be subjects, like children and those with dementia, who do not meet the threshold, and so who are not persons with human rights, on these accounts. It is consequently unclear how we ought to treat these subjects. This is the problem of marginal cases.

I argue that we cannot resolve the problem of marginal cases if we accept a unitary, binary view of personhood. Instead, I develop a new non-binary personhood account of human rights, and defend two main claims. First, there are many, scalar properties, the having of which are conducive to personhood. Second, different subjects have different human rights depending on which of these properties they have, and what threats apply to them. On my view, and contra most existing accounts, most marginal cases have some degree of personhood *and* are entitled to some human rights.

## ACKNOWLEDGEMENTS

This PhD was funded by an AHRC Midlands3Cities (M3C) Doctoral Training Partnership Studentship, and I would like to thank M3C for their generous funding. I would also like to thank the following individuals for their support throughout this thesis, and for making my PhD experience positive and enjoyable. If I have inadvertently missed anyone out, please accept my apologies!

My supervisors. I have been phenomenally lucky to have had an exceptional supervisory team for this PhD: Jussi Suikkanen, Heather Widdows, and Jeremy Williams. I am grateful to all of them for their insight and support, and for helping me to become both a better researcher and a more confident person.

As my lead supervisor, Jussi has approached our supervisions with care, patience, and kindness. He has consistently encouraged me to develop my thinking and believe in my own abilities, and has trusted me to take unusual and creative approaches to this thesis (and my wider philosophical work). His thoughtful feedback has also helped to make this thesis clearer and stronger, and I am indebted to him for the time and thought that he has put into his comments.

I am also thankful to my co-supervisors, Heather and Jeremy. Both of them read a final draft of the entire thesis during the Covid-19 pandemic. I am very grateful to them for taking the time to do this, and for their detailed, insightful comments, which were of great help during the editing process. Further, I thank both of them for their guidance and encouragement throughout my PhD.

I also thank Heather and my SWIP mentor, Clare Chambers, for mentoring me, and for offering invaluable advice on how to navigate academic philosophy as a woman in a predominantly male discipline.

Philosophy staff at Birmingham. The philosophy staff (past and present) at Birmingham have always made me feel welcome and valued. I would particularly like to thank the following staff members for their support and guidance, and for numerous discussions about philosophy and my thesis: Will Davies, Nikk Effingham, Nick Jones, Herjeet Marway, Jonathan Parry, Angie Pepper, Maja Spener, Scott Sturgeon, Henry Taylor, and Al Wilson.

Philosophy postgrads at Birmingham. I would like to thank my fellow postgrads (past and present) for their helpful comments at various work-in-progress postgraduate seminars, and for their general encouragement and friendship. Thanks to Matilde Aliffi, Victoria Bailey Galvao, Federico Bongiorno, Lauren Blackwood, Amy Conkerton-Darby, Thomas Davies, Casey Elliot, Jaz Gharu, Noelia Iranzo Ribera, Eugenia Lancelotta, Kate MacKay, Ciaran McKee, Alex Miller Tate, Valeria Motta, John Murphy, John J. Parry, Michael Roberts, Will Sharp, Perri Sriwannawit, and Kash Sunghutee.

I am particularly indebted to my philosophy little sister, Em Walsh, who has read numerous draft chapters, and sent messages of support and encouragement. I am thankful for her thoughtfulness and friendship, and for her sarcastic sense of humour.

I also thank James MacLaren who, alongside being a fellow postgraduate student, was my AS level philosophy teacher. His lessons and his encouragement inspired me to pursue

philosophy, and he should be held at least partly responsible for everything that I've inflicted on philosophy since then.

Further, I am grateful to my fellow co-organisers of the Birmingham branches of Women\* In Philosophy and Minorities and Philosophy UK (MAP UK). I am sure that they will continue to work hard to make the department, and academic philosophy as a whole, a more inclusive and welcoming environment.

Non-philosophy staff at Birmingham. I have greatly benefitted from discussions with members of non-philosophy staff at Birmingham. Sylvie Delacroix, Aaron Sloman, and Karen Yeung were all kind enough to spend time discussing AI and robots with me. I also thank Karen for employing me as a research assistant, and for her continued support and interest in my work.

Non-philosophy students at Birmingham. I am indebted to the following postgrads for their friendship and support, and for discussing thesis topics with me: Sarasvathi Arulampalam, Justyna Hofmanová, Shannon Oates, Dave Pollard, Amy Smith, and Nichola Tonks.

Non-Birmingham postgrads. I would like to thank Freya Ernsting, and Daniel Harris for our chats on AI, robots, and technology. I also thank Helen Waite for our initial chats on cyborgs, and for her friendship and encouragement.

Long suffering friends. I am exceedingly grateful to have a strong group of close friends outside of philosophy, who have supported and encouraged me throughout my degrees. They have been exemplary friends, confidants, and cheerleaders, and I am thankful to

each of them for simply being their amazing, caring selves. Thanks to Emily Brooks, Yu-Tai Cheung, Katie Cornish, Laura Cure, Judith Dray, Rosie O'Hagan, Shaunagh Sutter, and Ed Watts.

Even longer suffering family. I thank my family for their support and encouragement, which is too numerous to list in this acknowledgement section. Thanks to my father, John Ryland, and my brothers, Adam and Ben Ryland, for their patience, interest in my thesis, and for putting up with me. Special thanks go to my mother, Stella Ryland, who has provided cake and distractions when I have been stressed, offered sage advice and guidance, and gamely read drafts of every single thesis chapter. She now also knows this thesis well enough to do a viva on it (but has assured me that she will not crash my viva in order to test that theory).

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## INTRODUCTION

This thesis proposes a new solution to the problem of marginal cases of human rights. This problem arises because in our attempts to demarcate between those who have human rights and those who do not, there are marginal cases – such as children and those with psychological impairments – who do not easily fit in either category. This is because our current attempts at demarcation typically rely on a binary, all-or-nothing, notion of moral status that is grounded in either biological species (all humans have moral status and rights) or, more popularly, in the possession of certain properties (e.g. autonomy, sentience, etc.), the having of which are conducive to personhood (all persons have moral status and rights). I will argue that these existing binary views are problematic because neither personhood nor human rights are all-or-nothing. If we rely on binary views, we consequently cannot satisfactorily explain which marginal cases, if any, are persons with human rights, because our notions of ‘personhood’ and ‘human rights’ will be too restrictive.

In response, my solution is to develop a new *non-binary* personhood account. I ultimately accept two claims. First, there are many different psychological, emotional, social, physical, and phenomenal properties - many of which can ground personhood. The upshot of this is that there are many ways in which a subject can be a person; personhood is not all-or-nothing. Second, I argue that different subjects can have different human rights.<sup>1</sup> A consequence of this is that some persons can have *some* human rights, rather than *all*

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<sup>1</sup> When I say that ‘x has human rights’ I mean that, as a person, X automatically has such rights whether or not these are experienced. This follows from my commitment to a primarily moral view of human rights, which I explain in section 1.3.

human rights. By arguing for these two claims, I accept that marginal cases have some (degree of) personhood and some human rights.

My account is important because it radically changes our understanding of both personhood and human rights. On my account, there are more entities that are persons, and consequently more persons that have human rights, than other views typically accept. For example, I argue that at least some nonhuman animals and robots are persons with human rights (see 6.1.2 and 6.1.3).<sup>2</sup> On a moral level, the upshot of this is that we have more stringent obligations and duties towards marginal cases (both human and nonhuman) than previously supposed. If, as I argue, marginal cases are persons, then they warrant a particularly strong form of moral consideration and protection. On a legal level, one consequence of my account is that we ought to revise human rights law so as to properly accommodate the marginal cases. This would require us to take more seriously the rights of, for example, subjects with dementia, nonhuman animals, and robots (as discussed in 6.1.1-6.1.3). This, in turn, would have important applications to bioethics (and particularly end-of-life care), nonhuman animal welfare, and robotics and artificial intelligence. To argue for this conclusion, this thesis proceeds as follows.

### Outline of Thesis

**Part one** focuses on explaining the notions of ‘human rights’, ‘personhood’, and ‘marginal cases’. **Chapter one** introduces the foundations of human rights theory, and proceeds in three sections. First, I use W.B. Hohfeld’s (1923) analysis of rights to identify the key structural components of a right: claims, privileges, powers, and immunities (1.1).

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<sup>2</sup> One may worry that, by including nonhuman animals and robots in this way, I am no longer talking about *human* rights. I address this worry at the end of this introduction (in ‘Person rights or human rights?’).

Second, I consider what unique structural features human rights have that distinguish them from other moral and legal rights (1.2). I argue that human rights are weakly universal, minimum standards (rather than socio-political ideals), and also high priority norms. Finally, I discuss whether human rights, so understood, ought to be viewed as moral rights, legal rights, or some combination of the two (1.3). I argue that human rights are moral rights to which legal rights ought to correspond. I explain that, as moral rights, human rights need to be grounded in some universally important moral idea. I end by suggesting that the proper moral ground of human rights is the protection of personhood.

**Chapter two** introduces the moral concept of personhood. In 2.1 I use Sophie-Grace Chappell's (2011) analysis to argue that there are two ways of understanding personhood: humanism and criterialism. Humanism argues that being a member of the human species is sufficient for personhood. Criterialism argues that personhood is grounded in certain personhood criteria, such as agency or rationality. Contra Chappell, I argue that humanism must be rejected in favour of criterialism. In 2.2 I explain how personhood, so defined, is morally significant. I then outline the structure of personhood accounts of human rights.

2.3 argues that criterialism generates three types of marginal cases: epistemic, borderline, and rights marginal cases. Epistemic marginal cases are cases where we do not know enough about a subject to confidently assign them personhood. Borderline marginal cases are subjects who are close to satisfying some threshold for personhood (e.g. rationality) in the sense that there does not seem to be a fact of the matter if they satisfy it. Rights marginal cases are cases where we know that the subject is a person, but there is disagreement about whether this person has rights. Using these definitions of 'marginal

case', I create a new taxonomy of marginal cases which extends across [1] atypical humans, [2] nonhumans, and [3] posthumans.<sup>3</sup>

Having defined the marginal cases in part one, **part two** focuses on critically assessing current attempts to respond to the problem of marginal cases. **Chapter three** considers exclusionary responses to the problem of marginal cases. These responses work by creating a binary threshold for personhood that, as a consequence, limits personhood to standard adult humans (3.1). I consider two eminent exclusionary binary views by Alan Gewirth (1978a & b, 1984), and James Griffin (2008). As marginal cases do not pass the binary threshold for personhood, they cannot be persons with human rights, on this view.

I argue that this generates a moral worry (3.2). Exclusionary accounts cannot accept that the marginal cases are persons with human rights, and so need some other way of explaining why the marginal cases are protected, making it morally impermissible to mistreat them. If they cannot provide this explanation, then there is a worry that their accounts could *permit* the mistreatment of marginal cases. In essence, a marginal case will be mistreated in this way if it does not have an appropriate amount of protection against important threats (e.g. threats to life, to liberty, etc.). The remainder of the chapter considers two responses that exclusionary theorists give to this worry (3.3). First, both Gewirth and Griffin argue that certain marginal cases (typically children) are exceptions

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<sup>3</sup> [1] By 'atypical humans' I mean children and embryos (see Bortolotti 2007), those with psychological impairments (see Kittay 2005), subjects with dementia (see Higgs and Gillett 2016), and those who are persons but are outside of the moral community, such as convicts (see Ievins and Crewe 2015) and, more controversially, aborigines (see Readings 2000). [2] By 'nonhumans' I mean nonhuman animals (see Singer 2011), and extra-terrestrial lifeforms (see Puccetti 1968). [3] By 'posthumans' I mean cases where new nonstandard ways of living suggest the possibility of new types of person. This extends to robots (see Badmington 2000), and technologically enhanced superhumans (see Douglas 2013).

The above is just a brief introductory definition, and gives some examples of existing research. I discuss the various types of marginal cases in more detail in 2.3.

and have a diluted form of human rights. Second, Griffin argues that, whilst marginal cases do not have human rights, they have equivalent moral rights that protect against permissible mistreatment. I argue that neither of these solutions is satisfactory, as both solutions still permit the mistreatment of at least some marginal cases (3.4).

Because of the problems with *exclusionary* binary accounts, **chapter four** considers whether *inclusive* binary accounts can fare better. These accounts typically work by presenting the binary threshold for personhood in a way that allows most marginal cases to be above the threshold and to subsequently be beneficiaries of human rights protections (4.1). I explain that there are two types of inclusive account (4.2). Narrow scope inclusive accounts (hereafter NSI) focus on extending human rights to *human* marginal cases, whereas wide scope inclusive accounts (hereafter WSI) argue that both human *and* nonhuman marginal cases can be persons with human rights. I clarify that I will focus primarily on explaining WSI accounts, and in 4.3 I outline the WSI accounts of Tom Regan (2004) and Alasdair Cochrane (2013). In 4.4 I critically evaluate the inclusive binary accounts, and argue that there are three problems that affect inclusive binary accounts (both NSI and WSI). First, wherever inclusive binary accounts set the threshold for personhood, either too many or too few entities will be included as persons with human rights (4.4.1). Second, on the inclusive binary accounts, some marginal cases have either too many or too few human rights (4.4.2). Finally, I argue that inclusive binary accounts cannot provide an adequate response to difficult cases of rights conflict (4.4.3).

Having rejected binary accounts in part two, **part three** develops my new non-binary account and explains how, on my view, marginal cases have some degree of personhood and some human rights. **Chapter five** begins by critically assessing Christian Perring's

(1997) degrees of personhood view (5.1). I argue that Perring accepts three claims. First, there are many properties that are conducive to personhood. Second, personhood comes in degrees. Third, a subject's degree of personhood affects their human rights. This is precisely the sort of view that I want to accept as it promotes a non-binary view of personhood and human rights. However, I argue that Perring does not satisfactorily explain the connections between the relevant properties, degrees of personhood, and human rights (5.1.2). Consequently, I focus on developing my own, more substantial, non-binary view.

To develop my new non-binary view, I begin by creating a test for determining when a property grounds personhood (5.3). I argue that a property grounds personhood if and only if, and to the degree that, it is conducive to the subject being an agent, or to them satisfying their basic needs, and/or to them having a good life. I explain that there are many psychological, emotional, social, physical, and phenomenal properties that can pass this test (5.2, 5.3). On my view, a subject is a person if they have any of these relevant properties. I then briefly argue that most (if not all) of the relevant properties come in degrees (5.4). The upshot of this is that a subject can be a person (to some degree), even if they only have a minimal amount of a relevant property.<sup>4</sup> The remainder of chapter five then explains how these many, scalar properties are linked to human rights (5.5-5.7). I argue as follows:

P1) There are three fundamentally valuable goods: agency, the satisfaction of basic needs, and the good life.

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<sup>4</sup> One may worry that this will mean that my account is too inclusive. I will respond to this worry in 6.2.3



P2) There are many different properties, the having of each of which helps subjects to secure the aforementioned goods (or, more specifically, at least some of the fundamentally valuable goods).

P3) Because different subjects have different properties (and are persons in different ways), different things will threaten their ability to secure the aforementioned goods of agency, the satisfaction of basic needs, and/or the good life.

P4) Human rights are protections against these threats.

C1) Different subjects have different human rights on the basis of their different properties, and the different threats that apply to them.

**Chapter six** evaluates the above non-binary personhood account. I begin by applying my account to ongoing areas of controversy in the marginal cases debate. I focus on three exemplar marginal cases: subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3). I argue that, on my account, each of these marginal cases can have some degree of personhood and some human rights. This outcome is important for two reasons. First, it offers marginal cases more personhood and rights than they are currently given on standard views (above). Second, my arguments suggest a way to move forwards with the ongoing debates and to focus on how we ought to treat these marginal cases. Having explained the positive implications of my view, I then defend my account against six potential objections. First, I address concerns that my account may permit arbitrary discrimination (6.2.1), and provide moral justifications for the permissible mistreatment of marginal cases (6.2.2). I then respond to worries that my account is overinclusive (6.2.3), underinclusive (6.2.4), and unable to deal with a key problem case – embryos and

foetuses (6.2.5). Finally, I address concerns that my account cannot deal with rights conflicts (6.2.6).

I **conclude** by arguing that my account provides a viable and attractive way of responding to marginal cases of human rights. My account allows us to take a nuanced view of personhood and human rights, and so acknowledge that marginal cases have some degree of personhood and at least some human rights. I end by reiterating that my account requires us to radically rethink how we treat *all* persons; marginal and nonmarginal, human and nonhuman.

### Person rights or human rights?

Before embarking on the argument, a clarificatory note on terminology is useful. My account argues that all persons have at least some human rights, and I accept that both human and nonhuman subjects can be persons. As my account does not only extend human rights to *human* persons, there may be a query as to whether the rights that I am discussing are actually *human rights*.

In response, I accept Allen Buchanan's (2009: 348-349) claim that "...at least some of the rights that are called human rights are more properly described as persons' rights." Buchanan argues for the adoption of 'person rights' by emphasising that not all humans have human rights (see children, the cognitively impaired, etc.), whereas all persons *do* have human rights.<sup>5</sup> On this view, the correct class of rights-holders for human rights are

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<sup>5</sup> Harris (2016: 40, 54) also accepts that 'human rights' are not held exclusively by human persons. I am not discussing Harris further for two reasons. First, his focus is mainly on explaining how various moral enhancements (via advances in technology and medicine) are changing the concept of 'humanity'. Second, unlike Buchanan (2009, above), Harris acknowledges that 'human rights' is a problematic term but does not suggest an alternative.

thus persons, and not humans. Because I agree with Buchanan's claim that human rights are held by persons and not (all or exclusively) humans, one may suppose that it would be better for me to talk about 'person rights' rather than 'human rights'. For the purposes of this thesis, however, I will continue to use the term 'human rights'. There are two reasons for this. First, the usage of 'human rights' is consistent with the existing marginal cases and human rights literature. Most accounts continue to use 'human rights', even if they also accept Buchanan's claim that it is persons (not humans) that have human rights.<sup>6</sup>

The second reason why I will continue to use 'human rights' rather than 'person rights' is because I do not want to unintentionally give the impression that 'person rights' are different to, or less important than, human rights. I do not want to risk being misunderstood as asserting that marginal cases have person rights, but that 'person rights' are different to the human rights that standard adult humans have. So, to clarify, when I use 'human rights' I am referring to certain important rights that are held by all persons. If marginal cases are persons (as I will argue throughout), then we ought to accept that these marginal cases, both human and nonhuman, have human rights, qua person rights.

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<sup>6</sup> See, for example, Griffin's (2008) personhood account of human rights (discussed in chapter 3).

## **PART ONE: BACKGROUND AND DEFINITIONS**

# CHAPTER ONE. ESTABLISHING FOUNDATIONS: A THEORY OF HUMAN RIGHTS

## Introduction

This chapter explains what human rights are, and what distinguishes them from other types of rights. In 1.1 I draw on W.N. Hohfeld's (1923) analysis of the structure of rights to argue that human rights are claims, privileges, powers, and/or immunities. In 1.2 I identify the structural features of human rights that distinguish them from other types of right (legal rights, civil rights, etc.). I argue that human rights are weakly universal, minimum standards, and high priority norms. In 1.3 I consider whether human rights, so defined, ought to be understood as moral rights, legal rights, or some combination of the two. I argue that human rights are moral rights to which legal rights ought to correspond.

### 1.1 Hohfeld's analysis of rights

Many discussions of rights begin by referencing W.N. Hohfeld's (1923) analysis of the structure of rights.<sup>7</sup> Hohfeld argues that a right's basic structure involves four key components: claims (or rights in Hohfeld's terminology), privileges, powers, and immunities. These components generate four types of right, and to properly explain the connections between the components (and rights) Hohfeld considers each component in relation to its opposite and correlative (fig.1). This section will explain how each type of Hohfeldian right works, and how they link to human rights (particularly, the human rights of the marginal cases).

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<sup>7</sup> A non-exhaustive list of rights discussions that reference Hohfeld include: Cruft (2006: 175-177), Hudson and Husak (1980: 45-46), Kamm (2004: 477-480), Markovich (2020), Montague (2001: 258-266), Steiner (1994: 71-74, 95-96, 253-260), Thomson (1990: 39-77), and Woods (2014: 11-13).

**Fig. 1**

Jural Opposites			
Right (Claim)	Privilege	Power	Immunity
No Right	Duty	Disability	Liability
Jural Correlatives			
Right (Claim)	Privilege	Power	Immunity
Duty	No Right	Liability	Disability
(Hohfeld 1923: 36)			

Claim Rights

A claim right involves both an entitlement and a duty. A subject (Ann) has an entitlement to claim X, and another subject or organisation (B) has a duty to provide X for Ann. Both the entitled claims, and their correlative duties, can be positive (to help) or negative (to leave alone). In less abstract terms, we can explain this with the example of a right to welfare, and more specifically of child maintenance support. Suppose that Ann is a parent who lives in a welfare state, and is entitled to claim child maintenance support. As the government (B) runs the welfare state, it has a duty to provide Ann with the promised child maintenance support. Only those who are entitled to child maintenance (parents) can claim it, and so non-parents do not have a right or claim to child maintenance support.

It is widely accepted that most human rights either are claim rights or involve claim rights.<sup>8</sup> On this view, we have a right to claim what comes under the scope of a human right, e.g. education, healthcare, etc. This restricts the scope of a human right to what you are entitled to claim. For example, consider a right to a nationality. We could view this as a positive right (to help). Here, I am entitled to claim a nationality, and my home nation has a duty to provide me with, and to acknowledge, my nationality. Or we could view it as a negative right (to be left alone). This would entail that I am entitled to claim a nationality and that various governmental organisations have a duty not to prevent me from claiming a nationality and/or changing nationality. In both cases, the scope of the right extends to the nationality (or nationalities) that I am entitled to claim.<sup>9</sup>

### Privilege Rights

Privilege rights refer to the contrast between liberty and duty. Ann has a privilege right to do X if and only if she does not have a conflicting duty *not* to X. If Ann *does* have a duty *not* to X, then she is not at liberty to X. A less abstract way of explaining this is via a right to freedom of movement. As a free citizen of the UK, Ann has a privilege right to go to any city in the UK. This means that she has no duty not to visit any city in the UK. However, as a prisoner on parole, Bradley has no right to go beyond a specified distance. He *does* have a duty not to go to any city in the UK and, consequently, he does not have the same privilege right as Ann.

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<sup>8</sup> A non-exhaustive list of theorists who defend this view include: Buchanan (2013: 58), Feinberg and Narveson (1970: 249-257), Griffin (2008: 17, 107-110), Hart (1955), Nickel (2007: 23), Wenar (2013), and Woods (2014: 12).

<sup>9</sup> I discuss which positive and negative human rights apply on my account in 5.6.

As the above example demonstrates, there are some human rights that are primarily privilege rights. These rights are structured in a similar way to claim rights as both involve an entitlement and a duty, and both restrict the scope of the right to what one is entitled to do. The key difference is that, whereas claim rights explicitly correspond to the duties of other people, privilege rights correspond to whether *you* have a duty not to do something. That said, if you do *not* have a duty not to do something – and thus have an entitled privilege right – this implicitly entails a duty on *other* people to not stop you from performing the entitled action. In the above example, this would equate to other people *not* stopping Ann from going to any city in the UK.

### Power Rights

Power rights refer to Ann's ability to alter or affect any of the four Hohfeldian rights (claims, privileges, immunities, or other powers). For example, suppose that Ann buys a certain broadband tariff. As a consumer she has a claim right against a broadband provider. The provider has a duty to give Ann the broadband package that she has purchased. Similarly, Ann has a privilege right as, because she has no duty *not* to leave her broadband provider, she is at liberty to buy a different broadband tariff. Ann will be exercising a power right if she decides to change tariff as this will alter the existing rights that she had; her claim right is no longer against the original provider.

A similar example can be seen in a human right to private property. I am entitled to own certain properties, like a house, a car, a computer, etc. As I legally own these properties, said right enforces a duty on others to not arbitrarily deprive me of my property. However, I can *choose* to sell or exchange my property. If I do so, I will be exercising a power right



in regards to my human right to property. When I sell my property (e.g. my car), I alter the existing rights that I had by transferring my claim, privilege, power and immunity rights regarding the car to the new owner.<sup>10</sup>

### Immunity Rights

To have an immunity right is for someone to lack a Hohfeldian power over you. As Hohfeld explains, "...an immunity is one's freedom from the legal power or "control" of another as regards some legal relation" (Hohfeld 1923: 60). A less abstract way of explaining this is in terms of slavery. If Bradley tries to enslave Ann, then he is trying to control Ann and remove her claim and privilege rights. However, because Ann has a human right to not be enslaved, Ann has an immunity against Bradley's planned enslavement, and so Bradley lacks the power to enslave her.<sup>11</sup>

Above, I have explained that human rights are claim rights, privilege rights, power rights, or immunity rights, and/or involve a combination of these rights types. In chapters 5 and 6, I will argue that many (but not all) of the human rights of marginal cases are clusters of Hohfeldian incidents, of which the central element is a claim right. In other words, MC (the marginal case) has a right to X, and B has a duty to provide X for MC.<sup>12</sup> To present

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<sup>10</sup> When we consider human rights in relation to power rights, we get some interesting outcomes for the marginal cases. As mentioned above, a power right can involve giving away or transferring a first order right. In 2.3 I will suggest that aborigines and convicts are marginal cases. This raises interesting questions about whether such marginal cases have power rights to alter their claim and privilege rights to recognition, citizenship, and social and cultural rights.

<sup>11</sup> Immunity rights have a particular applicability to marginal cases. As I will argue throughout chapters 2 – 6, marginal cases are particularly liable to exploitation. This is because marginal cases are often perceived to have some exempting condition that prevents them from being granted full moral consideration. This may be in terms of species and/or constitution (e.g. nonhuman animals), or because the marginal case is viewed to be somehow incompetent (e.g. subjects with dementia). If, as I argue throughout chapters 5 and 6, marginal cases can be granted some degree of morally relevant personhood, then this would give them the beginnings of some immunity rights against exploitative treatment.

<sup>12</sup> I do not think that the marginal cases need to claim their rights themselves. Instead, I accept Scanlon's (2003) idea of reliable trusteeship. On Scanlon's view, it is possible for a subject to be a person and rights-

this argument, I will begin by examining which entities are marginal cases and potential rights-holders (2.3). I will then explain, in depth, why these marginal cases have valid claims and entitlements, and consequently have claim rights (5.5). I will argue that different marginal cases have different rights, depending on what they are entitled to claim. What a marginal case is entitled to claim will, in turn, depend on what morally relevant properties the marginal case has, and what threats apply to it (5.5; 6.1). At various junctures, I will also explain how privilege rights, power rights, and immunity rights interact with claim rights to affect the human rights of the marginal cases. For example, I will argue that, contrary to some standard views, subjects with dementia retain some important privilege and power rights (6.1.1). Throughout, I will thus be accepting that to properly determine what human rights the marginal cases have, we ought to see their rights as claims, privileges, powers and/or immunities in the Hohfeldian sense.

## **1.2 Distinguishing structural features of human rights**

Above I argued that human rights are rights in a Hohfeldian sense. Other types of right – like civil rights and legal rights – can also be rights in this way, as they too can be Hohfeldian claims, privileges, powers, and/or immunities. At present, we have not adequately distinguished between human rights and these other types of right. It is important to do this as I will later argue that marginal cases have *human rights*, independently of whether they also have other types of right (Chapter 5). This section

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holder without ever being able to make a claim right themselves. If we know what is good or bad for the subject in question, we, as reliable trustees, can make rights claims on their behalf. As Scanlon explains, reliable trusteeship will have particular applications for "...beings that are incapable of literally agreeing to anything" (Scanlon 2003: 135). It will thus accommodate most (if not all) of the marginal cases discussed in 2.3. Similar arguments – that rights-holders do not need to be able to actively claim their rights– are presented by Feinberg (1973: 61).

The example in the main text focuses on claim rights. Obviously, human rights could also be privileges, powers, or immunities (see above).

will thus be concerned with identifying the unique structural features that distinguish human rights from other types of right.

There is much ongoing debate about what the distinguishing structural features of human rights are. For example, both James Nickel (2007) and Rowan Cruft, S. Matthew Liao, and Massimo Renzo (2015) identify many different things as structural features of human rights, ranging from being “international standards of evaluation” (Nickel 2007: 10) to being of “...overriding or at least special importance” (Cruft, Liao and Renzo 2015: 10). In what follows, I will restrict my discussion to three key features that are generally agreed upon within the academic literature (and so which reflect a consensus view). I take it that the three features listed below are necessary, and jointly sufficient, features of human rights.<sup>13</sup> They ensure that human rights are good enough in practice, in the sense of protecting the rights-holder from the most serious threats.<sup>14</sup>

First, human rights are generally thought to be at least weakly universal. In its simplest form, this means that all subjects who meet the relevant criteria for being a rights-holder have human rights.<sup>15</sup> In chapter 2 I will claim that a subject is a rights-holder for human rights if they are a person. I will later argue that a subject is a person if they have certain

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<sup>13</sup> The idea that these features are necessary and jointly sufficient will be further discussed in 3.4.2.

<sup>14</sup> I will explain the connection between threats and human rights in more depth in 5.5.

<sup>15</sup> Many theorists discuss this ‘weak universality’ in terms of all *human* persons having human rights. For examples, see Cruft, Liao and Renzo (2015: 1, 4-5), Gewirth (1984: 1), Griffin (2008: 48-51), Pogge (1995: 107), Tasioulas (2009: 938-939), and Woods (2014: 5). However, Cochrane (2013: 656) denies this human focus and argues that if human rights are really universal, and extend to all relevant rights-holders, then they ought to extend to all sentient life and so be re-termed ‘sentient rights’. Cochrane argues that this is because “...all sentient creatures possess certain basic rights because they have interests” (ibid). I discuss Cochrane’s position in more depth in 4.3. I am sympathetic to Cochrane’s position as I too take human rights to extend beyond human persons (see 2.1-2.3). However, as I will argue in 4.4, sentience accounts cannot adequately explain the human rights of marginal cases. Instead, I will develop a pluralistic account that accepts that sentience is one of many properties that can enable a subject to be a person with human rights (5.2-5.7). My view will thus adopt a wider notion of universality than either standard accounts (all *human* persons have human rights) or Cochrane (all sentient beings have human rights).

morally relevant properties (see 2.2; 5.2) that help them to be an agent, or to satisfy their basic needs, or to have a good life (see 5.2–6.2). Importantly, on this view, it is only personhood that a subject (Ann) needs in order to be a rights-holder for human rights. There are no further requirements, such as having specific characteristics (race, gender, etc.) or meeting some criteria for moral desert, that Ann must meet in order to have human rights. In this sense, human rights are distinct from special minority rights (Nickel 2015) and qualified rights (Stemplowska 2015) respectively, which *do* take account of these features when deciding who classes as a rights-holder.

Second, human rights are typically thought to be minimum standards, rather than socio-political ideals.<sup>16</sup> This means that Ann has human rights to that which she *needs* (sustenance, shelter, education) rather than what she *wants* (a better job, a bigger house) or what it would be *ideally good* for her to have (complete socio-political equality, world peace). At first glance, it might seem like human rights as minimum standards do not give Ann moral protections that are good enough for her, at least in practice. It would always be good for Ann to have *more* than the minimum standards. This, however, confuses ‘what is good’ with ‘what is good enough in practice’. It is only the latter that we are interested in, and this is achieved by Ann having moral protections to the minimum things that she needs.<sup>17</sup> Human rights, so defined, are distinct from other types of right which go beyond these minimum standards. Certain legal rights arguably focus on flourishing and ideal goods, rather than on minimum standards and needs. For example, the UK

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<sup>16</sup> For a defence of this view, see Cruft, Liao and Renzo (2015: 13-16), Griffin (2008: 33), Nickel (2007: 10; 2019 section 1), and Rawls (1993: 57).

<sup>17</sup> I will provide an in-depth discussion of basic needs in 5.3 and 6.2.3-6.2.5. There, I will explain that not all needs are morally relevant. Only morally relevant needs are protected by human rights.

government recently announced that from 2020, all UK citizens will have a legal right to *high speed* broadband.<sup>18</sup>

Finally, human rights are generally understood to be high priority norms (Cruft, Liao and Renzo 2015: 10; Nickel 2007: 9). In cases where there is a conflict between a human right and another moral consideration, the human right will typically be strong enough to outweigh the other moral consideration.<sup>19</sup> For example, suppose that we are concerned with increasing general overall welfare by making many people slightly happier. We learn that many people get happiness from driving at very high speeds through residential areas late at night. The government considers introducing a policy that would allow people to do this. However, suppose Ann lives in the residential area. She has a human right to rest and leisure, and her rest would be disturbed by the sound of cars speeding outside her house late at night. Equally, she has a human right to minimum safety, which too would be violated by the speeding cars. Other things being equal, Ann's human rights, as high priority norms, will trump our other moral consideration – to increase the general welfare of many people by allowing them to speed at night.

Further, when we say that human rights are high priority norms, we also mean that states, as the addressees of rights, have strong duties to ensure that human rights are respected (Nickel 2007: 10). This means two things. First, the state is obligated to ensure that its citizens' rights are protected. The state is required to give Ann fair access to food, shelter,

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<sup>18</sup> For details, see the following press release: Department for Digital, Culture, Media and Sport and The Rt Hon Karen Bradley MP (2017) 'High speed broadband to become a legal right'. In contrast to this extensive *legal* right to internet access, Reglitz (2019) has argued on philosophical grounds for a human right to internet access. This moral right is much more minimal, as demonstrated by Reglitz' claim that a human right to internet access "does not require the latest information technology (such as a glass fibre connection or access to a 5G network)" (2019: 324).

<sup>19</sup> I will discuss rights conflicts in more depth in 6.2.6.

education, etc. Second, when a state does *not* ensure that its citizens' rights are protected, other states then have a strong duty to intervene.<sup>20</sup> As Antti Kauppinen (2010) explains, this duty arises because i) human rights are international standards that can be monitored and evaluated, and ii) states get their legitimacy via institutional recognition from other states.<sup>21</sup> Consequently, if state A fails to intervene when state B is violating its citizens rights, then A would be continuing to recognise the legitimacy of B and would be complicit in its human rights violations. This complicity is unacceptable if state A is supposedly committed to human rights.

As high priority norms, human rights are distinct from other types of right. For example, suppose that I have a moral right to not be lied to. This right is arguably not a high priority norm, in the sense described above. My right to not be lied to will not necessarily be strong enough to outweigh other moral considerations. For instance, suppose that we are utilitarians and believe in the greatest good for the greatest number. If lying to me would bring the greatest amount of good for a group of other people, then it can be morally permissible to lie to me, on this view.<sup>22</sup> Similarly, my right to not be lied to does not generate duties on the part of the state. The state is not morally obligated to ensure that I am not lied to, and other states have no duty to intervene if I am lied to.<sup>23</sup>

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<sup>20</sup> Note that this is a strong, but not absolute, duty. There may be scenarios in which intervention is not possible, advisable, or proportionate.

<sup>21</sup> Many other theorists also defend the idea that human rights provide strong justifications for legitimate intervention. See, for example: Beitz (2009: 13-47), Pogge (1995: 106-113), Popa (2018), and Rawls (1993: 58-64).

<sup>22</sup> Other moral theories would take a much stronger stance on lying. For example, Kant is often taken to support the strong view that lying is always impermissible (see Kant 1993). However, Carson (2010: 67-88) and Varden (2010) have questioned whether this extreme view is what Kant intended to present.

<sup>23</sup> We might suppose that the state *does* have a duty to ensure that I am not lied to *by the state or other official organisations*. This can be seen in the current backlash against 'fake news' and other forms of political deception. However, any duty that the state has to not lie to its citizens is arguably a legal (constitutional) duty or is contained within the human right to information. Such legal and human rights to truth and information are distinct from the moral right to not be lied to being discussed here. The moral right does not have the same scope or level of enforceability.

For the remainder of this thesis, I will accept that if a subject (marginal or otherwise) has human rights, then these rights are weakly universal, minimum standards, and high priority norms. I will take it as given that if a subject has a right which does *not* have these three features, then that right is not a human right (see 3.4.2). I will argue that marginal cases *need* human rights in order to be protected against the most serious threats (see 3.4.2, and 5.5). In 6.1 I will discuss this in relation to the human rights of subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3).

### **1.3 Human rights as moral rights to which legal rights ought to correspond**

The previous section argued that human rights have three distinguishing structural features – they are weakly universal, minimum standards, and high priority norms. There remains an open question as to whether human rights, so defined, ought to be understood as legal rights, moral rights, or some combination of the two. This section will critically assess the arguments in favour of viewing human rights as legal rights, and as moral rights. I will reject both of these options in favour of a combination view, whereby human rights are moral rights to which legal rights ought to correspond.

#### Human rights as legal rights

When most of us encounter human rights, we do so through legal documents and the various judicial organisations that implement and enforce these documents. As Kerri Woods (2014: 1) argues, this means that most of our interaction with human rights is limited to the International Bill of Rights.<sup>24</sup> Because most of our contact with human

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<sup>24</sup> Woods argues that the International Bill of Rights includes: “...the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Cultural, Economic and Social Rights (1966)...[alongside] the protests and claims and affirmations of political activists and non-governmental organisations (NGOs)...” (Woods 2014: 1).

rights *is* through notably legalistic means, it is tempting to assume that human rights must be legal rights. On this view, if I say that my human rights have been violated, this entails that some legal claim of mine has been subverted or ignored.

As John Tasioulas (2009; 2013) explains, this legalistic view is particularly popular with those who defend the idea that human rights are triggers for political intervention (see the discussion of high priority norms in 1.2, above). Key defenders of this view include Allen Buchanan (2013), Charles Beitz (2009: 13-47), Thomas Pogge (1995: 106-113), John Rawls (1993: 58-64), and Joseph Raz (2010). They all accept that if human rights are high priority norms, in the sense of being able to justify political intervention, then these rights must have an essentially legal nature (see Tasioulas 2009: 938). For example, Thomas Pogge (1995: 114) argues that:

By postulating a person P's right to X as a *human* right we are asserting that P's society ought to be (re)organised in such a way that P has secure access to X and, in particular, so that P is secure against being denied X or deprived of X officially: by the government or its agents or officials.

On this view, governments have duties to create societies in which human rights are claimable. They do this by organising society in such a way that all citizens have legal access to certain goods (like property, education, healthcare, etc.). As it is only governments who have these duties, human rights can only be violated if the government fails in this duty. This can happen in one of two ways. First, a human right can be violated if a government and/or officials acting on governmental orders actively violate a human



right (Pogge 1995: 106-109).<sup>25</sup> Second, a human right can be violated if the government does not intervene when it knows that some people are acting, without governmental orders, in ways that go against human rights (ibid).<sup>26</sup> Pogge (1995: 109-117) argues that political intervention is justified in either of these cases of rights violation. This is because the government is failing in its *legal* duties towards its citizens.

There are thus good reasons for supposing that human rights are legal rights. However, accepting this view has negative practical implications. First, legal rights only exist once the law has been created, and can only be exercised in countries where the relevant law is recognised (Fagan no date: section 3a). Second, a legal (human) right would be precarious as its existence would be dependent upon "...domestic and international political developments" (Nickel 2019: section 2.1).<sup>27</sup> Third, a legal right can sometimes permit moral wrongs and the serious mistreatment of people (Wenar 2020: section 5.4).<sup>28</sup> Any of these objections would be sufficient to question the idea that human rights are solely legal rights. This is because, if the objections hold, then these legal rights lack one

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<sup>25</sup> For example, if a governmental body arbitrarily seizes your property, then they have violated Article 17.2 of the UN Declaration of Human Rights: "No one shall be arbitrarily deprived of his property" (as discussed in Pogge 1995: 107-108).

<sup>26</sup> For example, suppose that some people are arbitrarily stealing cars. If the government does not intervene against these thefts, then it is failing to protect its citizens, and failing in its duty to create a society in which human rights are claimable. By failing to intervene, the government would be officially condoning the arbitrary thefts, rather than condemning them. In this case, human rights are still being violated by official government actions (Pogge 1995: 107-109).

Barry and Southwood (2011: 382) have offered the following objection to Pogge's arguments: "Pogge's view has the counterintuitive implication that if a person is tortured by a "rogue" government official in a society that generally is very effective at preventing torture, then that person's human rights are not violated, even though their moral rights are." I am not convinced that this *is* an objection to Pogge's argument. Presumably, Pogge could respond that if the government is not intervening to prevent the rogue agent from torturing civilians, then the torture *does* violate human rights, on the second understanding of human rights being violated by official government actions.

<sup>27</sup> As a related issue, Chalabi (2014) has emphasised the lack of unity between the conception of 'human rights' being legalised in domestic laws, and the notion of 'human rights' being demanded by international human rights documents and organisations.

<sup>28</sup> For example, consider the previous legal right to own slaves.

It is worth noting that there is some debate about whether the same problem also extends to solely moral rights – i.e. whether one can have a moral right to do wrong. This discussion is nicely summarised in Wenar (2020: section 5.4).

or more of the distinguishing structural features of human rights (1.2). The first and second objections emphasise that legal rights are not weakly universal. This is because legal rights do not necessarily extend to all persons. The third objection suggests that legal rights can (sometimes) fail to be minimum standards or high priority norms. If legal rights do not prevent the serious mistreatment of some person(s), then they arguably do not give that person protections to the minimum standards (required for *good* treatment), or view that persons' rights as high priority.<sup>29</sup>

An additional problem arises when we consider the marginal cases. It is a notable feature of law (and thus legal rights) that violations are considered on a case-by-case, rather than universal, basis. If human rights *are* legal rights, then human rights violations would need to be addressed in a similar manner. My claim about human rights violation A1 is considered separately to your identical claim about human rights violation A2. Viewing rights violations on this case-by-case basis would *not* cause problems for the human rights of *non-marginal* persons. As you and I are both non-marginal humans, we have the same legal status. This means that if my claim (A1) is successful, it will either automatically extend to you, or set a precedent for A2. This is because, as we have the same legal status and are making the same claim, the scope of the legal right would accommodate us both.

The same cannot be said about the marginal cases. Consider Steven Wise's attempts to give specific chimpanzees – Leo and Hercules – legal personhood in order to grant them the human right to habeas corpus (discussed in Thompson 2015). Meaning 'you shall have the body', this habeas corpus order was used to determine whether the chimpanzees' rights had been violated by being unlawfully imprisoned for medical experiments at Stony

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<sup>29</sup> For a similar argument in relation to *moral* rights, see 3.4.2.

Brook University. Wise was adamant that as legal cases move on a case-by-case basis, his arguments would only potentially grant personhood and the right to habeas corpus to these named chimpanzees, rather than all chimpanzees ('Storyville: Unlocking the cage', 2016, BBC4).<sup>30</sup> It is easy to see why Wise restricted his arguments as such; it was a landmark case and Wise was only concerned with certain cases of animal mistreatment.<sup>31</sup>

Whilst this case-by-case approach can grant legal human rights to *specific* marginal cases, it is problematic for the human rights of marginal cases *in general*. To see this, let us rework Wise's Leo and Hercules case using the structure of the A1 and A2 example above (which looked at the identical claims of *non-marginal* persons). Leo and Hercules are both marginal cases, and their legal personhood is in question. They do not necessarily have the same legal status because, as we are moving on a case-by-case basis, it is possible for Leo to be granted legal status, but for Hercules to be denied it (e.g. because their cases are examined by different judges with different sensibilities). As such, if Leo's claim to habeas corpus (HC1) is successful, it will *not* necessarily also extend to Hercules' identical claim (HC2), or set a precedent for its acceptance. This is because the scope of the legal right need only accommodate those whose legal status has been acknowledged. If Hercules' legal status is *never* granted, then his claim to habeas corpus will be unwarranted, even though Leo's identical claim was successful. This shows that if human rights are restricted to *legal* rights, then marginal cases' status as rights-holders becomes tenuous and determined by legal judgements and policy decisions. As HC1 and HC2 demonstrate, it is possible for contrary decisions to be made about the legal status of

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<sup>30</sup> The idea that legal animal rights would need to progress on a case-by-case basis is further defended in Wise's (2004) article 'Animal Rights, One Step At A Time'.

<sup>31</sup> There have been other notable attempts to give *individual* nonhuman animals (legal) human rights. For example, Sandra – an orangutan – was legally granted the status of a nonhuman person with human rights (particularly a right to liberty and against detainment). See Connelly 2019.

marginal cases, and this would make the resultant rights claims varied and non-standardised.

### Human rights as moral rights

Given the above problems with viewing human rights as solely legal rights, we might be tempted to change tack and class human rights as solely moral rights. As Kerri Woods (2014: 7, 19) emphasises, viewing human rights as moral rights offers solutions to many of the more serious problems highlighted above. If human rights are moral rather than legal rights, then human rights discourse can be extended to countries where human rights law is not recognised, and to issues currently not explicitly addressed in legal human rights documents, e.g. same-sex marriage. Additionally, human rights as moral rights can be held by agents that are not currently granted *legal* personhood status. This would beneficially accommodate many of our marginal cases (see 2.3; 6.1).

However, for this view to work, we must be able to clarify what a moral right is. As Woods (2014: 7) argues, this is difficult to do as, whilst legal rights are defined and delineated, moral rights are less clear-cut. This is because the scope of a *legal* right is determined by the statute that legally enforces and justifies that right. As these statutes are non-negotiable directives, they offer clear guidance on what the legal right is and when it has been violated. In contrast, Woods argues that the scope of a moral right is limited by the moral reasoning that is used to identify and justify the right (ibid). For example, I might have a moral right to not be exploited because, as we are Kantians, our moral reasoning requires that I am not treated solely as a means to an end (Kant 2011: 429). However, there may also be other moral reasons for believing that I have a moral

right to not be exploited. I might, for example, see exploitation as contrary to virtue, or likely to lead to bad consequences. This makes it difficult to clarify precisely what the moral right against exploitation is as, depending on what moral reasoning we use, both the content and the prescriptive requirements of the right will vary.

The best way to resolve this problem is to strengthen the moral reasoning that we are using to justify the moral rights. One way of doing this is to ground moral (human) rights in some fundamentally important moral idea that can be accepted universally (Fagan no date: section 3a; Feinberg 1973: 84-85, 90-91; Nickel 2019: section 2.1).<sup>32</sup> This would help to resolve the problem as, if we can provide a universal moral ground for our rights claims, then we remove some of the uncertainty and disagreements in our moral reasoning. This, in turn, would allow us to resolve issues surrounding the scope and implementation of moral rights. To utilise this solution, we thus need to determine whether it is possible to ground human rights in some universally acceptable moral idea. James Nickel (2019) outlines two suggestions as to how we may do this.

The first suggestion is to claim that human rights are “...part of actual human moralities...[and reflect]...worldwide moral unanimity” (Nickel 2019: section 2.1). The crux of this argument is that there are moral truths – like ‘it is wrong to commit murder’ – that are so fundamental that they are accepted universally across all times and peoples.<sup>33</sup>

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<sup>32</sup> This view works by offering some moral justification for human rights which, in turn, determines the scope of the rights. For example, Griffin (2008) defends a personhood view of human rights. In sum, he argues that persons are particularly morally important, and deserve rights protections. We have rights to that which is required to protect personhood. I will discuss personhood accounts further in chapters 2-4, and offer my own personhood account in chapters 5 and 6.

<sup>33</sup> One way of challenging this view would be to argue that there are no universally accepted moral truths, and that morality is relative. In other words, what is moral in one culture may be immoral in another. In response to this objection, however, we can draw on the arguments of Griffin (2008: 129-142), Rachels (2019: 14-31), and Sidgwick (1981: 602-605). They all posit that there *are* universal and absolute basic

If human rights are moral rights, then it may be that they reflect these fundamental moral truths. If this is the case then, as these moral truths are unanimously accepted and practiced, human rights are ground in *universal* moral guarantees.<sup>34</sup>

As Nickel (2019: section 2.1) explains, a difficulty with this view is that it rests on the idea that there can be moral unanimity (or consensus). This puts us in the horns of a dilemma in regards to human rights. On the one horn, if there is moral consensus, then there can be no moral progress. This is because human rights would be grounded in moral truths that reflect the moral status quo. They could therefore not challenge the moral status quo if it were found to be unsatisfactory or discriminatory. On the other horn, if there is no moral consensus, then there cannot be human rights, on the above view. This is because human rights *must* be grounded in *unanimously* agreed-upon moral truths, in order to not be indeterminate (ibid).

Given the problems with the first suggestion (above), we could instead suggest that human rights “...exist most basically in true or justified ethical outlooks” (Nickel 2019: section 2.1). For example, consider the right to privacy. On the above view, when we say that there is a human right to privacy, we are claiming that there are objectively sound *moral* reasons (independent of my desire for privacy) which make it *always* wrong to violate privacy. Because it is *always* wrong (on these objective reasons) to violate privacy,

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moral principles that are simply implemented differently across different cultures, thus giving the *appearance* of relativity.

<sup>34</sup> Further support for this view comes from the idea that human rights are minimum standards (1.2, above). As minimum standards, human rights protect very basic goods – like the rights to life, liberty, and property. It does seem at least credible that these rights reflect universal and fundamental moral truths, e.g. it is wrong to steal. This is because both the human rights and the fundamental moral truths are concerned with the minimal (moral) standards required for a good life and co-operative society. Thus, there is arguably some coalescence between moral truths and human rights.

we are justified in having *universal* moral rights prohibiting violations of privacy.<sup>35</sup> As Nickel explains, unlike the first suggestion – which looked at *existing* moral consensus – this second suggested approach is “...trying to create a consensus that could be supported by very plausible moral and practical reasons” (Nickel 2019: section 2.1). If this suggestion *does* work, then it would provide the universal moral guarantees that we are looking for.

However, as Nickel (2019: section 2.1) emphasises, there are problems with the above suggestion. To begin with, the above requires us to accept that objective moral truths/reasons exist, and that we are able to recognise them. Even if we can do this, Nickel suggests that objective moral truths/reasons would nevertheless be an insufficient ground for human rights. This is because objective moral truths/reasons could only ever provide a “...thin form of existence for human rights” (ibid), and thus would not be robust enough to properly ground human rights as moral rights. This is presumably because identifying objective reasons for action would only really provide us with surface details about human rights. We would know *why* there needs to be human rights, but not *how* these human rights should be practically implemented. Unless some thicker form of existence for human rights can be provided on moral grounds, we cannot view human rights as solely moral rights.<sup>36</sup>

### Human Rights as a combination

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<sup>35</sup> This idea is further reflected in Nickel’s own torture example: “On this account, to say that there is a human right against torture is mainly to assert that there are strong reasons for believing that it is always morally wrong to engage in torture and that protections should be provided against its practice” (Nickel 2019: section 2.1).

<sup>36</sup> This idea is further reflected in Griffin’s (2008: 37-39) claim that the moral ground of personhood is not determinate enough to fully explain human rights. He argues that we also require a practicalities ground which explains how the right actually works and is implemented in real life. Griffin’s view will be explained in more depth in chapter 3.

Above I explained that there are problems with seeing human rights as either solely legal rights or solely moral rights. In response, James Nickel (2019: section 2.1) has suggested that “the best form of existence for human rights would combine robust legal existence with the sort of moral existence that comes from being supported by strong moral and practical reasons.”<sup>37</sup> Below, I will consider two ways in which we could develop such a view.<sup>38</sup>

First, we could adopt a general approach and say that human rights are simply some combination of moral and legal rights, with neither type of right being granted primacy. For example, take the human right to religious freedom. We could suppose that this right is justified by *both* moral *and* legal reasoning, but that neither reason is more theoretically important than the other. For instance, on moral grounds, Darren’s right to religious freedom could be justified by appeals to his status as a moral agent who is capable of making rational choices and decisions (e.g. about what to believe). On legal grounds, the same right could be justified because Darren is part of a society that has passed laws against religious discrimination. Importantly, on the general approach, if Darren does not have *both* a moral *and* a legal right to religious freedom, then he does not have a human right to religious freedom.

A difficulty with this first, general approach is that it inherits the problems with viewing human rights as legal rights. In the above example, Darren does not have a human right to religious freedom if he lives in a theocracy or some other society where his rights to

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<sup>37</sup> This idea is also accepted by, for example, Barry and Southwood (2011: 370, 380-382), Fagan (no date: section 3a), and Woods (2014: 10-11).

<sup>38</sup> Nickel’s (2019: section 2.1) own discussion of how we ought to combine moral and legal rights is short and open-ended, but does seem to be compatible with the two options discussed below.



freedom of worship are not legally guaranteed. This problem cannot be avoided on the first, general approach. This is because we are giving moral rights and legal rights *equal weighting*. As a result, a right must *always* be legally recognised in order to be a human right.

To avoid these issues with equal weighting, we could instead argue that human rights are a combination of moral and legal rights, but that the moral rights have primacy.<sup>39</sup> On this view, we suppose that there is some fundamental moral idea that can ground human rights (see the moral rights views, above). In Chapter 2, I will argue that the protection of moral personhood is one such fundamental moral idea. Using our previous example, Darren has a right to religious freedom because this right protects some important parts of his personhood (e.g. his capacities for choice and belief, his membership of a religious community, etc.). If we accept that Darren does have this moral right, then this generates important moral requirements to act, in ways related to the defence or protection of his rights claim. On our new combined view, these moral requirements are made enforceable (and mandatory) by classifying the human right as a legal right and prescribing it via statutes. In other words, although human rights are primarily moral rights, there is also a requirement to make them legal rights, and thus give them legal force. This is the view that I will be adopting for the remainder of this thesis.<sup>40</sup>

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<sup>39</sup> I am giving moral rights primacy rather than legal rights because if we gave legal rights primacy, we would risk excluding marginal cases. See the discussion of Leo and Hercules and HC1 and HC2 above.

<sup>40</sup> A similar view is briefly presented by Tasioulas (2009: 939). Tasioulas states that "...there are myriad senses in which the orthodox [moral] conception recognises the 'political' character of human rights and of the reasoning that establishes them....for example, one may acknowledge that human rights typically have significant *implications* for the duties of officials, the legitimacy of states, political membership and the justifiability of intervention, without specifying the nature of human rights by reference to political duty-bearers or functions." Where Tasioulas and I diverge is that Tasioulas' moral conception accepts that human rights "...are moral rights possessed by all human beings simply in virtue of their humanity" (938). I will reject this humanist view in 2.1.

Note that when we do create the legal rights, we usually do this democratically (in an attempt to gain unanimous acceptance). As part of this democratic process, we will typically discuss the scope of the

Before accepting this view, it is worth responding to an obvious issue. The above argues that, whilst human rights are primarily moral rights, they must also have a legal status. It is thus unclear what we should do in cases where the moral (human) right has *not* also reached legal status. In response, I propose that we see the aim of turning moral (human) rights into legal rights as a political goal, in Martha Nussbaum's (1997) sense. Like me, Nussbaum accepts that human rights are primarily moral rights.<sup>41</sup> Whilst I will ground human rights in personhood (chapter 2), Nussbaum grounds them in "...people's capabilities, or their abilities to do and be certain things deemed valuable" (1997: 275). These capabilities include the capabilities for belief, to make choices, to have employment, etc. (1997: 277).

Nussbaum introduces the idea of political goals (1997: 291) to explain what should happen when the protection of capabilities is not recognised or guaranteed by law. For example, suppose that Emma lives in a society that does not legally permit women to work. Emma can thus not be employed, even though (were it not for the law) she would have the capability to do so. In this scenario, Nussbaum would argue that Emma's capability to have employment is a political goal "...that should be useful as a benchmark for aspiration and comparison" (ibid). In other words, we can compare Emma's society with those that *do* allow women to seek employment, and find Emma's society wanting in comparison. We can also suggest that Emma's society ought to aspire to permit women

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rights (i.e. what they are rights to). As the combined view that I am defending in this thesis would use this democratic process, the combined view can thus deal with the issues with scope and unanimity that affect solely legal rights and solely moral rights respectively (see above).

<sup>41</sup> This is reflected in the following quote: "I shall understand a human right to involve an especially urgent and morally justified claim that a person has, simply by virtue of being a human adult, and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group" (Nussbaum, 1997: 292). Whilst I agree with Nussbaum's focus on moral rights, I will reject the idea that human rights are held only by human adults (Chapter 2 onwards).

to seek employment, and we can campaign on her behalf. According to Nussbaum (1997: 289), we are justified in seeing Emma's capability for employment as a political goal because, like all capabilities, Emma's capability for employment is of both intrinsic and instrumental moral value. It has intrinsic value because employment is important in and of itself (e.g. as a final end or goal to work towards). It also has instrumental value because its realisation affects the value of other capabilities and goals. For instance, Emma's capability to have employment connects to her capability to make choices about what she wants to pursue.

In a similar vein, I argue that the protection of moral personhood is of both intrinsic and instrumental moral value. This is because personhood is valuable in and of itself (chapter 2), and also affects the value of rights that are grounded in personhood (chapters 5 and 6). Adapting Nussbaum's argument (above), I propose that the protection of moral personhood is a political goal. Our aim is to turn moral rights, which protect moral personhood, into legal rights, which enforce this protection. In cases where the moral right does not yet have a legal status, we should see the underlying moral protection as "a benchmark for aspiration and comparison" (Nussbaum 1997: 291). For instance, suppose that we accept that a nonhuman animal has a moral (human) right to protections against certain important threats, e.g. threats to life (see 6.1.2). If the nonhuman animal does not yet have legal rights to this protection, we ought to see this as an aspirational political goal, and provide reasons and argument for protecting the nonhuman animal's rights in law. By adopting this view, we can therefore accept that human rights as moral rights have political importance, even if our political goals have not yet been fulfilled, and the moral right has yet to reach full legal status.

## Conclusion

This chapter has made three main claims about human rights. First, human rights are claim rights, privilege rights, power rights, and/or immunity rights (1.1). Second, human rights are distinct from other types of right because they alone are weakly universal, minimum standards, *and* high priority norms (1.2).<sup>42</sup> Third, human rights are moral rights to which legal rights ought to correspond (1.3). I explained that, to defend this latter view, I will be grounding human rights in a particularly important moral idea – the protection of personhood. Chapter 2 will introduce this personhood view. I will explain what personhood entails (2.1), why it is an appropriate ground for human rights (2.2), and what types of marginal case exist on a personhood view (2.3). This will set up the arguments of later chapters (5 and 6) which will explain why (most, if not all) marginal cases have at least some human rights on a personhood account. When I say that marginal cases have some human rights, I mean human rights as defined in this present chapter.<sup>43</sup>

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<sup>42</sup> I accept that there are other types of right that can have *some* of these structural features, but I maintain that they will not have *all* three of these features. If a right *does* have all of these structural features, I suggest that it is a human right.

<sup>43</sup> The rights of marginal cases are also often discussed in relation to will and interest theories. Will theorists argue that rights-holders are “...small-scale sovereign[s]” (Hart 1982: 184) and, if a subject has a right, then this means that they have power or control over another person’s treatment of them. The function of rights is thus to provide justifications for limiting others’ freedoms. For good, lucid discussions of will theory, see Graham (1996), Hart (1955; 1982), and Van Duffel (2012).

Will theory is often criticised for not extending rights to those who lack the psychological capacities (such as the capacity to make choices) required to be small-scale sovereigns. This would include most, if not all, of the marginal cases discussed in 2.3. For examples of theorists who raise this objection see Cruft (2004), Kramer (2013), McCormick (1982), and Vrousalis (2010).

In contrast, interest theorists argue that a subject (x) does not need to have the capacity for choice to be a rights-holder. Instead, x can plausibly be thought of as a rights-holder if they have (certain morally important) interests. As Wenar (2020: section 2.2.2) explains, on this view, “...the function of a right is to further the right-holder’s interests. An owner has a right, according to the interest theorist, not because owners have choices, but because the ownership makes owners better off.” On interest theory accounts, marginal cases *could* be rights-holders if they have relevant interests, and can be better off if their interests are fulfilled and worse off if their interests are not fulfilled. For good, detailed discussions of interest theory, see Kramer (2010; 2013) and Kurki (2018).

A key difficulty with interest theory, however, is that it seems to make rights too expansive. This is because we typically accept that one can have an interest in x without having a corresponding right to x. For discussions of this objection (and potential responses to it) see Kramer (2010;2013), Kurki (2018), and Wenar (2020, section 2.2.2).

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Although will and interest theories *do* discuss marginal cases, I will not be considering these theories in any depth in this thesis. This is because will and interest theories are often used in discussions of *rights*, but are *not typically* used in discussions of *human rights*. For example, neither ‘will theory’ nor ‘interest theory’ are mentioned in key philosophical texts on human rights, such as Griffin’s (2008) *On Human Rights*, or Nickel’s (2007) *Making Sense of Human Rights*. As I am concerned only with whether marginal cases have *human rights*, rather than rights in general, I too shall forego any further in-depth discussion of will or interest theory. That being said, it should be noted that the discussions of exclusionary binary accounts (chapter 3) and inclusive binary accounts (chapter 4) have some similarities to will and interest theories respectively (but frame the discussion of marginal cases’ rights more explicitly in terms of human rights).

## CHAPTER TWO. PERSONHOOD: AN INTRODUCTION

### Introduction

The last chapter discussed the foundations of human rights theory. This chapter introduces the moral concept of personhood. I will clarify how we ought to understand personhood, explain why persons are morally significant, and suggest which marginal cases could be persons. The chapter should thus be read as laying the groundwork for all later chapters, which will present various arguments for adopting a personhood account of human rights. Such accounts take the protection of personhood to be a morally important consideration that can ground human rights.<sup>44</sup> Chapters 3 and 4 will critically evaluate *binary* personhood accounts of human rights. Chapters 5 and 6 will formulate my alternate *non-binary* personhood account.<sup>45</sup>

The present chapter proceeds as follows. In 2.1 I explain that, on personhood accounts, a subject is a person if they meet some criteria for personhood (understood in terms of the possession of relevant personhood properties). ‘Personhood properties’ are morally relevant properties (e.g. autonomy, sentience, rationality, etc.), the having of which makes the property-holder a person.<sup>46</sup> In 2.2 I outline current views that persons are particularly

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<sup>44</sup> In 1.3 I argued that, as human rights are moral rights to which legal rights ought to correspond, they need to be grounded in some morally important consideration.

<sup>45</sup> A key difference between binary and non-binary accounts is that binary accounts use a strict threshold for personhood, whilst non-binary accounts do not. This difference will be discussed further throughout chapters 3-6.

<sup>46</sup> This is a general, theory-neutral way of understanding ‘personhood properties’, and consequently makes no claims about whether the personhood properties are necessary and/or sufficient for personhood. Binary accounts (chapters 3 and 4) typically argue that personhood properties are jointly necessary and sufficient for personhood. There is some binary threshold property (or properties) that is needed to be a person, and the possession of this property (at a threshold level) is sufficient to make the property-holder a person. Non-binary accounts (like Perring (5.1) and my account (5.2-5.7)) generally argue that the personhood properties are individually sufficient for personhood, in the sense that there are many different morally relevant properties, and the possession of any of them is enough to make the property-holder a person.

In 5.2 I will outline which properties could be personhood properties, on my account. In 5.3 I will present a test for personhood. I will claim that a property is a personhood property if it passes my test for

morally important because they are directly morally considerable. I clarify how personhood, so understood, links to human rights as moral rights, and I outline the structure of personhood accounts of human rights. Finally, in 2.3 I offer a brief sketch of the sorts of marginal cases that follow from a personhood account of human rights. I argue that we ought to widen the scope of marginal cases from the current focus of atypical humans to also include nonhuman animals and posthumans (e.g. robots).<sup>47</sup>

## 2.1 Defining ‘personhood’

Suppose that Charlotte is a person. The remainder of this thesis will be concerned with explaining why Charlotte and beings like her (i.e. those who are also persons) have human rights. I will examine what grounds human rights, and explain how human rights are connected to personhood. Because of its theoretical importance, we need to be clear about what a ‘person’ is. As Sophie-Grace Chappell (2011: 2) explains, there are two opposing ways in which we might define a ‘person’. First, there is humanism – all humans are persons. Second, there is criterialism – all those with certain relevant properties (e.g. autonomy, rationality, etc.) are persons. This section will explain and critically evaluate

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personhood. Once a property *does* pass my test for personhood (and so is a personhood property) that property is individually sufficient for personhood, on my account.

<sup>47</sup> In 6.1.2 and 6.1.3 I will argue that nonhuman animals and robots have some human rights, in virtue of being persons. For an explanation as to why I view their rights as ‘human rights’ rather than some other form of ‘person rights’, see ‘person rights or human rights?’ in the introduction to the thesis (above).

these two views (as defined by Chappell).<sup>48</sup> Whilst Chappell argues in favour of humanism, I will argue that we ought to adopt criterialism.<sup>49</sup>

## Humanism

On humanist accounts, being a member of the human species is a necessary and sufficient condition for personhood (Chappell 2011: 2, 14-26). On such views, we will know that Charlotte is a person if we can identify her as a human being (Chappell 2011: 5-16; Diamond 1978: 469-470). This identification will largely be automatic and instantaneous (Chappell 2011: 5-16). When I meet Charlotte, I recognise her as a human being. I instinctively know that humans are persons because humans typically display characteristic ‘person behaviours’, like talking, laughing, walking, etc. Thus, I know that, as a human, Charlotte is the right kind of an entity to count as a person. I will subsequently treat her as a person, for example, by acknowledging that she has rights. Importantly, on this view, once I have identified Charlotte as a human being, I do not need to do any further work to classify her as a person. For instance, I do not need to assess whether she has certain properties, like self-consciousness, rationality, etc. (ibid).

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<sup>48</sup> Chappell’s discussion of humanism and criterialism is broad and general. This general account will suffice to show the distinction between humanism and criterialism, and the concerns that typically apply to each. I do, however, acknowledge that there are *versions* of humanism and criterialism. For example, the substance view – which essentially claims that *all* humans are persons in virtue of possessing a rational nature – is a version of humanism. For a detailed discussion of the substance view, see Greasley and Kaczor (2017). Griffin’s (2008) personhood view – which grounds personhood in normative agency – is a version of criterialism. For a detailed discussion of Griffin’s view, see chapter 3. I will not discuss individual versions of humanism or criterialism any further here, but I will discuss individual criterialist accounts throughout chapters 3-5.

<sup>49</sup> Criterialism is by far the more popular view. The idea that Charlotte is a person because she has certain relevant properties is accepted by, amongst others, Cohen and Regan (2001), Griffin (2008), and McMahan (2002). Criterialist views are also discussed in more depth throughout chapters 3-6.

It is worth noting that, on some criterialist views (chapter 3; 4.2), it follows that only human adults can have the properties required to be a person. This is slightly different to humanism as, on criterialist views, humans still need to meet the relevant criteria (having certain properties) in order to be a person. Consequently, not all humans are persons on these views.



Chappell (2011: 5-16) argues that humanism, so defined, is the correct view of personhood. This is because it offers a simple, clear notion of personhood that is compatible with how we understand and use personhood in everyday life. We do typically automatically view other humans as persons. We could also suggest that, if humanism is the correct view of personhood, and if we are using personhood to ground human rights, then we can clearly delineate the class of persons with human rights. All and only human beings would be persons, and all and only human beings would have human rights. If correct, humanism would thus remove the problem of marginal cases. This is because, if we accept humanism, then (currently) only human beings could be marginal cases of human rights (as only human beings can be persons with rights).<sup>50</sup> However, as *all* humans *are* persons with rights on a humanist view (Chappell 2011: 21), no human would actually be a marginal case.

Despite its apparent simplicity and intuitive appeal, I will argue that humanism *cannot* be the correct view of personhood. There are two reasons for this. First, Chappell's view relies on a problematic definition of 'species membership'. Second, humanism seems to entail speciesism. Both of these problems are discussed further below.

### Problem 1: Kind essentialism and species membership

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<sup>50</sup> I say 'currently' because Chappell does concede that some nonhumans could be persons in the future (but are not now) (Chappell 2011: 18-21). I discuss this further below. In making this concession, Chappell argues that 'being a member of the human species' is a sufficient but not a necessary condition of personhood, on humanist views. This is different to my definition of humanism, above. In what follows I will argue that, in spite of Chappell's claims, humanism *does* seem to depend on viewing 'being a member of the human species' as a necessary condition for personhood. When it is no longer a necessary condition, humanism collapses into criterialism. I will explain this further in the discussion of speciesism, below.

Chappell's humanism requires us to make a clear, non-ambiguous distinction between species. This is central to her claim that being a member of the *human* species (and no other species) is sufficient to make Charlotte a person and rights-holder. To argue for this position, Chappell (and theorists like her) must rely on some form of kind essentialism.<sup>51</sup> Kind essentialist views accept that a species is a natural kind which is defined by the possession of some distinguishing essential properties (Ereshefsky 2017: section 2.1). In Chappell's terms, this would translate to members of the human species being any x who possesses certain essential *biological* properties (e.g. a certain number and organisation of chromosomes).<sup>52</sup> There are two main reasons why reference to essential biological properties is problematic.

First, reference to essential biological properties fails to provide a clear criterion for species membership in cases where a member of the named species either lacks the essential property, or has a variant of it (Ereshefsky 2017: section 2.1). For example, consider the idea that having a certain number and organisation of chromosomes is an essential property of the human species. This idea becomes problematic when we consider humans with atypical chromosome arrangements, such as those with Down's syndrome (who have three copies of Chromosome 21, rather than two), Klinefelter's syndrome (XXY rather than XY), and Turner's syndrome (XO rather than XX). If we are defining human species in terms of essential biological properties, it becomes unclear how a kind essentialist could respond to such biologically atypical human cases.<sup>53</sup> As Chappell wants

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<sup>51</sup> This can be reflected in Chappell's repeated use of the term 'human kind' (2011: 11, 12, 14, 15, 20, 21).

<sup>52</sup> Chappell (2011: 1) emphasises this biological focus in the abstract of the article. She claims: "In normal cases, we have already identified a creature as a person before we start looking for it to manifest the personal properties.... This pre-identification is typically based on biological features..."

<sup>53</sup> A similar problem affects accounts that aim to ground personhood and human rights in 'human dignity' (see Gilibert 2018, Giselsson 2018, and Michael 2014). Like Chappell, these accounts argue that *all* humans are persons (with human rights) in virtue of an inherent worth, value or dignity (however defined)

to claim that being a member of the human species is sufficient for personhood, this inability to clearly designate human species is an issue for her theory.

Second, even if Chappell could utilise a version of kind essentialism which can properly respond to these atypical cases (perhaps by adopting a different essential property), it is not obvious that reference to species membership would actually allow for the distinction between species that Chappell's humanism requires. As Marc Ereshefsky (2017: section 2.1) emphasises, parallel evolution means that many essential properties (both biological and non-biological) have species overlap. For example, it is commonly accepted that human beings and chimpanzees have a DNA similarity of 98%. Consequently, most biological properties that Chappell could use to ground *human* species membership will likely also apply to *chimpanzee* species membership.<sup>54</sup> The distinction between species is not as clear-cut or relevant as Chappell suggests.<sup>55</sup>

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that they possess as members of the natural kind 'human'. 'Human dignity' accounts thus also face problems defining 'human kind'. Unlike Chappell, 'human dignity' accounts also face additional problems with their definitions of 'human dignity'. Some (but not all) dignity accounts ground human dignity in the possession of certain properties (and thus, unlike Chappell, they adopt a criterialist approach). For example, Gilabert argues that human dignity is grounded in "the human capacities for sentience, knowledge, prudential and moral reasoning and choice, aesthetic appreciation, self-awareness, creative production, social cooperation, and sympathy" (Gilabert 2018: 128). Michael argues that "humans have inherent dignity because, as a kind, they are self-aware, have the ability to question existential issues and a capacity for morality" (Michael 2014: 17). And some, like Kant, argue that human dignity is linked to rationality and autonomy (see Sensen 2011, and Von Der Pfordten 2009). Due to the difficulties defining 'human dignity', some argue that dignity cannot be used to ground personhood or human rights (see: Harris 2016: 47, Macklin 2003).

<sup>54</sup> There is one biological property that will not be shared by humans and chimpanzees. This is the property of 'having the ability to produce fertile offspring'. This is a standard definition of 'biological species'. Using this definition, humans can only produce other humans, and chimpanzees can only produce other chimpanzees – the reproductive ability cannot cross species. I accept this, but maintain that most other biological properties *are* shared across the human and chimpanzee species.

<sup>55</sup> Chappell acknowledges this point, but does not provide a convincing reply to it. In relation to the lack of differentiation between humans and other species, Chappell responds: "This is true, but irrelevant to my argument, which can work equally well with the population conception of species, or indeed with any conception at all that will allow humanity to count as the name of a kind of *some* kind. At least for creatures like us, whose temporal experience runs only over decades, hardly ever over centuries, let alone the millions of years that speciation requires, it should not be a controversial thought that a population of creatures sharing a common genetic heritage, physiology, and ethology can sensibly be treated as a unitary grouping..." (2011: 21). To me, this is not a satisfactory response as it still requires us to be able to identify

## Problem 2: Speciesism

As explained above, Chappell's humanism relies on the assumption that there is something special and morally significant about human beings. All and only human beings are persons. As Chappell acknowledges, one may worry that this view is speciesist (2011: 3). Speciesism occurs when demarcation between human and non-human species is grounded in arbitrary differences which result in humans being favoured and non-humans being discriminated against. In this sense, speciesism is like racism and sexism (Chappell 2011: 3). This is because in all three cases arbitrary reasons are given for saying that one group (human beings, white people, men) are of a higher and more morally noteworthy status than a second group (nonhuman animals, non-white people, women). It is the arbitrary nature of the discrimination that makes all three of these cases problematic. If the reasoning for distinguishing between groups *is* justified and morally relevant, then the demarcation is not an issue.<sup>56</sup>

To show that humanism is *not* speciesist, Chappell must either demonstrate that other species *could* be persons, or that there is some morally relevant reason why being human (and only human) is sufficient for personhood. The latter option would require her to identify some morally significant feature of human species membership. I posit that this option is not available to Chappell due to the problems with kind essentialism mentioned

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the defining characteristics of human kind. As such, the problem described above (in the main text) would still apply to Chappell's response.

<sup>56</sup> There has been much research into the unacceptability of speciesist discrimination. For example, Singer (1975) famously considers the issue in *Animal Liberation*. Milligan (2011: 223) explains that classic discussions of speciesism are typically presented in a species-neutral way; any species can be guilty of speciesism. He argues that this is the incorrect way to view speciesism as it is an exclusively human problem- only humans can show speciesist discrimination (ibid). Others, such as Horta (2010), however, deny that there are these different types of speciesism. For the purposes of this thesis I will take no stance on whether speciesism is species neutral or exclusively human. I will simply highlight that Chappell's humanism is guilty of speciesism, however defined.

above.<sup>57</sup> Consequently, I will focus only on the claim that humanism could allow for non-humans to be persons.

In response to objections of speciesism, Chappell (2011: 14-16) begins by acknowledging that it is currently only human beings that are persons (on a humanist view). She explains this by considering how we respond to human babies, cats, rubber plants, and sofas. We have certain expectations about how such entities will interact with us, what behaviours they will display, and what capacities they will develop. She argues that, whilst we treat the baby and the cat with more respect than the plant or the sofa, it is currently only the human baby that we treat as a person (2011: 15). However, she concedes that, at some future time, humanism could allow for non-humans to be persons if these non-humans are "...like the human species in that its members are characteristically persons (in one sense or another)" (Chappell 2011: 19).

There are two ways of reading Chappell's above response, both of which are problematic. On the first reading, we could view her as implying that a nonhuman could be a person if and only if it is sufficiently human-like. Given her previous claim that we identify humans automatically and instantaneously (above), this *could* connote that a nonhuman would need to look humanoid or display obvious human behaviours (like talking, (typically) walking on two legs, emoting, etc.) in order to be a person. There are two related issues

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<sup>57</sup> To recap, the key problem with kind essentialism is that there do not seem to be any (biologically based) essential properties that apply to all and only humans. Some humans will lack the essential property, and some nonhumans will possess it.

Even if my opponent rejects my kind essentialist argument (above), Chappell's assignments of personhood could still seem spurious and arbitrary. For example, she argues that: "Our understanding of which creatures are persons...is not formed on an individual basis but on the basis of experience with humans in general...when we see that some creature is a human, just seeing that is enough to license us to adopt the interpersonal attitude toward that creature" (2011: 14). This seems to imply that 'having a demonstrably human form' (and so *seeming* to be human) is enough for some x to be a person. 'Having a human form' is, however, morally arbitrary.

with this first view. First, ‘being human-like’ is morally arbitrary. As Chappell has not sufficiently explained why ‘being human’ is morally significant, we do not (yet) have any non-arbitrary reason why nonhumans need to be ‘human-like’ in order to be morally relevant persons.

Second, it would be difficult, if not impossible, for nonhumans to meet Chappell’s human-similarity requirement (so defined). This is nicely explained by Marya Schechtman (2014: 131-137), who adopts a similar human similarity test to Chappell in her Person Life View.<sup>58</sup> Schechtman explains that, for a nonhuman animal to be a person, it would need to be like the fictional dog, Mr. Peabody, from the *Rocky and Bullwinkle Show* (132-133). Mr. Peabody is human-like (and we instantly view him as such) because he talks like a human, dresses like a human (he wears glasses), and does human-like behaviours (for instance, operating machinery (his time machine)). However, Schechtman emphasises that Mr. Peabody is only human-like if we imagine that he has vocal cords that permit speech, the right sort of ears to hold up glasses, and opposable thumbs to operate machinery (133). In real-life, no nonhuman animal has these features, and so only *fictional* nonhuman animals can be human-like (131-137).<sup>59</sup> If this is so, then no *real* nonhuman could pass Chappell’s (or Schechtman’s) human-similarity requirement and so be a person. Consequently, the first reading of Chappell’s response

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<sup>58</sup> Schechtman’s Person Life View argues that “...persons are defined in terms of the characteristic lives they lead” (2014: 110). Like Chappell, Schechtman accepts that “we do not, when we encounter animate things in daily life, make an assessment of their attributes and capabilities before deciding whether they should be viewed and treated as fellow persons. When we encounter other humans we automatically see them as persons and interact with them as such” (2014: 113). Thus, Schechtman seems to accept the sort of humanism that Chappell defends, and which has been discussed above. Also like Chappell, Schechtman accepts that x can be a person if they are sufficiently human-like, in the sense that they have lives like ours (2014: 110). This will entail having a similar internal constitution to us, doing characteristic activities and interactions, and participating in certain social and cultural practices and institutions (2014: 112-113).

<sup>59</sup> Schechtman does accept that bonobos could *almost* be person-like (read human-like) as they do walk and behave like us. However, she argues that a bonobo would only be a person if it had “super intelligence” (2014: 134) and this is unlikely enough to be essentially fictitious.

does not avoid speciesism. This is because ‘being human-like’ is morally arbitrary and is used to demarcate between humans (who are naturally human-like and so persons) and non-humans (who cannot be human-like in the relevant ways).

Alternatively, we could read Chappell’s response as entailing that nonhumans could be sufficiently human-like if they have the sort of *properties* that humans typically have (e.g. autonomy, rationality, etc.).<sup>60</sup> This view is more promising as it does not automatically exclude nonhumans. Nonhumans can feasibly have human-like properties (like rationality) even if they cannot be human-like in other ways, such as talking or walking like a human (as discussed above). For example, many great apes have human-like properties in this sense.<sup>61</sup> Note, however, that if Chappell were to adopt this view, she would no longer be defending humanism. She would be accepting criterialism (that an entity is a person if it has certain relevant properties, discussed below). As even Chappell seems to fall back on this criterialist view (2011: 19), this could be taken to entail that criterialism is the only real way to avoid speciesism.<sup>62</sup>

The above suggests that humanism cannot be the correct view of personhood. For humanism to work, we must be able to distinguish between humans and other species,

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<sup>60</sup> This is reflected in Chappell’s claim that “...some particular individual creatures...might start to count as persons, perhaps by displaying the personal properties...” (2011: 19).

<sup>61</sup> I will discuss this idea – that at least advanced nonhuman animals, like apes, can have personhood properties – in 6.1.2.

<sup>62</sup> Indeed, the desire to avoid speciesism is often given as a reason to accept criterialism. For example, amongst others, Buchanan (2009), Griffin (2008: 34), Harris (2016), and Perring (1997: 181) all accept that other species *could* be persons, and this is explainable if we accept that personhood is determined by the possession of relevant properties (criterialism) rather than human-species membership (humanism). Similarly, Frankfurt (1971: 6) has emphasised that: “In those senses of the word which are of greater philosophical interest...the criteria for being a person do not serve primarily to distinguish the members of our own species from the members of other species.” However, whilst criterialism is often presented as a way to avoid speciesism, it is worth noting that criterialist accounts of personhood can still be speciesist. Indeed, I will argue that speciesism affects certain criterialist binary views of personhood, discussed in chapter 3 and 4.2. In 6.2.1 I will argue that my criterialist account of personhood is not guilty of problematic speciesism.

and give some *non-arbitrary* (and thus non-speciesist) reason as to why humans (and only humans) are persons. However, the kind essentialism that would underlie such claims would either exclude biologically atypical humans from being classed as ‘human beings’ or ‘persons’, or fail to explain why biologically similar nonhumans (like chimpanzees) are not persons.<sup>63</sup> Either outcome – the exclusion of atypical humans or the inclusion of nonhumans – is incompatible with the humanist claim that humans have some special moral significance (personhood). If Chappell is correct – and the debates about personhood are exclusively between humanism and criterialism – then our rejection of humanism implies that we ought to accept criterialism.

### Criterialism

As Chappell explains, criterialism is the view that “...the [actual] possession of personal properties such as self-consciousness, emotionality, sentience, and so forth is necessary and sufficient for the status of a person” (Chappell 2011: 1).<sup>64</sup> In other words, Charlotte is a person because she possesses some relevant properties, like [1] autonomy and rationality, [2] self-awareness, [3] the capacity for language, [4] having interests, or [5] membership of a group or moral community.<sup>65</sup> Her status as a human is incidental to her

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<sup>63</sup> I will argue that similar problems affect exclusionary binary personhood accounts (Chapter 3).

<sup>64</sup> Two points of clarification here. First, I have inserted the ‘actual’ into this quote. Chappell stresses the importance of actual possession of properties a few sentences later than the quoted text. She argues that “Actual possession of the criterial properties is necessary and sufficient for membership of the PMC [primary moral constituency]” (2011: 2).

Second, Chappell uses the term ‘personal properties’. I find this term misleading as it could be read as relating to any property that someone has that individuates them (e.g. their height, eye colour, ethnicity, etc.). Instead, I will use the term ‘personhood properties’. ‘Personhood properties’ are the *morally relevant* properties in virtue of which you are a person (e.g. autonomy, sentience, rationality, etc.). Height, eye colour, ethnicity etc. are not personhood properties on this definition, because they are not morally relevant. See 5.2 and 5.3 for a more in-depth discussion of what the personhood properties are on my account.

<sup>65</sup> For [1] see Cohen and Regan (2001: 32-33), Griffin (2008: 2, 33, 156), McMahan (2002: 204), and Schechtman (2014: 112). For [2] see DeGrazia (2002; 2009), and Schechtman (2014: 112). For [3] see Griffin (2008: 156), and McMahan (2002: 204). For [4] see Cohen and Regan (2001: 32-33), and McMahan (2002: 204). For [5] see Cohen and Regan (2001: 32-33), and Schechtman (2014: 112). For the purposes



personhood. As a humanist, Chappell argues that criterialism (so defined) is untenable, and she offers two key objections to criterialist accounts of personhood (discussed below). As I want to adopt criterialism (chapters 5 and 6), the remainder of this section will focus on defending criterialism from Chappell's objections.

Chappell's first objection is that criterialism's conditions for personhood are too strong and exclusionary (2011: 3-5). This is because, as quoted above, Chappell takes criterialism to be the view that it is the *actual* possession of personhood properties that is jointly *necessary* and sufficient for personhood. It is the 'actual' and 'necessary' that Chappell believes are too strong. This is because, as certain atypical humans (children and cognitively impaired adults) do not *actually* possess certain personhood properties, they would not be deemed persons on a criterialist account (2011: 7-14). Consequently, they would lack a moral status and human rights. In chapter 3, I will argue that this objection *does* apply to certain exclusionary (criterialist) accounts.

There are a number of ways in which a criterialist could attempt to overcome Chappell's first objection. First, they could argue that the actual possession of personhood properties could be set at a low threshold. If the threshold were low enough, then it is possible that atypical humans could still *actually* possess these properties to the requisite degree and class as persons. This strategy will be discussed in depth in chapter 4. Second, they could argue that subjects only need to possess *some* personhood properties rather than *all* personhood properties (Perring 1997: 181-184; Schechtman 2014: 111-113). For example, Charlotte might be sentient and self-conscious, but lack rationality. On this

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of this section, I will not consider which properties *are* personhood properties. I will leave this discussion until 5.2 and 5.3.

view, provided that atypical humans *actually* possess *some* relevant personhood properties (like self-consciousness), then they are persons on a criterialist account. I will argue for this view in chapters 5 and 6. Finally, they could suggest that ‘human birth’ is a sufficient, but non-necessary, condition for personhood.<sup>66</sup> This strategy would allow atypical humans to automatically meet at least one personhood property (and so be persons on a criterialist view). Note that this strategy would not dissolve into humanism as ‘human birth’ would only be *one* of the properties required for personhood, rather than the *only* property required (as in humanism). Criterialism can allow for there to be many different personhood properties, and so alongside ‘human birth’ there could be ‘autonomy’, ‘rationality’, ‘the capacity to have emotions’, etc.

Above, I have suggested a number of ways in which the criterialist position could be amended to overcome Chappell’s first worry. Indeed, Chappell accepts that, if criterialism could be suitably clarified and delineated in the proposed ways, then the above would be a suitable response to her objection (Chappell 2011: 5). However, as a humanist, Chappell believes that criterialism *cannot* be suitably clarified and delineated in this way, and will thus remain problematic. In chapters 5 and 6 I will develop a criterialist view which, I argue, *can* provide the clarification and delineation that Chappell demands.

Chappell’s second objection to criterialism is that, even if we can provide the requisite clarification, there is still something wrong with the identification process used by criterialism (2011: 5-16). This is because criterialism suggests that we have to determine whether Charlotte possesses certain properties (like rationality) before we can decide if

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<sup>66</sup> If we want to avoid the speciesism worries mentioned above, we must accept that ‘human birth’ cannot be a necessary condition for personhood.

she is a person. This goes against the common-sense way in which we understand identification (mentioned above), whereby we automatically identify Charlotte as a human and thus a person, and use this identification to determine her treatment.

In response, I concede that Chappell is correct that our everyday understanding of personhood is more akin to the humanist view. We see Charlotte as a human and consequently treat her as a person. This is what we do in *standard* cases.<sup>67</sup> However, in *atypical* cases, like the marginal cases, I propose that we *do* need to identify a subject's properties before deciding whether they are a person. For example, consider a human being with severe and wide-ranging psychological impairments (Donna). It is plausible to suggest that Donna's status as a human being is insufficient (by itself) to determine her moral status and rights. Because Donna is *atypical*, her status as a person and rights-holder will potentially be *different* to that of a 'typical' human.<sup>68</sup> In chapter 5 I will argue that, to determine Donna's status and rights, we need to know what personhood properties she has. This is because I will claim that properties, personhood, and rights are intimately connected to one another (5.5). Thus, if we want to properly, and accurately, understand the personhood and rights of marginal cases, I will suggest that we need to embrace criterialism (chapters 5 and 6).

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<sup>67</sup> The reason we do this is because we have so much evidence for the connection between 'being human' and 'being a person'. The two things do usually go hand in hand.

<sup>68</sup> Note that this claim is simply that Donna's status may be *different* to that of a typical human, *not* that her status as a person and rights-holder will necessarily be *less* than that of a typical human.

As implied above, I take human marginal cases to be an acid test for Chappell's view - humanity is present, but the relevant personhood may not be. Unlike the standard adult humans, we do not seem to have consistent, common sense views about i) what moral status these marginal humans have, and ii) how they ought to be treated. This runs counter to Chappell's above claim that common sense entreats us to treat all those whom we automatically identify as humans as persons.

Again, Chappell accepts that the above could be a viable response, as criterialism *may* be needed to identify the status of atypical persons (2011: 18-20). Her concession here, however, is based on the caveat that marginal cases having personhood is a distant possibility based on extreme, unlikely, and simply fictional cases (such as talking animals, etc.) (ibid). Recall that, on her humanist view, no human beings could be marginal cases (above), and so all of the marginal cases that she considers are non-human.<sup>69</sup> She argues that for other species to class as persons, they would need to pass some human-similarity test (discussed above in relation to speciesism). As no non-human marginal cases could currently pass this test (see above), it is easy to see why Chappell views (nonhuman) marginal cases' personhood as a distant possibility. As I reject humanism (for reasons discussed above), I suggest that marginal cases' personhood is neither a distant nor extreme possibility. Contra Chappell, I do not accept that marginal cases need to be sufficiently human-like to be persons.<sup>70</sup> Once we have clarified, expanded, and strengthened the criterialist approach to personhood, it will be clear that marginal cases have some (degree of) personhood and some human rights. I will argue for this position in chapters 5 and 6.

In sum, this section has considered two ways of defining personhood – humanism and criterialism. I have argued that we ought to adopt criterialism. Criterialism is the substantive view that the properties in virtue of which you are a person are not dependent upon being a member of the human species. The next section (2.2) will explain why

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<sup>69</sup> Specifically, Chappell considers “aliens, talking chimps, Locke’s parrot, and a possessed refrigerator” (2011: 18).

<sup>70</sup> I will defend this claim when considering the personhood and rights of nonhuman animals (6.1.2) and robots (6.1.3).

‘being a person’ is morally considerable, and why the protection of personhood is sufficiently morally significant to ground human rights.

## **2.2 The moral significance of personhood**

This section will outline why personhood is morally significant, according to the personhood theories. I will outline why personhood accounts take persons to be especially directly morally considerable. I will then outline the structure of personhood accounts.

Recall our claim that Charlotte is a person. Why does this matter? According to personhood theories, it matters because if we class Charlotte as a person, then we are accepting that she has a certain type of high moral status.<sup>71</sup> As an individual with this high moral status, Charlotte is a direct source of moral reasons to be treated in certain ways (see Jaworska and Tannenbaum 2018). For example, because she is a person and has this high moral status, she merits certain forms of moral treatment – she deserves equal concern and respect, she has certain rights, and so on. Further, because Charlotte is a person, it would be *wrong* to mistreat her in certain ways – we ought not lie to her, or neglect her, etc. To do so would *fail* to show her equal concern and respect, it would violate her rights, and so on.

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<sup>71</sup> The moral landscape is typically divided between moral agents and moral patients. Moral agents are subjects that can grasp moral concepts (like right or wrong) and be held responsible for their actions. A standard adult human is an example of a moral agent. Moral patients are subjects that can be the target of others’ right/wrong actions, but who are not morally responsible themselves. A nonhuman animal or a child would be a typical moral patient. For discussions of moral agents and moral patients see, amongst others, Gray and Wegner (2009), Regan (2004: 150-156), and Rowlands (2012: 71-98).

There is some debate about whether a subject needs to be a moral agent or a moral patient in order to have the sort of high moral status discussed above (which connects to equal considerability and rights). For example, DeGrazia (2002: 28) has explained how some opponents of animal rights claim that one must be a moral agent in order to have the above type of moral status. This view, however, contrasts with the more minimal view offered by the likes of Harman (2007) and Warren (2000). Both accept that moral patiency is sufficient for this form of moral status. I will be accepting that both moral agents and moral patients have the relevant type of moral status (and are persons), though as personhood can come in degrees (5.4; 5.7), the moral status of moral agents and moral patients may also differ in degree.

On the above definition, persons have an *especially high* type of moral status. It is consistent with this view that non-persons can also have a moral status (though their moral status will typically be lower than that of persons). I consider the moral status of non-persons at various junctures throughout chapters 3-6. I also discuss the connections between ‘having moral status’ and ‘having personhood’ further in 5.2. There, I will argue that, on my account, ‘having moral status’ *can* be sufficient for ‘having personhood’. I acknowledge that this is a departure from the norm, and I will offer an in-depth defence of my position in 5.2. In chapters 5 and 6 I will also clarify the relations between ‘being a person’ and ‘having human rights’. I will argue that the correct class of rights-holders for human rights are persons, and that human rights are moral protections against certain important threats. Each of these threats relates to different ways in which a person (or rights-holder) can be wronged or mistreated in morally relevant ways.

As the above emphasises, the sphere of morality that I am focusing on in this thesis is, at least in part, interpersonal and concerned with the ways in which persons interact with, and treat, one another. When an individual is a person, with the high moral status that this entails, “then that individual deserves direct moral consideration and is taken to be part of our moral community” (Bortolotti 2007: 153). Persons are one of us, morally speaking, and we ought to care about how we treat them. This is because, as explained above, persons are a source of direct moral reasons – there are reasons to treat them well. A consequence of this is that, on the personhood accounts, it makes sense to suppose that persons have morally relevant *claims* to be treated in certain ways (and, by association, others have moral duties to treat them well).<sup>72</sup> Consequently, personhood theorists would

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<sup>72</sup> For a discussion of claim rights and how they link to duties, see 1.1.

say that, because Charlotte is a person, she is directly morally considerable and has a high level of moral importance (in the sense that others have moral duties towards her).<sup>73</sup> This moral importance is not shared by entities that are either not morally considerable, or are only indirectly morally considerable (see below).<sup>74</sup>

Not morally considerable. An object will not be morally considerable if it is not the source of moral claims or reasons at all. For example, consider a regular armchair. I do not have any morally relevant reasons to treat the armchair in a certain way. Similarly, the armchair can have no morally relevant claims on me regarding its proper treatment. I simply cannot treat an armchair rightly or wrongly. For example, if I were to neglect the armchair – by relegating it to an attic– we would not typically say that my neglect has ‘wronged’ the armchair.

Indirectly morally considerable. An entity will be indirectly morally considerable if its moral value is either instrumental or symbolic (Bortolotti 2007: 153-155). An entity has instrumental moral value if it is only valuable in relation to something or someone else. For example, suppose that Doris owns a one-off painting that she treasures. Suppose also that someone slashes the canvas of this painting, destroying it. The act – slashing the canvas – does not wrong the painting, and so is not morally considerable in this direct sense. However, the act can still be wrong because of the effect that it will have on Doris – she will be devastated, and her reactions are morally important (because, unlike the painting, Doris has a moral status). Actions done towards the painting are thus indirectly

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<sup>73</sup> I will outline views which accept this claim throughout chapters 3-6.

<sup>74</sup> In chapters 5 and 6, I will argue that marginal cases (defined in 2.3) are persons and so are directly morally considerable. I will consequently argue against claims that they are only indirectly morally considerable. For example, in 6.1.1 I will explain how subjects with dementia are standardly viewed as indirectly morally considerable, and I will argue against this view.

morally considerable in virtue of the instrumental (non-intrinsic) value that the painting has for Doris.<sup>75</sup>

In contrast, an entity will have symbolic moral value if, in itself, it symbolises something morally important. For example, suppose that I create a statue that reflects, and so comes to symbolise, important aspects of the gay rights movement. The statue has symbolic moral value because it is a symbol of inclusion, tolerance, anti-discrimination, etc.<sup>76</sup> Suppose that in a homophobic attack, the statue is destroyed. As with the painting (above), the destruction of the statue does not harm the statue itself. Nevertheless, the act is indirectly morally considerable because of the effect that it may have on the gay community (instrumental moral value), and because it can be viewed as an attack on tolerance, inclusion, etc. (symbolic moral value).

As the above emphasises, within the moral landscape, persons are especially morally important. Persons have a particularly strong moral status that makes them *directly* morally considerable and gives us *very strong* reasons to treat them in certain ways.<sup>77</sup> Because of this moral importance, personhood (in some form) plays a central role in most (if not all) normative theories. In consequentialist theories, an act can be wrong if it has negative consequences for persons. In Kantian deontology, we ought not treat other persons as a means to an end. In virtue ethics it is persons who can display virtuous or

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<sup>75</sup> In chapter 6 I will suggest that plants and ecosystems are indirectly morally considerable in this sense (6.2.4).

<sup>76</sup> Note that the statue is different to Doris' painting (above). I am assuming that the painting is just a painting, and does not symbolise anything (like national pride, religious belief, etc.). Conversely, the statue in my example is designed to be symbolic.

<sup>77</sup> This is not to deny that non-persons with a weaker moral status can also be directly morally considerable. They will, however, typically be less directly morally considerable than persons, and the reasons against treating them in certain ways will be weaker.



vicious behaviour.<sup>78</sup> Persons are at the heart of moral thought because it is persons who are especially important objects of (direct) moral consideration.

Because personhood is so important (morally speaking), many argue that we have a moral duty to either respect or protect personhood. This is particularly well-documented in bioethical contexts.<sup>79</sup> For example, Johan Brännmark (2017: 173) has emphasised how ‘Respect for Persons’ (understood in terms of respecting their autonomy) has been a core guiding principle for bioethical research since the 1970s, and is featured in key documents like *The Belmont Report*. As bioethics has applications to, amongst other things, medicine and medical ethics, healthcare, biotechnology, and law and policy, ‘respect for persons’ plays an important role in many everyday contexts concerned with the treatment of persons. For example, ‘respect for persons’ will affect how we treat medical research subjects and patients in hospitals; the policies that we implement for start-of-life and end-of-life care; and what we allow people to do with biological matter (like human remains, tissue samples, etc.). In each case, the good treatment of persons requires us to respect them and take account of their autonomous choices (e.g. by requiring informed consent for medical research). As Brännmark (2017: 178) states “...our standing as persons is something woven into the very fabric of societal institutions in a good society.” Something has gone wrong if persons are mistreated.

The remainder of this thesis will be concerned with examining, and defending, personhood accounts of human rights. Such accounts argue that the protection of

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<sup>78</sup> A similar discussion of how personhood links to various normative theories can be seen in Brännmark (2017: 174).

<sup>79</sup> See, for example, Miller et al (2012), and Woods (2005). For discussions of how ‘respect for persons’ can be implemented in medical contexts across different cultures, see Macklin (2016), and Padela et al (2015).

personhood is morally substantive enough to ground human rights (as moral rights to which legal rights ought to correspond (1.3)). The arguments for adopting a personhood account of human rights will be presented in chapters 3-6. For now, I will simply outline the structure of personhood accounts.

In essence, all personhood accounts of human rights have to do three things. First, they must explain what makes some being a person. For reasons discussed above, all of the personhood accounts discussed in this thesis will utilise criterialist accounts of personhood. Consequently, each personhood account will argue that some being is a person in virtue of having certain qualities or properties. Where different personhood accounts diverge is in (i) what they take the relevant personhood properties to be, and (ii) how many personhood properties they accept. For example, in 3.1 I will discuss James Griffin's (2008) claim that personhood is grounded in normative agency. In 4.3 I will assess views which claim that all sentient beings are persons. And in 5.2 I will argue that there are many different psychological, emotional, social, physical and phenomenal properties, each of which can ground personhood. This first stage is particularly important for our purposes as it determines the criteria that marginal cases must meet in order to be persons (on the various personhood accounts discussed (chapters 3-6)).

Once personhood accounts have determined what the relevant personhood properties are, they must explain why personhood (so defined) is morally significant. They must clarify why, on their account, persons are directly morally considerable and ought to be protected and treated well. Again, there are many different ways in which a personhood account could explain the moral significance of personhood. One answer might be that persons are morally significant because they are agents and can make choices that ought to be

respected (see chapter 3). Or, alternatively, we could suppose that persons are morally considerable because they have morally relevant basic needs, or can have a good life (see 5.3). In 5.3 I will defend a pluralist view whereby persons are morally considerable because they are agents, or because they have basic needs, or because they can have a good life.

Finally, personhood accounts must explain what human rights persons have (in virtue of being persons). To simplify greatly, many existing personhood accounts are binary and accept that personhood is all-or-nothing (chapters 3 and 4). On these views, all those who pass some binary threshold for personhood have qualitatively identical human rights (however defined), whilst all those who are below the threshold do not. In chapters 5 and 6 I will defend a more nuanced view, whereby different subjects have different human rights depending on what personhood properties they have, and what threats apply to them. I will argue that my account is preferable to existing views because it can properly explain the human rights of marginal cases. Before I can argue for this position, however, we need to clarify what sort of marginal cases there are on a personhood account of human rights. I will discuss this question in the next section.

### **2.3 Personhood and the marginal cases**

In 2.1 I argued in favour of criterialism. Charlotte is a person in virtue of having relevant qualities or personhood properties (e.g. autonomy, rationality, etc.). I consequently accept that there is a criteria for being a person (defined in terms of the relevant personhood properties), and all and only subjects that meet this criteria are persons. Ideally, we ought to be able to use criterialism to divide the moral landscape into those that meet the criteria and who are persons with human rights, and non-persons who fail to meet the relevant

criteria. For example, we might intuitively suppose that adult humans meet the criteria for being a person with human rights, whilst armchairs do not. However, there are other cases – the marginal cases – where it is less obvious as to whether an entity is a person or not. This is because the marginal cases – like infants and those with psychological impairments – seem to fall between two extremes; they are neither obviously persons nor obviously non-persons. The remainder of this thesis will be concerned with determining how we should categorise and treat the marginal cases. In chapters 5 and 6 I will argue that most marginal cases are persons with human rights. For now, though, I will focus on clarifying what sorts of marginal cases follow if we adopt a criterialist view of personhood. I argue that there are three types of marginal cases that we ought to consider (discussed below).

Epistemic Marginal Cases. Epistemic marginal cases are cases where there is epistemic uncertainty as to whether a subject is a person or not. Here, ‘marginal case’ is essentially a place-marker term used to emphasise that we presently do not know enough about the subject to confidently assign them personhood or non-personhood status. For example, suppose that we currently do not know what properties a subject (Sandra) has. This may be because she has some degenerative illness, and we are unclear about how her psychological capacities (like rationality) have been affected by the illness. Until we know more about Sandra and her capabilities (e.g. by doing medical tests on her), we cannot definitively say that she has the relevant properties required to be a person. I will discuss cases of this sort throughout chapters 3-6.

Borderline Marginal Cases. Suppose that we specify some threshold for personhood.<sup>80</sup>

For instance, we may claim that, in order to be a person, subjects must have a sufficiently high level of self-consciousness, or autonomy, or rationality. Borderline marginal cases will be subjects who are close to satisfying the threshold, in the sense that there does not seem to be a fact of the matter if they satisfy it. For example, we might say that a subject is a person if they have a threshold level of rationality, set at the level of a standard adult human. It could follow that children and those with early onset Alzheimer's *almost* have the same level of rationality as a standard adult human, *but not quite the same level*. Consequently, we may want to view them as marginal cases who are on the threshold of having relevant personhood properties. I will discuss such cases in chapters 3 and 4, and in 6.1.1.

Rights Marginal Cases. Finally, we could also look at cases where subjects have the properties required for personhood (e.g. autonomy, rationality, etc.), but where there nevertheless remains a question as to whether the subject has rights. Such rights marginal cases are likely to predominantly (but not exclusively) be nonhuman subjects, like nonhuman animals and robots. This is because we may question whether human-centric rights can apply to these nonhuman subjects. I will discuss this in 6.1.2, 6.1.3, 6.2.1, 6.2.3, and 6.2.4.

These three senses of 'marginal case' often interact with one another. For example, suppose that Charlie has early onset Alzheimer's. We may view him as an *epistemic marginal case* because we do not currently know how much Charlie's Alzheimer's affects

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<sup>80</sup> Such threshold views will be discussed in chapters 3 and 4. My personhood account (chapters 5 and 6) does not use a standard for personhood. One benefit of my account is that it thus removes borderline marginal cases.

his personhood. We may also view him as a *borderline marginal case* because, as a result of his early onset Alzheimer's, Charlie may experience diminished psychological capacities, and so fall just below some threshold for personhood (if the threshold involves psychological capacities). And we might view him as a *rights marginal case* if we worry that certain rights no longer apply to him *because* of his Alzheimer's (for example, those that rely on decision-making, like a right to marry). I suggest that, by considering all three senses of 'marginal case', we will get a more robust and well-rounded understanding of marginal cases of human rights. Consequently, in this thesis, I will discuss marginal cases in all three senses. As standard practice, if I refer to 'marginal cases' then I am using a general definition that accommodates all three senses. If I use a named marginal case (e.g. 'rights marginal cases'), then I am restricting my discussion to one type of marginal case.

At this point, it is worth also clarifying the scope of our marginal cases discussion. As I am not adopting humanism, I do not accept that it is only humans who can be persons with human rights (see 2.1). As such, I am willing to accept that there can be both human and non-human marginal cases. For a subject to be a marginal case, it simply needs to make sense that the subject could have relevant personhood properties, and so could potentially have human rights. I suggest that this applies to the following groupings:

Atypical Humans.<sup>81</sup> On many of the extant theories discussed in this thesis (and particularly those in chapter 3), there is a model person and rights-holder, typically

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<sup>81</sup> I had difficulties naming this group. I considered 'human marginal cases', but that did not seem quite right as there are technologically enhanced human beings in our 'posthumans' category (below), and I take these enhanced human beings to be marginal in a slightly different way to the humans discussed in this 'atypical' category.

As explained in the main text, I have used 'atypical' simply to highlight that the marginal humans under discussion are different to the 'model' or 'standard' human adult that is often referred to in the personhood/ human rights literature. I thus use 'atypical' solely as a technical term. I do *not* use it in an evaluative sense to suggest that the marginal humans under discussion are abnormal or subnormal.

discussed in terms of a ‘standard’ adult human. This standard adult human is supposed to possess certain properties (like high-level rationality, autonomy, etc.), and be part of the moral community (they have rights, duties, etc.). ‘Atypical humans’ thus refers to any human being who is not a standard adult human, so defined. Examples include [1] embryos and foetuses, [2] children, [3] those with psychological impairments, and [4] subjects with dementia.<sup>82</sup> Whilst all of the above cases could arguably have some level of relevant personhood properties (e.g. some rationality, some sentience, etc.), they are not typically thought to have the standard level required to be a person and rights-holder (see chapters 3 and 4, 6.1.1, and 6.2.5). They could thus be conceived of as epistemic or borderline marginal cases, in the senses defined above.

We could also include [5] aborigines and [6] convicts as atypical humans.<sup>83</sup> This is because, unlike standard adult humans, they arguably fall outside of the mainstream moral community, and so certain rights may not apply to them (thus making them rights marginal cases, in the sense defined previously). There is not enough space in this thesis to consider each of these atypical human cases. Consequently, in 6.1.1 I will focus on one exemplar case by providing an extended discussion of the personhood and rights of subjects with dementia.

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<sup>82</sup> For [1] see Bortolotti (2007: 153-155), Li (1997), and Strong (2006). Further discussions of the personhood status of embryos and foetuses can also be found in 6.2.5. For [2] see Bortolotti (2007: 156), Griffin (2008: 83-94), and Schechtman (2014: 110-137). Children are also discussed in chapter 3. For [3] see Kittay (2005), Griffin (2008: 83-94), Nelson (1988), and Schechtman (2014: 110-137). For [4] see Griffin (2008: 83-94), and Higgs and Gilleard (2016). Further discussion of subjects with dementia can be found at 6.1.1.

<sup>83</sup> For [5] see Conway-Long (2016), and Readings (2000: 115). For [6] see Ievins and Crewe (2015: 483-489), and Watson (2012).

Nonhumans. Nonhumans are any *biological* lifeform that is not human. Examples include [1] nonhuman animals and, more abstractly, [2] some aliens.<sup>84</sup> On criterialist accounts, nonhumans can be persons if they have whatever properties or qualities we have set as the criteria for personhood (e.g. autonomy, sentience, etc.).<sup>85</sup> For example, we might suppose that an orangutan is a person if it can show rationality by using tools or finding hidden food. Note that the claim here is *not* that *all* nonhuman animals are persons, nor that all nonhuman animals are not persons.<sup>86</sup> It is that *some* nonhuman animals are persons, and they are persons because they meet some criteria for personhood by having relevant personhood properties. I will discuss the personhood and human rights of nonhuman animals further in 4.3 and 6.1.2.

Posthumans. Posthumans are cases where technology has created new nonstandard ways of living which suggest the possibility of new types of person. This could include new machine-based lifeforms, such as [1] robots, and [2] technologically enhanced human

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<sup>84</sup> For [1] see, amongst others, Cochrane (2013), DeGrazia (2002), and Singer (1975). Further discussion of nonhuman animals can also be found in 4.3 and 6.1.2. By [2] I mean extra-terrestrial aliens (rather than ‘political aliens’ or those who have been alienated). For discussions of the potential personhood of extra-terrestrial aliens, see Chappell (2011: 18-20), Griffin (2008: 34-35), McMahan (2008: 98), Puccetti (1968:96), and Schechtman (2014: 134). Sachs (2018) also outlines the ethical questions that could apply to our interactions with extra-terrestrial aliens. Note that in the main text (above), I say ‘some aliens’ rather than ‘all aliens’. This is to allow for the possibility that some aliens could be non-biological lifeforms (e.g. robot aliens).

<sup>85</sup> In 6.2.4 I will argue against the idea that plants and ecosystems (nonhuman biological lifeforms) could be persons with human rights. This is because any properties that they have are not morally relevant. I argue that the same is not true of nonhuman animals (6.1.2), who can have morally relevant personhood properties.

<sup>86</sup> The question ‘which animals might be persons?’ has three obvious possible answers. No nonhuman animals are persons. All nonhuman animals are persons. And some nonhuman animals are persons. Of these, answers one and two are both overly extreme. The first answer requires a complete delineation between human and non-human species, and we have already discussed the problems with this in the humanism section (2.1). Conversely, the second answer is overly inclusive as it seems questionable to suggest that *all* nonhuman animals, regardless of how simple, are persons. This would, for example, make placozoa- the simplest non-parasitic multicellular animal- a person. As placozoa are so simple that they lack any properties that we would typically associate with personhood, it seems like we would want to avoid classing them as persons.



beings, like super-humans.<sup>87</sup> In 6.1.3 I will consider posthumans by arguing for the personhood and human rights of robots.<sup>88</sup>

## **Conclusion**

This chapter introduced the moral concept of personhood. In 2.1 I argued that Charlotte is a person, not because she is a human being (humanism), but because she meets some criteria for personhood in virtue of having relevant qualities or properties, like autonomy and rationality (criterialism). In 2.2 I outlined how, on personhood accounts, persons have a direct moral status of a high bar and a particular sort, and, consequently, are a direct source of moral reasons or claims. On these views, because Charlotte is a direct source of moral reasons or claims, it is possible for others to wrong her. I then drew on bioethics to explain how the respect and/or protection of personhood is an important moral consideration. I ended the section by outlining the structure of the personhood accounts of human rights discussed in later chapters (3-6). Finally, in 2.3 I discussed what marginal cases we ought to consider if we adopt a (criterialist) personhood account of human rights.

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<sup>87</sup> For [1] see Anderson (2012), Coeckelbergh (2010), Neely (2014), and Solum (1992). Further discussion of robots' personhood can be found in 6.1.3. For [2] see Buchanan (2009), and Douglas (2013).

We might also want to consider 'transhuman' cases. These would be cases where human personhood extends beyond the biological human body into nonstandard environments. For example, consider cases of online personhood where a subject 'exists' in a virtual world (like a game, or social media platform). The question in these cases is whether personhood and human rights extend to these online environments.

Whilst interesting, I will not consider such transhuman cases any further in this thesis. This is for reasons of space. In order for a discussion of transhuman cases to be non-trivial, we would need fairly extensive discussions of i) what virtual worlds are and how they work, ii) how real-world moral concepts (like rights) can extend to non-real virtual worlds, iii) how subjects can exist in such virtual worlds (i.e. if and how virtual embodiment is possible), and so on. As this discussion would take up a lot of my thesis word count, it is best saved for a different work where it can be given more focus and space.

<sup>88</sup> Above, I have discussed marginal cases in terms of atypical humans, nonhumans, and posthumans. It is worth noting that there could be marginal cases who belong to more than one of these groups. For example, human-animal chimeras could have a combination of human and nonhuman animal properties and capacities. For a lucid discussion of chimeras, and the ethical questions that they raise, see DeGrazia (2007). Similarly, we might also consider 'everyday cyborgs' who are humans with medical or technological implants. Unlike the superhumans discussed in the 'posthumans' section (above), the implants given to everyday cyborgs typically enable them to have standard abilities and capabilities, rather than superhuman capabilities. For a good discussion of 'everyday cyborgs', see Quigley and Ayihongbe (2018).

I argued that atypical humans (e.g. those with dementia), nonhumans (e.g. nonhuman animals), and posthumans (e.g. robots) are all marginal cases, in the sense that all could potentially meet some criteria for being a person with human rights.

The remainder of this thesis will discuss how we ought to respond to such marginal cases. Chapters 3 and 4 will consider opposing arguments whereby marginal cases either are not persons and do not have human rights (chapter 3), or are persons and have all basic human rights (chapter 4). I will argue that neither of these views is satisfactory. Consequently, in chapters 5 and 6 I will defend my new, pluralistic personhood account, on which marginal cases have some (degree of) personhood and some human rights.

**PART TWO: CRITICAL ASSESSMENTS OF CURRENT BINARY  
RESPONSES TO THE MARGINAL CASES**

## CHAPTER THREE. BINARY PERSONHOOD AND THE EXCLUSION OF MARGINAL CASES

### Introduction

Part one of this thesis explained the notions of ‘human rights’ (chapter 1), ‘personhood’ (2.1 & 2.2), and ‘marginal cases’ (2.3). Part two (chapters 3 and 4) will outline binary personhood accounts of human rights, and critically assess their responses to the marginal cases. Binary accounts characteristically use some threshold conception of personhood that, as a consequence, either excludes most marginal cases (chapter 3) or includes them (chapter 4). In what follows, I will conduct a two-part analysis of exemplar binary accounts. First, I will review what a given account says about the marginal cases. This will involve examining the theory of personhood used to ground the binary account. I will then explain which marginal cases, if any, are persons with human rights according to this theory of personhood. Second, I will evaluate whether the accounts’ ethical consequences (excluding or including marginal cases) are defensible. To do this, I will question whether marginal cases have an *appropriate* amount of moral protection on the binary accounts. I will ultimately conclude that they do not as, on binary accounts, marginal cases either have too little moral protection (chapters 3 and 4) or too much moral protection (chapter 4). This will set up the discussions of part three (chapters 5 and 6) which will explain how my non-binary account can do better. I will argue that my account offers a ‘Goldilocks Approach’, whereby the marginal cases have moral protections that are ‘just right’; marginal cases have neither too much nor too little moral protection.

This chapter (chapter 3) will outline and evaluate exclusionary binary accounts. In 3.1 I explain how exclusionary theorists introduce a strict binary threshold for personhood which, as a consequence, justifies the exclusion of marginal cases. As marginal cases do

not meet the threshold, they *cannot* be persons with human rights. In 3.2 I outline a permissible mistreatment worry generated by this exclusion. If marginal cases are not persons with human rights, it might seem like we are permitted to (mis)treat them in certain ways (e.g. curtailing their liberty, etc.). In 3.3 I consider the two standard responses that exclusionary binary theorists give to this worry. They make exceptions, whereby some marginal cases are granted some restricted rights, or they say that marginal cases have some other moral protections which are supposedly, at least in practice, equivalent to human rights. Each response is intended to show why it is, in fact, *impermissible* to mistreat the marginal cases, on the exclusionary accounts. In 3.4 I argue that neither of the outlined responses is defensible. The former solution (making exceptions) relies on problematic arbitrary discrimination amongst the marginal cases. The latter solution (other moral protections) entails either that marginal cases ought to have human rights (and so should not be excluded), or that at least some marginal cases are not morally protected against permissible mistreatment. Neither of these outcomes allows us to retain an exclusionary binary view of personhood whilst avoiding the permissible mistreatment worry. I conclude that we cannot use exclusionary binary views of personhood to ground human rights.

### **3.1 Exclusionary binary accounts**

This section introduces the binary personhood accounts and explains how they attempt to justify excluding marginal cases from having human rights. I consider how exclusionary binary accounts use threshold conceptions of personhood which, as a consequence, limit the scope of ‘persons’ and ‘rights-holders’ to standard human agents.<sup>89</sup> By ‘standard

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<sup>89</sup> I will be using the term ‘standard human agents’ throughout this chapter. There are other terms which could be used, such as James Griffin’s favoured “normal human agents” (Griffin 2008: 38). I have chosen to avoid this term as ‘normal’ seems overly evaluative and would have the implication that marginal cases

human agents' I mean any human being who meets the threshold conception of personhood (however defined) and is consequently a person and rights-holder for human rights on these accounts. I explain how the exclusion of marginal cases relies on a sense of othering; as marginal cases do not meet the threshold for personhood, they are not within the class of persons with human rights, and can permissibly be treated *differently* to the standard human agent.<sup>90</sup>

The exclusionary binary thresholds work by identifying some unique, valuable feature of standard human agents and arguing that it is this feature that is required to be a person and, by doing so, this feature also grounds human rights.<sup>91</sup> In what follows, I suggest that exclusionary binary views *actually* focus on identifying features that are required to be a certain *type* of human person. Namely, the exclusionary binary views imply that the 'standard human agent' can *only* be a *standard* human *adult*, and the features that they identify presuppose a level of psychological competency on the part of the agent in order to ensure this. To demonstrate this, we can look at the threshold features identified by both Alan Gewirth (1978a, 1978b, 1984) and James Griffin (2008).<sup>92</sup>

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are somehow abnormal. This would introduce a negative bias where we do not want one. Consequently, I will be using the less evaluative 'standard human agents'.

<sup>90</sup> As I will argue below, the central idea that we can extract from this exclusionary literature is that the correct rights-holders for human rights are persons, and that persons will typically be standard human agents. Here, persons as standard human agents are taken to be a subset of human beings.

<sup>91</sup> For a discussion of personhood and an overview of the structure of personhood accounts of human rights (like the exclusionary binary accounts) see 2.1 and 2.2.

<sup>92</sup> I am focusing on Gewirth and Griffin because a) their explanations of, what I am calling, exclusionary binary accounts are clear and detailed, and b) their views on human rights have been extensively discussed within the literature and are viewed as 'key texts'. For discussions of Gewirth, see Bauhn (2016), Brännmark (2017: 177), Gould (2015: 180-187), Kohen (2005), and Pojman (1992: 616-618). For discussions of Griffin, see Barry and Southwood (2011), Brännmark (2017: 177), Buchanan (2010), Cochrane (2013: 660-661), Crisp (2014), Cruft (2014, 2015), Gould (2015), Hooker (2014), Kauppinen (2010), Liao (2015), Miller (2014), Nickel (2014), Reidy (2014), Tasioulas (2002, 2014, 2015: 64-70), and Wellman (2014).

Gewirth and Griffin are, however, not the only exclusionary binary theorists. For example, other leading human rights theorists, like Pogge (1995: 107), could also be viewed as exclusionary, in the sense that they accept that rights-holders for human rights are all and only adult humans with certain psychological capacities, like rationality.

For Gewirth, the uniquely valuable feature of standard human agents is their ability to perform *human actions* (1978a: 1150, 1978b: 176, 1984: 15). For Griffin, it is *the capacity for normative agency* which distinctly characterises the standard human agent (2008: 33-36, 44-46). Whilst these qualities are terminologically different, ‘human action’ and ‘normative agency’ refer to similar ideas. Agents that have these qualities will act in certain ways; they will be able to reflect on conceptions of the good life, rationally choose amongst different courses of action and, having made a choice, autonomously engage in outcome-oriented behaviours.<sup>93</sup> It is the possession of these qualities that is supposedly necessary for personhood, on the exclusionary binary views. To understand my claim that these threshold qualities seem to presuppose a level of psychological competency on the part of the agent, we can look at the underlying ‘goods’ that Gewirth and Griffin claim are necessary for the full use of the personhood properties. I will refer to these as ‘goods of choice’ and ‘goods of resources’.

‘Goods of choice’ refer to the idea that the agent has made an autonomous choice to pursue some goal *and* is left at liberty to pursue that goal. For example, consider the act of getting married. An agent (call her Sally) has a good of choice if she has voluntarily consented to get married, and is allowed to get married (if she so desires). Goods of choice are reflected in Gewirth’s ‘freedom’ condition for human action (Gewirth 1978b: 103, 1984: 2, 15) and Griffin’s ‘autonomy’ and ‘liberty’ conditions for normative agency (Griffin 2008: 33).

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<sup>93</sup> Due to this focus on rational agency, exclusionary binary accounts have similarities to will theories of rights. For a definition of will theory, and an explanation as to why it will not be discussed in this thesis, see footnote 43 at the end of chapter 1.

‘Goods of resources’ refer to the idea that Sally has the minimum abilities and resources needed to successfully implement a chosen action. For example, in our marriage case, this would entail that Sally is legally able to get married and has access to a marriage licence and officiant. Goods of resources are reflected in Gewirth’s ‘well-being’ condition for human action (Gewirth 1978b: 103, 1984: 2, 15) and Griffin’s ‘minimum provision’ condition for normative agency (Griffin 2008: 33).

Gewirth and Griffin argue that these underlying goods are needed for Sally to fully be able to do human action and to be a normative agent respectively. Central to these underlying goods are the notions of ‘agency’ and ‘autonomous choice’. Unless Sally can choose to pursue certain actions, she cannot be said to have the ability to perform human actions or to have the capacity for normative agency. Importantly, in order to make these autonomous choices, Sally must have high-level reflective abilities; she must be able to reflect on her choices, and give reasons as to why one conception of the good life should be pursued over others. Because exclusionary binary views have these underlying requirements for autonomy and reflection, they set the threshold for personhood at a level that automatically excludes most (human) marginal cases. For example, Griffin (2008: 83) emphasises that the following subjects are *not* persons: human foetuses, human infants, children, those with severe psychological impairments, and sufferers of dementia. This is because all of these subjects arguably lack these reflective abilities, and as they therefore cannot make autonomous choices, they are not persons on the exclusionary binary view.



The above discussion has important implications for human rights. On the binary personhood views, human rights protect what is required to be a person.<sup>94</sup> We have already established that this equates to having the ability for human action on Gewirth's view, and being a normative agent, on Griffin's view. As explained, to have these qualities (and meet the personhood threshold), the agent must have the underlying goods (autonomy etc.). On the binary views, human rights are understood as entitling relevant agents to these underlying goods, as it is these goods that enable personhood (Gewirth, 1984; Griffin, 2008). On the above views, the marginal cases do not meet the relevant binary threshold for personhood and so do not have human rights as a result. In the next section, I explain how this exclusionary view of marginal cases generates a permissible mistreatment worry.

### **3.2 Moral worries about exclusion**

The previous section outlined an exclusionary binary view of personhood. This section will explain what follows from the 'exclusionary' and 'binary' elements of this view. I begin by detailing two ways in which we could understand the use of binary criteria of personhood. We could understand the binary accounts as i) using a binary personhood property or ii) using a binary threshold for personhood. I explain that, on either understanding, marginal cases do not meet the relevant criterion and are not persons with human rights, on the exclusionary binary accounts.<sup>95</sup> I then explain two worries that follow from this exclusionary view; both of which are concerned with the permissible mistreatment of the marginal cases.

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<sup>94</sup> For an explanation of why the protection of personhood is morally significant in this way, see 2.2.

<sup>95</sup> For a discussion of the marginal cases, see 2.3.

### 3.2.1 Binary personhood and the marginal cases

Above I argued that exclusionary theories work by grounding human rights in a binary criterion of personhood. By ‘binary criterion of personhood’ I mean that the criterion of personhood demarcates between those who are persons and those who are not. Personhood, on this view, is all-or-nothing. When we examine the exclusionary theories presented in 3.1, it seems that there are two ways in which we could understand their use of binary criteria of personhood. First, we could see them as introducing a *binary personhood property*. This generates the following binary criteria of personhood. For Gewirth, a person is someone with the ability to do human action. For Griffin, a person is someone who has normative agency. On this understanding, we have a clear criterion of personhood, and marginal cases are excluded because they do not possess the named binary personhood property.

However, this first understanding only works if the named personhood properties (normative agency and human action) are binary (all-or-nothing). This has been challenged by Douglas Husak (1984: 8-10), John Tasioulas (2014: 22-30), and David Reidy (2014: 66). All argue that the binary personhood properties used in exclusionary accounts are problematically indeterminate as it is unclear how much of the named property one needs in order to be a person. Husak (1984: 8-10) explains that this problem occurs because personhood properties are scalar rather than binary. For example, Sally can be more or less of a normative agent, or be more or less able to do human action.<sup>96</sup>

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<sup>96</sup> I will consider non-binary personhood throughout chapters 5 and 6.

To counter this problem, we could view exclusionary accounts as using a binary *threshold* for personhood, rather than binary personhood properties. On this view, the personhood properties are the same. Sally is a person because she is a normative agent, or because she has the ability to do human action. The binary nature of the account comes in determining the *amount* of a named personhood property required to be a person. Here, we could accept that exclusionary theorists set a high binary threshold for personhood, whereby Sally is only a person if she possesses the personhood property to x degree. Taking Gewirth as an example, we could still accept that a person is someone who does human actions. The only difference (to the first understanding, above) is that we are now accepting that human action can come in degrees. The degree required to be a person will be at the threshold level of a standard human agent (3.1, above). Any agent who does not meet the threshold is not a person and does not have human rights. As most marginal cases would not meet the threshold for personhood, this second understanding allows exclusionary accounts to exclude marginal cases from having human rights, whilst responding to the objection that personhood properties are scalar.<sup>97</sup>

This second understanding is compatible with *both* of our exemplar exclusionary accounts (Gewirth and Griffin, 3.1). Indeed, the notion of a ‘binary threshold for personhood’ plays an important role in their responses to the marginal cases (3.3). For now, though, we do not need to determine which of the two ways of understanding the binary nature of exclusionary accounts (above) is correct. This is because either view has the same consequences for the marginal cases. To see this, let us consider how

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<sup>97</sup> It is important to note that, whilst this second understanding does allow for scalar degrees of personhood, the account generated is notably different to the non-binary personhood view presented in Chapters 5 and 6. This is because our second understanding (above) still utilises a binary threshold for personhood which excludes marginal cases from being persons or having human rights. The non-binary personhood view of Chapters 5 and 6 does not invoke an exclusionary threshold.

exclusionary binary views affect the marginal cases presented in 2.3: epistemic marginal cases, borderline marginal cases, and rights marginal cases.

### Epistemic marginal cases

2.3 defined epistemic marginal cases as cases where there is epistemic uncertainty as to whether a subject is a person. Examples include nonhumans (animals and aliens) and posthumans (robots and superhumans). If we recalibrate this definition to take account of our two understandings of ‘binary criterion of personhood’, we get the following result. Epistemic marginal cases will be cases where we do not know if an agent a) possesses a binary personhood property, or b) crosses a binary threshold for personhood. With this definition in mind, there are two ways that exclusionary theorists could respond to epistemic marginal cases: clarification and omission.

In terms of clarification, our exclusionary theorists could argue that binary criteria of personhood remove epistemic uncertainty by clarifying the necessary conditions of personhood. On a binary view, there is a clear demarcation between those who are persons and those who are not. If marginal cases cannot meet this binary criterion, we can say with certainty that they are not persons. For example, we *know* that very simple nonhuman animals (like placozoa) cannot meet a binary criterion of personhood as they cannot perform human actions or display normative agency (in the sense discussed in 3.1).

However, this strategy only works for those epistemic marginal cases that we *know* cannot (currently) meet a binary criterion of personhood. Difficulties remain for those epistemic marginal cases who could *possibly* meet a binary criterion of personhood, for example,

robots and complex nonhuman animals (like apes).<sup>98</sup> In these cases, we do not currently know enough about the marginal cases' capabilities to claim *with certainty* that they cannot meet a binary criterion of personhood. It thus remains an open question as to whether robots and complex nonhuman animals can be normative agents, or have the ability to perform human action.

To avoid the above epistemic uncertainty, our exclusionary theorists could simply adopt a policy of omitting nonhuman marginal cases outright. To do this, they could argue that all (exclusionary) binary criteria of personhood are defined in terms of the standard human agent. Consequently, we know that nonhumans cannot be persons in the relevant sense because they can never meet the (human-centric) binary criterion of personhood. Thus, regardless of whether a nonhuman epistemic marginal case possesses a relevant personhood property, it can be excluded as a nonperson on the binary criterion of personhood. This solution would, however, have the problems with speciesism discussed in 2.1.<sup>99</sup>

### Borderline marginal cases

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<sup>98</sup> I will discuss the personhood of nonhuman animals and robots in 6.1.2 and 6.1.3 respectively.

<sup>99</sup> My opponent could respond that omission is not the only viable option in cases of moral uncertainty. Instead, my opponent may want to suggest that the exclusionary binary theorists could err on the side of caution and count our nonhuman epistemic marginal cases as persons (just in case they are). In response, I suggest that this 'err on the side of caution' approach is not one that our exclusionary binary theorists would be comfortable adopting. This is well reflected in James Griffin's (2008: 34-35) discussion of aliens. In this discussion, Griffin considers whether we would have to extend normative agency to aliens if they could potentially meet his criteria for normative agency. He argues that "...the kind of autonomy we are interested in will reflect the peculiarly human way of experiencing and conceptualising the world; it will be shaped by characteristic human concerns and sense of importance. We do not know what it is like to be Martian or Venusian. Our aim must be the more modest one of understanding not the autonomy of a spare, abstract self, but the autonomy of *Homo Sapiens*. So by the word 'human' in the phrase 'human rights' we should mean, roughly, a functioning human agent" (ibid). To me, this suggests an unwillingness to err on the side of caution and count nonhumans as persons, just in case.

A similar policy of exclusion could be adopted for borderline marginal cases. 2.3 defined borderline marginal cases as cases where there is no fact of the matter whether a subject meets some threshold conception of personhood. It is generally atypical humans (e.g. children, those with psychological impairments, etc.) who are borderline marginal cases. When we explain borderline marginal cases in terms of our binary criterion of personhood, we get the following definition. Borderline marginal cases are cases where there is no fact of the matter whether a subject a) has a binary personhood property, or b) has a scalar personhood property to a degree sufficient to pass the binary threshold for personhood. For example, at certain stages of degenerative psychological illnesses (like dementia), there is arguably no fact of the matter whether a subject can display normative agency, or display it to a notable threshold level.<sup>100</sup> In response to such borderline marginal cases, exclusionary theorists could emphasise that binary criteria of personhood are all-or-nothing. To be on the ‘all’ side of the binary divide, it must be a fact of the matter that the subject meets the binary criterion of personhood. As this cannot be said about borderline marginal cases, all borderline marginal cases can be excluded from being persons on an exclusionary binary criterion of personhood.<sup>101</sup>

### Rights marginal cases

2.3 defined rights marginal cases as cases where the subject is clearly a person, but it is unclear whether the subject also has human rights. Examples include aborigines and convicts, who may be viewed as ‘atypical’ because, unlike standard human agents, they

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<sup>100</sup> I will discuss the personhood of subjects with dementia in 6.1.1.

<sup>101</sup> There are two other alternatives here. First, they could include all borderline marginal cases. This would entail adopting an inclusive binary view (chapter 4). Second, they could include only *some* borderline marginal cases. This would, however, be arbitrary.

arguably fall outside of the mainstream moral community and so certain rights may not apply to them. When we examine rights marginal cases using our definitions of ‘binary criterion of personhood’ we get the following claim. Rights marginal cases are cases who *do* a) possess a binary personhood property, or b) surpass a binary threshold for personhood, *but* whose status as a rights-holder for human rights is in question for some other reason. There are two ways in which exclusionary theorists could respond to rights marginal cases: inclusion or exclusion. This is problematic as it is unclear which response exclusionary theorists *should* take.

In terms of inclusion, exclusionary theorists could argue that if a rights marginal case meets the binary criterion of personhood, then they are automatically a person with human rights. For example, we can suppose that convicts can perform human actions (Gewirth), and be normative agents (Griffin). If all that is required to have human rights is to meet the binary criterion of personhood, then the correct response to rights marginal cases may be to include them in our human rights theory.<sup>102</sup>

Alternatively, exclusionary theorists could argue that human rights are in some sense conditional, and that rights marginal cases have lost their status as human rights claimants. As David Miller (2012: 1-25) argues, this could follow if a subject voluntarily waives their human rights, forfeits their human rights as a result of their actions, or has their human rights restricted as a result of a situation, e.g. war. In our convict example, we could suppose that a convict’s crime causes them to forfeit their human rights. To make this position stronger, exclusionary theorists could argue that this forfeit occurs because

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<sup>102</sup> Griffin seems to support this view. He argues: “The criminal, in virtue of the crime, does not cease being human in the relevant sense – namely, a normative agent- so the criminal, it seems, retains all human rights, including rights to life and liberty” (Griffin 2008: 65).

the convict no longer meets the binary criterion of personhood *in the right sort of way* to be a person with human rights. They could argue that the binary criterion is set at the level of a standard human agent within the mainstream moral community. By performing a crime, the convict falls outside of the mainstream moral community, and so does not conform to the binary criterion. On this view, it could be permissible to exclude rights marginal cases from being persons with human rights.

### **3.2.2 Exclusion and the permissible mistreatment worry**

Above I explained how, on exclusionary binary accounts, most marginal cases fail to meet a binary criterion of personhood and are consequently excluded from having human rights. Whilst this definitive exclusionary stance does ensure that exclusionary theorists have a clear, determinate position on who has human rights, it generates moral concerns about the treatment of the marginal cases. In this subsection, I will consider one minor and one major moral worry.

It is notable that the classification of marginal cases that I am using (2.3) is broader than most theorists accept. Standard classifications would typically be restricted to what I am calling borderline marginal cases – atypical humans, such as children, those with dementia, etc.<sup>103</sup> By allowing for epistemic and rights marginal cases, I introduce new non-standard human marginal cases (like aborigines) and nonhuman marginal cases (like nonhuman animals and robots). A minor worry is that exclusionary accounts remove many of our marginal cases (like nonhuman animals) from consideration before we even begin.<sup>104</sup> This is not surprising as exclusionary accounts never claim to be considering

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<sup>103</sup> For example, Griffin (2008: 83) only considers human borderline marginal cases. See 3.1, above.

<sup>104</sup> This is reflected in the following quote by Griffin: “Perhaps Great Apes share more of our nature than we used to think, though we have no evidence that any species but *Homo Sapiens* can form and pursue conceptions of a worthwhile life. But there might be intelligent creatures elsewhere in the universe also



epistemic or rights marginal cases per se. In chapters 5 and 6, I will argue that there is no justification for not considering these further marginal cases.<sup>105</sup> Thus, I claim that exclusionary accounts do not consider *all* marginal cases.

A more substantial moral worry comes from the act of exclusion itself. The last section concluded with the claim that, according to the exclusionary binary views, marginal cases do not possess the necessary threshold quality for personhood (such as normative agency or human action), and consequently fail to count as persons with human rights. This position generates a permissible mistreatment worry. If marginal cases – including children and those with psychological impairments – are *not* persons with human rights, then it may seem like we are potentially permitted to (mis)treat them, on the exclusionary binary accounts. Here, I take it that an account *permits* the mistreatment of marginal cases if it fails to provide them with an appropriate amount of protection against certain important threats (e.g. threats to liberty, to life, etc.). This mistreatment will be *wrong* in cases where the marginal cases intuitively *ought* to have these protections.

To explain the above further, we can begin by examining cases where a marginal case *has* had their human rights ignored and have consequently been mistreated. A notable example of this is the so-called ‘Bournewood’ case (AgeUK 2011: 26; Equality and Human Rights Commission 2016). This case concerns an autistic man (HL) with severe psychological impairments that prevent him from being able to communicate. Because of

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capable of such deliberation and action. If so, we should have to consider how *human* rights would have to be adapted to fit them” (Griffin 2008: 32). Here, Griffin emphasises that it is *only* human beings who he considers to currently be persons, and that, even if nonhumans were persons, then they would have to have some adapted human rights, rather than the human rights that he is presently discussing. I challenge this claim in 6.1.2 and 6.1.3.

<sup>105</sup> There are some *inclusive* binary accounts that do consider nonhuman animals. I will discuss such accounts in 4.3.

this inability to communicate, HL cannot consent or object to medical treatment. Following an incident at day care, HL was sedated and detained at Bournemouth Hospital. HL's carers were prevented from seeing him or taking him home, and HL was detained from July-December 1997 (Equality and Human Rights Commission 2016). This detainment did not follow the procedural safeguards of the Mental Health Act (and so failed to treat HL in an appropriate manner). "The European Court of Human Rights found this lack of procedural safeguards to be a breach of the right to liberty" (AgeUK 2011: 26).

On the exclusionary binary accounts, we can imagine human beings who are similar to HL, and who do not meet the threshold for personhood. We can also imagine cases where, like in the example above, these human beings are treated in ways that we would typically see as human rights violations (having their privacy violated, being unlawfully detained, etc.). On the exclusionary binary accounts, however, these acts of mistreatment are *not* human rights violations because, on these accounts, marginal cases do not have human rights to violate.

If the exclusionary binary accounts want to argue that such mistreatment is wrong (and they do), then they need to explain why we are not permitted to (mis)treat the marginal cases in the ways described above. They need to explain how their accounts can protect marginal cases *without* granting them full personhood or human rights. In what follows I will argue that their attempts to provide this explanation are unsatisfactory, and so the above permissible mistreatment worry stands.<sup>106</sup>

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<sup>106</sup> I discuss permissible mistreatment worries further in 6.2.2. There, I argue that my account (chapter 5) does *not* allow for the permissible mistreatment of marginal cases.

### 3.3 Responses to the permissible mistreatment worry

The previous section outlined how the exclusion of marginal cases generates a permissible mistreatment worry. To offer an effective solution to the problem of marginal cases, exclusionary accounts must respond to this objection. They must stipulate that their treatment of marginal cases is justifiable, in the sense that marginal cases have an *appropriate* amount of moral protection.<sup>107</sup> Exclusionary theorists typically make one of two responses to our permissible mistreatment worry. First, they make exceptions, whereby some marginal cases are granted some restricted rights. Second, they argue that marginal cases have some other moral protections which are supposedly, at least in practice, equivalent to human rights. I outline both of these solutions below. Both solutions work by trying to prevent marginal cases from being susceptible to permissible mistreatment. This is key to my argument. If the binary solutions *cannot* avoid the above permissible mistreatment worry, then binary views have not resolved the problem of marginal cases. I argue for this conclusion in 3.4.

#### Making Exceptions

The making exceptions response follows from a tension between two claims. First, because marginal cases do not meet the threshold for personhood, they fail to count as persons with human rights. Second, there are some marginal cases – typically children –

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<sup>107</sup> By ‘moral protection’ I mean that others have moral duties to treat the marginal cases in a certain way. My opponent could argue that exclusionary theorists could bite the bullet and say that the appropriate amount of moral protection for marginal cases is no moral protection. In this case, the above examples are not mistreatment because we do not have moral duties to treat the marginal cases in certain ways (not sedating them, not detaining them, etc.) This would be a very extreme view to take, and is not one that I think any reasonable exclusionary theorist would want to adopt as it would require them to accept that it is permissible to treat children, those with psychological impairments, etc. any way that we choose to.

whom we *want* to have human rights.<sup>108</sup> This is because we are particularly concerned with the mistreatment of children (see Griffin 2008: 83), and so it is counterintuitive to present a theory that seems to *permit* their mistreatment. Consequently, to allow children to have human rights *without* abandoning the exclusionary binary view, exclusionary theorists must explain *why* we can make an exception for children. This explanation has two parts, discussed below.

First, exclusionary theorists must explain why there is something special about children that gives them, but not all other marginal cases, human rights. Alan Gewirth (1978b: 140) explains this in terms of children being “prospective purposive agents” who, unlike potential agents, already have latent abilities for meeting the threshold qualities.<sup>109</sup> In standard circumstances, children *will* become normative agents (Griffin 2008: 94-95) and *will* have the ability to do human actions (Gewirth 1978b: 140-142). On this view, children are exceptional – in the sense of being a marginal case that can, somewhat, be classed as persons with human rights – because they have a degree of the relevant personhood properties, and will gain further personhood properties as they mature.

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<sup>108</sup> Note that this claim does not necessarily entail that children would have *all* human rights. We can accept that children could have some important human rights (e.g. a right to education and a right against torture) but lack some other human rights that adults have (e.g. a right to vote). The idea that there are moral reasons as to why children have some, but not all, human rights has been well-discussed by Archard (2018), and Brighouse (2002). For a discussion of the difficulties of determining what human rights older children should have, see Lundberg and Lind (2017).

<sup>109</sup> Unlike Griffin (2008: 94-95), Gewirth (1978b: 141-142) does not say that it is *only* children who are prospective agents. Gewirth argues that those with psychological impairments may have a low degree of the relevant personhood properties, and that this personhood should be respected only to the extent that it does not interfere with the personhood of standard human agents. Similarly, Gewirth (1978b: 142-143) argues that foetuses have an even lower level of purposive agency and, in cases of rights conflict, the interests of the mother (a standard human agent) will always outweigh those of the foetus. It is only children who Gewirth takes to have the degree of prospective agency needed to be a self-standing person. Unlike the foetus or those with psychological impairments, Gewirth does not discuss the personhood of the child as being relative or subservient to that of the standard human adult (Gewirth 1978b: 141). Because children *are* the clearest case of prospective agency/personhood on Gewirth’s account, I will focus exclusively on his claim that children can become persons and rights-holders.

Second, exclusionary theorists must explain what human rights children actually have. Both Griffin (2008: 94-95) and Gewirth (1978b: 122, 140-145) accept that children should have human rights that are proportionate to the amount of personhood properties that the child possesses. There are two ways in which we can understand this idea of proportional rights. Griffin argues that children have *fewer* human rights than the standard human adult but, when they do have a right, their rights claims are *just as strong*. In contrast, Gewirth argues that children (potentially) have *all the same* human rights as the standard human adult, but their rights claims are comparatively *weaker*. At this point, it does not matter which of these views is correct. The point of both arguments is simply to demonstrate that children have an *appropriate* amount of moral protection. On the binary views, due to their relative levels of personhood properties, children should have fewer human rights than a standard human adult, but more human rights than other (non-exceptional) marginal cases. *Importantly, these proportional rights supposedly ensure that children, as exceptional cases, have (some) human rights which protect against possible mistreatment.*

#### Other Moral Protections

The other moral protections solution takes a more global view. Instead of arguing that *some* exceptional marginal cases have some human rights, this view claims that *all* marginal cases have other moral protections. This solution is suggested by James Griffin (2008: 83), who argues as follows: “[marginal cases may]...have certain general moral rights simply in virtue of being human – only analogous to human rights, it may be, but for all practical purposes just as good”. This view depends on the idea that there exist some general moral rights that are practically equivalent to human rights. Such practical

equivalency is necessary for these other moral protections to be ‘just as good’ as human rights. To understand this solution, we thus need to determine what this notion of ‘practical equivalency’ entails. This is important as Griffin fails to fully explain the concept himself.

Moral human rights are generally thought to correspond to strong moral duties (see chapter 1). We can assume that, for the other moral rights to be practically equivalent to human rights, they must correspond to equally strong moral duties as human rights. It is these moral duties that ensure that, in practice, rights protections are recognised and enforced. Griffin argues that human rights correspond to strong moral duties as a result of being grounded in the intrinsically valuable concept of normative agency. It is wrong to mistreat a normative agent, and for this reason normative agents have human rights (above). For the other moral rights to be practically equivalent to human rights, they must also possess this moral weight. To do this, the other moral protections must be grounded in some ethically substantive property.

It is clear that this ethically substantive property cannot be normative agency. There are two reasons for this. First, Griffin has already explained that marginal cases cannot meet his binary threshold for normative agency (3.1, above). Grounding the moral rights of marginal cases in normative agency would, therefore, exclude marginal cases from having these other moral rights. This is counterproductive. Second, if the other moral rights were grounded in normative agency, and Griffin claimed that marginal cases have these other moral rights, then this would entail that marginal cases also have the requisite normative agency for human rights. There would be no reason to *not* give marginal cases human rights rather than practically equivalent moral rights.

To retain the distinction between human rights and the other moral rights, Griffin must ground the other moral rights in a different ethically substantive property. A strong candidate for this property is sentience (when combined with the ability to feel pain).<sup>110</sup> To see this, we can look at the arguments of Peter Singer (2011). Singer argues that sentience is a necessary condition of a being having moral status. This is because only sentient beings are conscious of pain, and a subject's ability to experience pain and suffering generates weighty moral concerns and, on Singer's view, moral protections.<sup>111</sup> If Singer's arguments are correct, then sentience is ethically substantive, and so we could use sentience to ground the other moral rights of marginal cases. *On Griffin's view, if a marginal case has these other moral rights, then they are no more at risk of mistreatment than if they had human rights.*

### **3.4 Problems with the exclusionary responses**

3.3 summarised two exclusionary solutions to the problem of marginal cases. Whilst the 'making exceptions' and 'other moral protections' solutions recommend different responses to the marginal cases, both solutions work on the same underlying mechanics. Binary theorists accepting either solution are attempting to argue for two claims: i) that marginal cases are not (full) persons with (full) human rights and ii) that marginal cases are morally protected against permissible mistreatment. This section will argue that *neither* exclusionary solution works. To do this, I critically assess both the making exceptions solution (3.4.1) and the other moral protections solution (3.4.2) and argue that there is a dilemma that affects both solutions. On horn one of the dilemma, marginal cases are morally protected against permissible mistreatment but only because they are persons

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<sup>110</sup> I discuss sentience views in more depth in 4.3.

<sup>111</sup> Sentience is not the only ethically substantive property that could be used here. We could also use agency, self-awareness, the capacity to have interests, emotions, language, etc.

with human rights (refuting claim i, above). On horn two, marginal cases are not persons with human rights, but are also not sufficiently morally protected against permissible mistreatment (refuting claim ii, above).

### **3.4.1 Making exceptions and the problem of arbitrary discrimination**

To recap, the making exceptions response works by making three claims. First, standard humans have some personhood property (hereafter property ‘P’) that gives them human rights. Second, marginal cases do not have the property P. Third, some marginal cases have some other property (hereafter property ‘Q’) which makes them an exception and allows them to have human rights. Here, there need not be only one property that plays the role of property Q; there could be a disjunction of multiple properties, any one of which is sufficient to play this role.

To clarify the above argument, let us imagine the following situation. Chris is a standard human adult with the property P. Amy is a marginal case who is an exception and thus she has the property Q but not the property P. Brian, in contrast, is a marginal case who does not have the property Q nor the property P, and thus he is not an exception. For the making exceptions response to work, we must have some account of what the property Q is and why it is morally significant enough to give the property-holder some human rights.

One option would be to suppose that Amy stands in some significant relation to being a standard human being with human rights (like Chris). On this view, we could suppose that the property Q is a specific relational property that consists of the fact that Amy will develop the property P in the future (for simplicity I will hereafter refer to this as ‘the



property of becoming a person’).<sup>112</sup> For example, suppose that property P is normative agency. Property Q would then be the capacity to *become* a normative agent at some point. If Amy possesses the property Q, we can then be reasonably certain that she will have the property P (normative agency) in the future. Property Q thus highlights Amy’s potential. One day Amy will be like Chris; she will have the property P and be a person with human rights. In contrast, because Brian does not possess the property Q, he will never come to have the property P, for example, because he has advanced dementia and so lacks the capacity for normative agency. As Brian does not have potential personhood, he is not an exception, according to the view under consideration.

The difficulty with this option is that in all other respects Amy and Brian could be exactly alike. For example, both could have the same cognitive abilities, they could be equally sentient, and they could interact with others in the same way. Importantly, neither Amy nor Brian has personhood (property P) now. This means that the property Q must do all the work to justify treating Amy and Brian differently. I argue that the property Q, understood in the way explained above, cannot be substantial enough to justify this difference in treatment. There are two main reasons for this, explained below.

The first problem with the above proposal is that, in order for it to succeed, we must accept that Amy has the status of a rights-holder because she is a potential person (as a result of having the property Q). In opposition to this view, Michael Tooley (1972) has argued that potential personhood, by itself, does not give a human being human rights.<sup>113</sup> This is because if potential personhood were to be sufficient for human rights, then our

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<sup>112</sup> I discuss similar views in 6.2.5.

<sup>113</sup> A similar argument is presented by Warren (1973).

human rights theories would be over-inclusive and would lead to absurd consequences. To explain this, Tooley considers a case in which a kitten could be injected with a chemical that would allow it to possess the capacities for human personhood, and as a result the kitten would be a potential person. He explains that, if all potential persons had a right not to be killed, then the kitten would have extensive human rights protections.<sup>114</sup> As most of us would not be willing to accept this outcome, it seems like we must accept that potential persons do not have human rights simply because they are potential persons. If this is so, then we can question whether property Q (potential personhood) is sufficient to give Amy human rights.

The second problem with the above potentiality view is that it leads to unjust discrimination. The above assumes that the property Q, consisting merely of potential, is ethically weighty because having it means that Amy will gradually *gain* personhood and human rights (both of which are, themselves, morally important). The standard way of presenting this is that Amy is a child, and her personhood and rights will both increase as she matures and develops her abilities (see 3.3). However, this ignores that the converse could also happen. To see this, suppose that Brian has advanced dementia. Like Amy, Brian does not have the property P and so does not meet the threshold for being a person with human rights. However, prior to developing dementia, Brian did meet this threshold and *was* a person with human rights. In this sense, Brian also stands in a relation to being a standard human being with human rights. Whereas Amy is gaining the property P and

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<sup>114</sup> Tooley's arguments are controversial and have been extensively discussed within the abortion literature. For a good summary of some of the responses to Tooley's position, see Tushnet and Seidman (1986).

will *become* a person with human rights, Brian *was* a person with human rights but is now gradually losing the property P (and losing his personhood and human rights).<sup>115</sup>

In the above example, Amy and Brian have all the same properties, except for the direction of travel of P – Amy gains the property P, whilst Brian loses the property P. On the exclusionary binary views discussed above, we would need to accept that this difference in direction of travel is morally significant. This is because, on these views, we must be able to state that Amy gains human rights as she gains the property P, but that Brian is not similarly exceptional and has no human rights.<sup>116</sup> The difficulty here is that it is not clear why this should be the case. There is nothing inherently morally significant about the direction of travel – going up or down a scale. Because of this, and because Amy and Brian *do* have all the same other properties, it is arbitrary discrimination to give Amy the human rights that she has (because of her place on the scale) but to deny human rights to Brian. To clarify this, we can note how the difference in treatment between Amy and Brian reflects the sort of problematic arbitrary discrimination that we see in sexism or racism (as discussed in 2.1). In all three cases, individuals are given a special status because they possess some morally *irrelevant* property (being male, being white, *gaining* the property P). The treatment that follows from this (preferential treatment, being given

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<sup>115</sup> Below, Brian (our subject with dementia) is discussed in order to highlight a problematic asymmetry that follows from the making exceptions response. For discussion of further problems that follow from Griffin's and Gewirth's treatment of subjects with dementia, see 6.1.1.

<sup>116</sup> Some may object to my claim that Brian would have no human rights. Instead, they may argue that the exclusionary theorist could claim that Brian simply no longer has the full array of human rights (and so he has some human rights but not others). On this view, contrary to my above claim, there is in fact a symmetry between Amy (the child) and Brian (the dementia sufferer) as both have some human rights but not all human rights. This is intuitively true (and indeed is what I will argue for below – where I will claim that Amy and Brian *should* be treated in the same way). Note, however, that this is *not* a position which the exclusionary theorists could accept. Dementia sufferers (Brian) are not an exception and so, on the exclusionary binary accounts, Brian *would* have *no* human rights, rather than some human rights.

My opponent could also retort that I am being too quick. Perhaps exclusionary theorists could argue that Brian is, in fact, similarly exceptional and has human rights in virtue of *having had* property P (before he developed dementia). I explain views of this kind, and reject them, in 6.1.1.

human rights) is unjust *because* it is grounded in this morally irrelevant property, and so does not reflect morally important differences between the relevant individuals (males and females, white and non-white people, Amy and Brian). If we focus on *morally relevant* properties (such as having a *degree* of the property P) then Amy and Brian are the same and should be treated in the same way – this would be just. This cannot be done if we assume that the property Q is the property of *becoming* a person.

Above I explained how the potentiality view cannot be used to justify the making exceptions response. I now want to briefly consider a second view – whereby we abandon talk of potential and define the property Q in some other way. On this new view, the property Q is something other than the property of becoming a person (as defined above). For example, we could instead see the property Q as sentience or group membership or rationality, etc. Again, we can then imagine that Amy has the property Q when it is understood in this way, whilst Brian does not.

The difficulty with this second view is that it would entail that there are two grounds for human rights. Both the property P *and* the property Q give those who have them human rights. This is problematic for the exclusionary binary view as, on the above explanation, the property Q is no longer linked to the binary threshold for personhood. It is not the case that Amy has some human rights because she is an exception in this case (in the sense of having a degree of the threshold qualities). Rather, Amy now has some human rights because she has the property Q, which *itself* grants personhood and human rights. This would make property P (personhood) redundant for human rights. I discuss similar

redundancy problems in relation to the similarity interpretation of the other moral protections response (3.4.2, below).<sup>117</sup>

This section has argued that there is no way for the making exceptions response to work whilst still being committed to the exclusionary binary view. The making exceptions response would either need to accept arbitrary discrimination (which would not avoid the mistreatment worry) or accept that human rights can be grounded in something besides the binary property P (which would remove the need for a making exceptions response). Consequently, the making exceptions response *cannot* be used to resolve the problem of marginal cases. The next section (3.4.2) will argue that a different exclusionary solution – the other moral protections response – also fails.

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<sup>117</sup> Above, I have outlined two views which follow from the making exceptions response, and which involve an asymmetry between Amy (a child) and Brian (a dementia sufferer). As detailed above, I take this asymmetry to be unjustified and problematic. In response, my opponent may want to challenge my argument by proposing a third alternative using a more Rawlsian view of personhood. On Rawls' concept of personhood, a person is "someone who can be a citizen, that is, a normal and fully cooperating member of a society over a complete life" (Rawls 2005: 18). On this 'complete-life' view, Amy (a child) and Brian (a dementia sufferer) could both be persons with human rights because both can be citizens in Rawls' sense. As defined, the above presents a challenge to my objection to the making exceptions response. This is because, if the Rawlsian view is correct, then there is no longer a problematic asymmetry between Amy and Brian.

In response, I argue that the above Rawlsian view is not as problematic for my argument as it seems, for two reasons. First, it is not clear that Rawls' complete life view would be accepted by the exclusionary theorists to whom my making exceptions objection is directed. Griffin (2008: 84) explicitly questions whether late foetuses, babies and infants can be persons, or whether this shows the sort of overinclusion that I discussed in relation to Tooley (above). Griffin also objects that "it would be the plainest of non sequiturs to argue that because a normal adult person has human rights, anything that is the same person as it has human rights" (Griffin 2008: 87). Both of these arguments suggest that Griffin would not be willing to accept the Rawlsian complete-life view. This implies that Rawls' conception of personhood is not necessarily compatible with the exclusionary binary views of personhood under discussion. If so, then Rawlsian personhood cannot be used *by exclusionary binary theorists* as a solution to my asymmetry objection. On the exclusionary binary views of personhood, the problematic asymmetry between Amy and Brian remains intact.

Second, even if exclusionary binary theorists *could* use Rawls' conception of personhood, it should be noted that Rawls' view would still only make *some* marginal cases persons. Indeed, Rawls acknowledges that his view of personhood is idealised and would not extend to those with permanent psychological impairments (Rawls 2005: 21). Whilst we would still have moral duties towards those with psychological impairments, they would not be persons with human rights on Rawls' view. Thus, it seems that Rawls would have to accept that these marginal cases have other moral protections, rather than human rights. 3.4.2 (below) will explain the problems with this 'other moral protections' view.

### 3.4.2 Other moral protections and permissible mistreatment

To recap, the other moral protections response accepts three claims. First, non-marginal humans have human rights. Second, marginal cases do not have human rights. Third, marginal cases have other moral rights (hereafter ‘OMRs’) instead that are just as good, in practice, as human rights. This third claim requires us to accept an assumption: *that human rights are good enough in practice*. To clarify this further, consider the following case. Debra is a standard non-marginal human, and she has human rights. Her human rights will be good enough in practice if they provide her with moral protections that are *good enough for her*, in the sense of morally protecting her from the most serious threats and harms. I posit that Debra’s human rights are good enough in practice because they have the defining structural features discussed in 1.2 – her rights are weakly universal, minimum standards, and high priority norms.<sup>118</sup> Each structural feature ensures that Debra has an appropriate amount of moral protection and is not at risk of permissible mistreatment. Now that we have addressed the underlying assumption that human rights *are good enough in practice*, we can return to the third claim of the other moral protections response: marginal cases have OMRs that are *just as good*, in practice, as human rights. To evaluate this claim, let us suppose the following: there is a marginal case, Elizabeth, who has the OMRs. The third claim demands that, in the same way as Debra’s human

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<sup>118</sup> Human rights are weakly universal in the sense that all relevant rights-holders (persons) have human rights. Because Debra is a person, she has human rights. Human rights are minimum standards, rather than socio-political ideals because Debra has rights to that which she *needs* (sustenance, shelter), rather than what she *wants* (a bigger house) or what it would be *ideally* good for her to have (world peace). Finally, human rights are high priority norms in two senses. First, in cases where there is a conflict between a human right and another moral consideration, Debra’s human rights will typically be strong enough to outweigh the other moral consideration, other things being equal. Second, as high priority norms, states, as the addressees of rights, have strong duties to ensure that human rights are respected. This means that the state is required to give Debra access to food, shelter, education, etc. Additionally, if the state fails to give her these things, other states have a strong duty to intervene.

rights are good enough for her, Elizabeth's OMRs must be just as good, at least in practice.

One way of developing this third claim is in terms of a similarity interpretation. On this view, the OMRs are just as good in practice because they share all of the same distinguishing structural features as human rights. Using the above discussion as a guide, this would entail that the OMRs too would be weakly universal, minimum standards, and high priority norms. The OMRs will be weakly universal if they are held by all relevant rights-holders. Elizabeth will be a relevant rights-holder if she meets the grounds for having the OMRs (sentience, group membership, etc.). The OMRs will be minimum standards if they grant Elizabeth moral protections to that which she *needs* as a being of her kind.<sup>119</sup> Finally, the OMRs will be high priority norms if they are typically strong enough to win in conflict cases, and if states, for example, have strong duties to see to it that Elizabeth's OMRs are respected. The similarity interpretation thus works on the assumption that it is the distinguishing structural features that make human rights good enough in practice, and so if the OMRs also have these structural features, then the OMRs will be just as good. Indeed, if the OMRs do have these structural features then it seems like, as with Debra's human rights, Elizabeth's OMRs *do* morally protect her against permissible mistreatment and give her moral protections that are good enough for her.

However, an obvious problem with the similarity interpretation is that, if human rights and the OMRs *do* have all of the same structural features, and also offer the same (or very similar) moral protections, then human rights and the OMRs seem to be qualitatively

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<sup>119</sup> I will discuss needs, and specifically what sort of needs are morally relevant, in 5.3 and throughout chapter 6.

identical.<sup>120</sup> In what follows, I will argue that this similarity creates a redundancy dilemma which can be viewed in two ways, both of which are problematic.

First, the similarity interpretation could entail that *human rights are theoretically redundant*. Whilst Elizabeth does not meet the grounds for having human rights, both Elizabeth and Debra *do* meet the grounds for having the OMRs (sentience, group membership, etc.). Consequently, both marginal cases (Elizabeth) and non-marginal cases (Debra) are relevant rights-holders for the OMRs as both can meet the OMRs' low criteria for being a rights-holder. Additionally, if the OMRs have the same structural features as human rights *and* offer the same moral protections, then there would be no benefit to also having human rights. Debra would get nothing extra from having human rights that she would not already have from the OMRs. As the OMRs would, in this case, be both more widely-applicable and exhaust the full scope of human rights, it seems like we should favour the OMRs over human rights. It is clear that this outcome – human

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<sup>120</sup> Here I am assuming that the OMRs would offer the same or very similar moral protections to human rights. In other words, I am assuming that whatever protections Elizabeth *would* have had with human rights (e.g. to life, to liberty, against torture, etc.) have an equivalent OMR (e.g. there are OMRs to life, to liberty, against torture, etc.). To me, this follows from the idea that, on the similarity interpretation, both OMRs and human rights protect minimum standards, and so both sets of rights have the scope of protecting what is required to have a minimally good life. Here, the OMRs and human rights are qualitatively identical because both have the quality of protecting the individual in the above way.

My opponent could object that a better approach would be to see the OMRs as having the same structural features as human rights, *without* offering the same degrees or kinds of moral protection. On this view, we could accept that marginal and non-marginal cases have different capabilities and needs and consequently require *different* moral protections. So, as explained in footnote 108, a child might have a right against being tortured, but not have a right to vote (because they do not have the necessary cognitive capacities). Whilst an adult might have the full complement of human rights.

I concede that this is a sensible approach to take and I argue for a similar view throughout chapters 5 and 6 (though in terms of human rights rather than OMRs). However, I suspect that the above approach would be of little help to the exclusionary theorists. This is because the OMRs still have the same structural features as human rights, on the above approach. As explained below, if the structural features *are* distinguishing structural features (that are held exclusively by human rights) then the OMRs would still seem to be human rights, in virtue of having the relevant structural features. The redundancy objection that I will soon discuss would still stand.

Note also that if the exclusionary accounts *were* to suggest that marginal cases have human rights (but these rights have a different content to the rights of standard adult humans), then they would end up arguing for an *inclusive* binary account, as discussed in chapter 4. This is because they would no longer be excluding the marginal cases from having human rights.



rights are redundant – cannot be what the exclusionary views want to accept. To accept this, an exclusionary theorist would need to reject claim one (above) and concede that standard humans do not have human rights. As this claim is foundational to all exclusionary theories, this concession cannot be accepted.

Consequently, in order to retain the importance of human rights, we could instead understand the similarity interpretation in a way that would entail that *the OMRs are theoretically redundant*. On this view, if the OMRs really do have all of the same distinguishing structural features as human rights, then it is plausible to suppose that the OMRs really *are* human rights. This is because the structural features mentioned above (weak universality, minimum standards, high priority norms) are supposed to distinguish human rights from other types of rights (see 1.2). If a right has these distinguishing structural features, it thus seems like it must be a human right rather than any other type of right (assuming that the structural features really are *distinguishing* structural features). If we accept this, then we would be accepting that both Debra (our non-marginal case) and Elizabeth (our marginal case) have human rights. Once again though, this cannot be what the exclusionary theorists want to argue. To accept this conclusion – that the OMRs are redundant and marginal cases have human rights – the exclusionary theorist would have to accept two things. First, there are at least two grounds for human rights – the personhood ground that Debra meets, and the other ground that Elizabeth meets (sentience, group membership, etc.). Second, because both Elizabeth and Debra have human rights, there is no reason to treat them differently. Accepting either of these things would prevent us from having an exclusionary account as Elizabeth is no longer excluded from having moral protections that Debra has.

If the above is correct, then it seems clear that we cannot use a similarity interpretation to understand the other moral protections response. Accepting a similarity interpretation would cause either the OMRs or human rights to be redundant, and if either one of these is redundant, we cannot make the comparative claim that the OMRs are just as good, in practice, as human rights. Consequently, to avoid this redundancy, it seems like defenders of the other moral protections response need to adopt a difference interpretation. On the difference interpretation we could state that, provided that Elizabeth gets moral protections that are good enough for her, her OMRs can be just as good as human rights, at least in practice, *without having the same structural features as human rights*. On this view, we can suppose that the OMRs lack at least one of the distinguishing structural features of human rights. The OMRs will either not be universal, not be minimum standards, or not be high priority norms. In what follows I argue that whichever structural feature the OMRs are stipulated to lack will allow for the objectionable mistreatment of at least some marginal cases. This possibility for mistreatment means that the OMRs are not just as good, in practice, as human rights.

First, if the OMRs lacked universality, then this would entail that there is some property Q that gives some marginal cases the OMRs, even if having that property does not give the OMRs to *all* marginal cases. To clarify this, imagine the following case. Elizabeth (our marginal case) has the property Q. Frida, another marginal case, also has the property Q. Elizabeth and Frida also have all of the same other qualities and so there are no properties that Frida has but Elizabeth lacks. However, if the OMRs lacked universality, then Frida could have the OMRs whilst Elizabeth could lack them. As a result, Elizabeth could lack both the OMRs *and* human rights, and therefore she would not be morally protected against permissible mistreatment (by having either set of rights). If the OMRs

worked in this way, then they would not be good enough in practice because some agents who *should* have the OMRs (like Elizabeth) would not be suitably protected.

Alternatively, we could suppose that the OMRs were not minimum standards. *First, we could suppose that the OMRs entitle Elizabeth to less than the minimum standards.* Here, Elizabeth would be lacking certain important moral protections that she *needs* as a being of her kind. For example, she may not be entitled to fair access to food, shelter, education, etc. This option is obviously problematic as if Elizabeth's OMRs do not entitle her to the minimum standards required to be a being of her kind, then she is at risk of permissible mistreatment and exploitation. *Second, and in contrast, we could suppose that Elizabeth's OMRs entitle her to more than the minimum standards.* On this view, Elizabeth is protected against permissible mistreatment but she now has stronger and/or more extensive rights than Debra. This cannot be what the exclusionary views want to accept as it would make non-marginal cases more disadvantaged than marginal cases, and would also make human rights *worse* than the OMRs.

Finally, it could be suggested that, unlike human rights, the OMRs are not high priority norms. In saying this, we could mean one of two things. First, in cases of conflict between an OMR and other moral considerations, the OMRs would be outweighed by the other moral considerations. To see this, let us imagine a case. Suppose there is a surgeon with a dilemma; she has been scheduled to perform important surgery at the same time as she has promised to meet a friend. Here there is a conflict between the patient's rights (to life, to medical care, i.e. surgery, etc.) and another moral consideration (the duty to keep a promise). Now suppose that Debra and Elizabeth are the surgeon's patients. In the case of Debra, our surgeon would be morally obligated to perform the surgery and break her

promise. This is because Debra's human rights are high priority norms, and so they outweigh the surgeon's moral obligation to keep her promise. In the case of Elizabeth, however, it is not clear that the surgeon would have to perform the surgery. If Elizabeth's OMRs were low priority norms, then Elizabeth's rights would not necessarily outweigh the surgeon's moral obligation to keep her promise. For this reason, Elizabeth's OMRs would *not be* just as good in practice as Debra's human rights. Elizabeth's rights (but not Debra's) could be easily expendable, and Elizabeth could therefore be permissibly mistreated in ways that Debra could not be.

Alternatively, we could mean that, because the OMRs are low priority norms, states do not have strong duties to ensure that the OMRs are respected. On this view, if there were good reasons for allocating resources elsewhere (such as increased general welfare), then the state would not be obligated to provide Elizabeth with sustenance, shelter, education, etc. The difficulty with this is that it would require us to accept a different, and notably worse, system for the protection of marginal cases than we currently have. Recall that the marginal cases typically include human fetuses, human infants, children, those with severe psychological impairments, and sufferers of dementia (3.1 and 3.2, above). Many people think that states *should* provide strong protections to these particularly vulnerable human beings. This intuition is reflected in a series of reports by Human Rights Watch (2018), including 'It's not normal' (October 18, 2018); 'I needed help, instead I was punished' (February 6, 2018), and 'They want docile' (February 5, 2018). These reports - which respectively cover abuses against children, those with psychological impairments, and those with dementia - highlight how the rights and protections of marginal cases are considered to be important, and how the *mistreatment* of marginal cases is seen as a problem worthy of international concern. If the OMRs were only low priority norms,

however, then states would lack this strong moral obligation to protect vulnerable human beings.

If the above is correct, then we cannot accept the difference interpretation. To accept the difference interpretation, we would need to state that the OMRs lack at least one of the distinguishing structural features of human rights but, as argued above, removing any of these structural features causes Elizabeth to be at risk of permissible mistreatment and to not have moral protections that are good enough for her. As neither the similarity nor difference interpretations work, we cannot accept the other moral protections response.

### **Conclusion**

This chapter has argued that exclusionary binary accounts fail to deal with the problem of marginal cases in a satisfactory way. I began by summarising the exclusionary binary views which argue that, because marginal cases do not meet the relevant threshold for personhood, they are not persons with human rights (3.1). In 3.2.2, I argued that this exclusion raises a permissible mistreatment worry. If marginal cases are not persons with human rights, then there is a worry that they will lack an appropriate amount of protection against mistreatment.

The remainder of the chapter critically assessed two exclusionary solutions to this concern. The first solution, discussed in 3.3 and 3.4.1, argued that some marginal cases (typically children) are exceptions and have some human rights. A marginal case will be an exception if it is developing relevant personhood properties and so stands in some relation to a standard human agent (the typical rights-holder for human rights). The second solution, discussed in 3.3 and 3.4.2, argued that marginal cases have other moral rights that are practically equivalent to human rights and so offer moral protections that

are good enough, at least in practice, for the marginal cases. I argued that neither of these exclusionary solutions can be accepted because both fall foul of a dilemma. On the first horn of the dilemma, we could accept that marginal cases are morally protected against permissible mistreatment, but only because they end up being persons with human rights. As exclusionary binary accounts do not class marginal cases as persons, this way of avoiding the permissible mistreatment concern requires conceding that the exclusionary binary accounts are wrong. This problem affects the making exceptions response (3.4.1) and the similarity interpretation of the other moral protections response (3.4.2). On the second horn of the dilemma, we could claim that marginal cases are *not* persons with human rights, but are not morally protected against permissible mistreatment in some other way. On this horn, we have an exclusionary response (as marginal cases are excluded from being persons with human rights), but cannot avoid the permissible mistreatment concern (as whatever other moral protections the marginal cases have will be too structurally weak to protect against mistreatment). This problem affects the difference interpretation of the other moral protections response (3.4.2).

The above suggests that, to respond to the problem of marginal cases, we must either reject the exclusionary binary view, or concede that marginal cases can be permissibly mistreated. We cannot accept the latter option as it would be morally unacceptable to permit the mistreatment of marginal cases. If horn one of our dilemma is correct, then the best way to avoid this morally unacceptable outcome is to accept that marginal cases are persons with human rights. This conclusion is accepted by inclusive binary accounts (chapter 4) and my non-binary view (chapters 5 and 6). The remainder of this thesis will be concerned with demonstrating that my non-binary view is preferable to the inclusive binary accounts.

## CHAPTER FOUR. BINARY PERSONHOOD AND THE INCLUSION OF MARGINAL CASES

### Introduction

The previous chapter critically assessed *exclusionary* binary accounts. These accounts use a *high* binary threshold for personhood which, as a consequence, excludes most, if not all, marginal cases from being persons with human rights.<sup>121</sup> I explained that the exclusionary binary accounts aim to show that marginal cases are still adequately protected on their accounts, despite not being persons with human rights. I argued that their attempts to show this fail, and that some marginal cases are consequently at risk of permissible mistreatment. I concluded that one way to avoid this permissible mistreatment worry would be to abandon exclusionary views and accept that marginal cases are persons with human rights.

This chapter focuses on *inclusive* binary accounts. These accounts use a *low* binary threshold which, as a consequence, includes most, if not all, marginal cases as persons with human rights.<sup>122</sup> Whilst I agree with the aim of the inclusive binary accounts (to *include* marginal cases), I will argue that the accounts themselves are theoretically problematic. To clarify, my concerns are not with the act of inclusion itself, but with the ways in which the inclusive binary accounts argue for this inclusion. In chapters 5 and 6 I will argue that my account provides a clearer and more defensible argument for including marginal cases as persons and rights-holders for human rights.

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<sup>121</sup> I say that exclusionary binary accounts exclude most, if not all, marginal cases in order to accommodate ‘the making exceptions’ response (3.3; 3.4.1), which does aim to include children as rights-holders.

<sup>122</sup> I say that inclusive binary accounts include most, if not all, marginal cases as at least some of the marginal cases that I discussed in 2.3, such as robots, are typically not addressed by inclusive binary accounts. It is a benefit of my account (chapters 5 and 6) that it can accommodate these other cases (see, for example, 6.1.3). My account is thus generally more inclusive than the inclusive binary accounts.

To argue for the above, this chapter proceeds as follows. In 4.1 I outline the basic structure of the inclusive binary accounts. In 4.2 I explain that there are two types of inclusive binary account: narrow scope inclusive accounts (NSI) and wide scope inclusive accounts (WSI). NSI accounts focus on extending human rights to *human* marginal cases, whereas WSI accounts argue that both human *and* nonhuman marginal cases can be persons with human rights. I clarify that I will focus primarily on WSI accounts. In 4.3 I further explain the WSI accounts by outlining the eminent WSI accounts of Tom Regan (2004) and Alasdair Cochrane (2013).

Finally, in 4.4 I critically evaluate the inclusive binary accounts, and argue that there are three key problems that affect all inclusive binary accounts (WSI and NSI). First, there are theoretical problems with the low binary threshold. Wherever inclusive binary accounts set the threshold for personhood, either too many or too few entities will be included as persons with human rights (4.4.1). This is problematic as it entails that inclusive binary accounts do not have an accurate and consistent picture of which entities (and so which marginal cases) are persons with human rights, on their accounts.

Second, there are problems with the rights that marginal cases have on the inclusive binary accounts (4.4.2). Inclusive binary accounts argue that all those who pass the low binary threshold (and so most, if not all, marginal cases) have qualitatively identical basic rights. I argue that, by failing to differentiate between marginal cases, some marginal cases have too many or too few rights, on the inclusive binary accounts.

The final problem affecting inclusive binary accounts concerns their response to rights conflicts (4.4.3). I explain that any human rights account must be able to state which right



ought to be prioritised in a conflict case (e.g. where Amanda's right to life conflicts with David's right to liberty, and so on). I draw on Regan's (2004) and Cochrane's (2013) responses to rights conflicts to argue that the sort of priority setting view open to inclusive binary accounts can only resolve easy conflict cases (where there is a clear difference between the weightings of different rights). I argue that inclusive binary accounts cannot obviously deal with more difficult conflict cases whilst still retaining the idea of *equality* that is central to all inclusive binary accounts. This is problematic as if inclusive binary accounts cannot deal with these difficult conflict cases, then the theory of human rights that follows from their account is incomplete.

Before embarking on this argument, it is worth clarifying that I will only be discussing inclusive binary accounts that extend *human rights* to the marginal cases. There are many other notable, and otherwise inclusive, accounts that argue for the personhood and moral rights of the marginal cases (but not for their human rights). For example, Eva Feder Kittay (2005) and Amy Mullin (2011) have both argued that children and humans with psychological impairments are persons because they are part of morally valuable caring relationships.<sup>123</sup> From an animal rights perspective, Peter Singer (2011) has argued that certain nonhuman animals have moral rights because they are sentient.<sup>124</sup> And so-called

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<sup>123</sup> Both Kittay (2005) and Mullin (2011: 294) frame their arguments as responses to McMahan's (2002) *The Ethics of Killing: Problems at the Margins of Life*. Specifically, they argue against McMahan's controversial claims about the moral status of the severely cognitively impaired. In a section devoted to nonhuman animals and the severely cognitively impaired (2002: 2.1), McMahan argues that there are two important similarities between these groups. First, nonhuman animals and the severely cognitively impaired have the same level of psychological complexity: both lack all of the properties that make an entity a person (204-205). Second, because they are not persons, it is less wrong to kill a cognitively impaired human or a nonhuman animal, than it is to kill a standard adult human (ibid). Kittay (2005) and Mullin (2011:294) argue that McMahan seriously mischaracterises the psychological abilities of the cognitively impaired. They also claim that he fails to appreciate that relationships based on care are morally significant, and are sufficient for personhood (Kittay 2005; Mullin 2011: 294, 299-304).

<sup>124</sup> Specifically, Singer (2011) argues that apes and primates (95-99), pigs (99), scrub jays (100), cats, dogs, and chickens (101), and certain types of fish and octopi (102) are sentient in the relevant way.

‘interest theories’ have argued that marginal cases could have certain moral rights if they have certain morally important interests (Kramer 2010, 2013; Kurki 2018).<sup>125</sup> I acknowledge that the above are prominent additions to the marginal cases literature, and I will draw on the above views and debates periodically throughout the remainder of the thesis. However, I will not offer an *in-depth* discussion of the above accounts in this chapter (or any other chapter). This is because they do not explicitly address the *human* rights of the marginal cases, which is my thesis focus.

#### **4.1 The structure of inclusive binary accounts**

This section briefly outlines the general structure of the inclusive binary accounts. I explain that, on the inclusive binary accounts, an entity is a person with human rights if it passes a certain low binary threshold for personhood. I outline two ways in which we can understand the binary threshold, and so two ways in which an entity (e.g. a marginal case) can pass the binary threshold.

In chapter 3, I explained how exclusionary binary accounts work by emphasising the differences between standard adult humans and the marginal cases. Unlike standard adult humans, the marginal cases either do not have the relevant personhood properties (e.g. normative agency, or the capacity for human action), or do not have them to a sufficient degree. Consequently, on exclusionary accounts, the marginal cases cannot pass the binary threshold for personhood, and so are not persons with human rights. The inclusive binary accounts discussed in this chapter reject this approach. Rather than emphasising marginal cases’ differences, inclusive binary accounts argue that we ought to focus on similarities. It is because the marginal cases are like us (standard adult humans) in some

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<sup>125</sup> For a summary of interest theories, and an explanation of why they will not be discussed at length in this thesis, see footnote 43, chapter 1.

important respect that they are persons with human rights and must be included rather than excluded (see 4.2-4.3).<sup>126</sup>

All of the inclusive binary accounts discussed below accept that, in order to be included as a person with human rights, an entity must meet a certain binary threshold for personhood. Like the binary accounts of chapter 3, inclusive binary accounts thus accept two claims. First, there is some (typically unitary) threshold property that entities must have in order to be persons (and rights-holders). Second, personhood, so understood, is an all-or-nothing concept – you either have it or you do not. All those who have personhood (by passing the threshold) are subsequently equal in terms of both their inherent moral value (personhood) and in terms of how they ought to be treated (e.g. by having rights).<sup>127</sup> On the inclusive binary accounts, any entity (marginal or otherwise) that passes the relevant threshold is thus a person and has human rights. As explained in 3.2.1, there are two ways in which a marginal case can meet a binary threshold for personhood, discussed below.

First, inclusive binary accounts can introduce an inclusive binary property. This would be some simple, and morally relevant, property that marginal cases will have, and which

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<sup>126</sup> In chapters 5 and 6 I will take a different approach to both the exclusionary and inclusive binary accounts (chapters 3 and 4). I will argue that the marginal cases are persons with human rights (in line with the inclusive accounts), but their inclusion is compatible with them being different to standard adult humans (where this difference is in line with the exclusionary accounts).

<sup>127</sup> This view is nicely summarised in the following quotes by Regan (2004):

“All animals *are* equal, when the notions of ‘animal’ and ‘equality’ are properly understood, ‘animal’ referring to all (terrestrial, at least) moral agents and patients, and ‘equality’ referring to their equal possession of inherent value. Inherent value is thus a *categorical concept*. One either has it, or one does not. There are no in-betweens. Moreover, all those who have it, have it equally. It does not come in degrees” (240-241).

“*The validity of the claim to respectful treatment, and thus the case for recognition of the right to such treatment, cannot be any stronger or weaker in the case of moral patients than it is in the case of moral agents. Both have inherent value, and both have it equally; thus, both are owed respectful treatment, as a matter of justice*” (279).

is then argued to be both necessary and sufficient for personhood. In 4.3 I will consider the property of being sentient. On this first understanding, a marginal case meets the binary threshold if it has the relevant property.

Second, inclusive binary accounts could accept that the relevant properties come in degrees. Using our sentience example, this would entail that different entities can have different amounts of sentience. The binary nature of the account would then come from determining how much of the relevant property an entity needs in order to be a person. Given that the inclusive binary accounts are aiming to include the marginal cases as persons, the threshold will typically be set at a low level (see 4.2 & 4.3). On this second understanding, a marginal case meets the binary threshold for personhood if it has a requisite amount of the relevant property.

As with the exclusionary accounts of chapter 3, I will accept that we do not need to determine which of the two ways of understanding the binary nature of the inclusive binary accounts is correct. This is because either view has the same consequences for the marginal cases. At least some marginal cases will be included as persons with human rights.

#### **4.2 Two types of inclusive binary account**

This section outlines two types of inclusive binary account, which I shall refer to as narrow scope inclusive accounts (NSI) and wide scope inclusive accounts (WSI). The breadth of the scope refers to the types of entities that they seek to include in their binary theory. NSI accounts focus on including human marginal cases (like children and those with psychological impairments), whereas WSI accounts aim to include human marginal cases *and* nonhuman marginal cases (specifically, nonhuman animals). Below, I will

explain why my discussion of the inclusive binary accounts will focus primarily on WSI accounts.

NSI accounts argue that most human marginal cases (and human *nonmarginal* cases) are persons with human rights, whilst nonhuman marginal cases (typically) are not.<sup>128</sup> This is because, according to the NSI theorists, most human marginal cases are enough like standard adult humans to share their high moral status (personhood) and protections (basic human rights). Conversely, NSI theorists argue that most (if not all) nonhuman marginal cases are sufficiently different to, and less morally important than, standard adult humans. It is consequently permissible to exclude (most) nonhumans from being persons with human rights, on NSI accounts. As Agnieszka Jaworska and Julie Tannenbaum (2019: 69) emphasise, the above NSI view is often presented as a ‘common-sense view’:

By “commonsense [sic] view” we mean...that, by and large, human beings have FMS [full moral status or personhood] and a higher moral status than that of chickens and dogs. That is, whether a human being is severely cognitively (i.e. intellectually or emotionally) impaired or not, whether it is an adult or child (infant to teenager), that human has FMS (ibid).

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<sup>128</sup> In chapter 3 I outlined a similarity interpretation of the ‘other moral protections’ response. I argued that a consequence of this view (that could not be accepted by *exclusionary* binary accounts) is that human marginal cases would be persons with human rights (3.4.2). The similarity interpretation is thus a version of an NSI account. If a binary theorist were to accept an NSI account (rather than an exclusionary account), they would avoid the problems that I raised in chapter 3. However, in 4.4 I will outline general problems with inclusive binary accounts. As these general problems would extend to NSI accounts, I posit that we ought not accept NSI accounts either. There are consequently problems for binary theorists whichever type of binary account they adopt (exclusionary or inclusive).

To defend this view, NSI theorists aim to identify a morally relevant property that most, if not all, humans have (and which most, if not all, nonhumans lack). There are many different accounts of what this morally relevant property is, and Jaworska and Tannenbaum (2019) provide a neat summary of these different accounts. As they explain, various suggestions for the relevant property include: (i) sophisticated cognitive capacities (like autonomy, self-awareness, and the capacity to care) (69-70), (ii) the potential or capacity to develop these sophisticated cognitive capacities (70), (iii) rudimentary cognitive capacities (70-71), (iv) membership of a cognitively sophisticated species (71-72), (v) being in a special relationship with a member of one's own species (72-73), and (vi) incomplete realisations of sophisticated cognitive capacities (73-75).<sup>129</sup>

Whilst the above NSI accounts are well-discussed in the literature, and may seem 'common-sense' to many, I will not be focusing on NSI accounts in my discussion of inclusive binary accounts. There are two reasons for this. First, as presented above, the NSI accounts are similar to the humanist accounts discussed in 2.1. Like the humanist accounts, NSI accounts aim to identify some morally relevant property that is (typically) unique to human kind, and which most (if not all) nonhuman animals do not possess. The problems that were levelled against humanist accounts will thus also extend to NSI accounts. Specifically, NSI accounts will also struggle to identify a human-specific property, and will be at risk of speciesism. For example, David DeGrazia (2014: 547) has challenged the NSI claim that only humans have the characteristic capacity to care, or be

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<sup>129</sup> Jaworska and Tannenbaum (2019) claim that the following theorists defend these accounts: (i) is defended by, amongst others, Jaworska (2007), and McMahan (2002). (ii) is defended by Marquis (1989), and Stone (1987). (iii) could be defended using Regan (2004), though as Jaworska and Tannenbaum emphasise, Regan's account is in fact a WSI account (70-71). I discuss Regan (as a WSI theorist) further in 4.3. (iv) is defended by, amongst others, Benn (1967), Dworkin (1993), and Finnis (1995). (v) is defended by Kittay (2005), and Nozick (1997). (vi) is their own account and is also presented in Jaworska and Tannenbaum (2014, 2015).

in special caring relationships. As similar accounts (and problems) have already been discussed in 2.1, an extended discussion of NSI accounts would risk repetition.

Second, this thesis has a strict word limit and not every relevant account or theory can be discussed in depth. Consequently, difficult decisions have to be made about which ideas are the *most* relevant to my thesis, as a whole. On balance, I take the WSI accounts (described below) to be more relevant to my wider thesis. The wider scope of WSI accounts (which accommodates both human and nonhuman marginal cases) provides (i) a more direct challenge to the exclusionary binary accounts of chapter 3 (which exclude most, if not all, marginal cases), and (ii) a more solid foundation on which to build my account (chapters 5 and 6), which also aims to include a wide range of marginal cases (though for different reasons and in different ways to the WSI accounts). With the above in mind, I will be focusing mainly on the WSI accounts in this chapter (though the general evaluation of inclusive binary accounts (4.4) will also apply to the NSI accounts).

WSI accounts argue that both human *and* nonhuman marginal cases are persons with human rights.<sup>130</sup> To argue for this position, WSI theorists accept that there is some morally important similarity between standard adult humans, human marginal cases, and a range of nonhumans. The WSI position thus challenges the ‘common-sense view’ of NSI accounts (above), which claimed that there is some morally important difference between nonhumans and humans. In opposition to this, WSI theorists argue that it is common-sense that, if nonhumans have (at least some of) the same morally important properties as humans, then they ought to have the same moral status (personhood) and be

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<sup>130</sup> Above I explained how NSI accounts have similarities to the humanist accounts discussed in 2.1. In contrast, WSI accounts can be seen to draw on criterialism (2.1). Criterialism explicitly states that there are certain morally relevant criteria for personhood that go beyond species membership.

treated in the same way (have human rights).<sup>131</sup> In the next section, I will explain the WSI views further by examining the eminent WSI accounts of Alasdair Cochrane (2013) and Tom Regan (2004).

### 4.3 Wide Scope Inclusive Accounts (WSI)

This section outlines the WSI accounts of Alasdair Cochrane (2013) and Tom Regan (2004). Both argue that a certain morally relevant form of sentience grounds both (i) personhood and (ii) human rights. I explain both of these claims in depth below. A consequence of these WSI accounts is that, as human *and* nonhuman marginal cases can be sentient in the relevant way, most (if not all) marginal cases are persons with human rights.

#### Claim One: A relevant kind of sentience grounds personhood

In his subject-of-a-life view, Tom Regan (2004: 243-248) argues that the morally relevant sentience ought to be defined in terms of phenomenological consciousness plus subjective interests. Before outlining Regan's view, I will explain these terms. First, phenomenological consciousness refers to a form of subjective awareness, typically explained in terms of a conscious being having a subjective point of view. A being has a subjective point of view if there is something that it is like to be that being. It is assumed that this subjective point of view gives the being's experiences a phenomenological quality. By 'phenomenological qualities' we mean those qualities that determine what it is like for the being to have a named experience. For example, the phenomenological

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<sup>131</sup> This is reflected in the following quote: "...it is surely only sensible to recognise that *all* sentient creatures have at least *some* very basic interests which are sufficiently strong, all things considered, to ground *some* duties on the part of others....We can reasonably agree that all sentient creatures possess at least some interests which impose duties on us. As such, we can also reasonably agree that all sentient creatures possess at least some basic rights" (Cochrane 2013: 659).



qualities of a headache (pain sensations, etc.) refer to how the headache is experienced from the being's point of view (Allen and Trestman 2017: section 2; Nagel 1974).

You and a cat both have phenomenological consciousness in this way. There is something that it is like to be you or a cat, and the experiences of both you and the cat have phenomenological qualities as they are experienced from a specific point of view. Conversely, a table does not have phenomenological consciousness. There is nothing that it is like to be a table, and the table cannot have experiences that can be defined from the table's point of view.

The second term that we need to define is 'subjective interests'. In its simplest form, the interest view argues that it is not enough to say that there is something that it is like to be a certain being (phenomenological consciousness, above); we must also be able to say that a being has morally relevant interests (Rossi 2010: note 1).<sup>132</sup> There are two main ways in which we can understand this concept of 'interests': in terms of objective interests and in terms of subjective interests. I discuss both below.

Objective interests can be explained using the objective list theory of well-being (see Wasserman, Asch, Blustein, and Putnam 2016: 1.2; Parfit 1984: 493-502). According to an objective list theory, there are certain things that are good or bad for us, whether or not we want to have the good things, or to avoid the bad things. Drawing on objective list theory, we can classify objective interests as those things that are objectively good for an entity. For example, I have an objective interest in truth (as it is an objective good), even if, subjectively, I would prefer to be deceived. In this sense, when we talk about the

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<sup>132</sup> Interest views are also discussed in footnote 43, chapter 1.

objective interests of an entity, we are typically making judgements about what would be best for the entity, all things considered.

Conversely, subjective interests refer to those things that matter *to* the entity (regardless of whether they are also objectively good *for* the entity). For example, imagine that a certain rare book matters to Jill. She *believes* that the book contains important religious truths. As a devotee of the religion in question, Jill is *emotionally invested* in the contents of the book. She *desires* to own the book in order to further her own religious development, and to prevent the book from falling into the wrong hands. The book thus matters to Jill in a way that it does not matter to other people (who do not share her beliefs, desires, or level of emotional investment). Jill's interest in obtaining the rare book is thus a subjective interest – as it matters deeply to her – rather than an objective interest – which would matter to everyone.

Regan (2004: 243-248) argues that a being has the sort of morally relevant sentience required to be a subject-of-a-life if they have both phenomenological consciousness and the previous kind of subjective interests. He begins by defending the claim that at least mammalian animals have phenomenological consciousness (18). Drawing on evolutionary theory, he argues that, as human beings have phenomenological consciousness, and we evolved from other mammalian animals, it would be strange if (at least) mammalian animals did not also have some form of phenomenological consciousness (18-20, 27-30, 33). At a very basic level, this would entail that there is something that it is like to be the nonhuman animal in question, and that the nonhuman animal can have named experiences that have phenomenological qualities. For example, on Regan's view, we can suppose that there is something that it is like to be a cat; the cat

has a subjective point of view. The cat can also have certain named experiences (like ‘being in pain’) that are experienced by the cat in certain ways – for example, if the cat is wounded, she may experience the pain of her injury as an aversive physical sensation.

Regan goes on to argue that, if we grant that nonhuman animals have phenomenological consciousness (and so a subjective point of view), then it is reasonable to suppose that they also have an internal mental life. He argues that the mental life of nonhuman animals is characterised by beliefs and desires (34, 46, 58-60), expectations (68), intentionality (70, 74-75), memory (73), the capacities for recognition and perception (74), future-oriented beliefs (74), self-consciousness (75), emotions (75), preference autonomy (84-86), and welfare interests (82, 87). To defend this position, Regan argues that we can see that nonhuman animals have this inner mental life by observing animal behaviour (25-30, 58-81). For example, let us return to our wounded cat. If we observe her behaviour, we will see that she licks her wounds, returns home to seek shelter, and attempts to find her human owner. On Regan’s view, we can extrapolate from this behaviour that she *understands* that she is injured, has a *welfare interest* in getting better, *believes* that cleaning her wound will help her to get better, and *wants* comfort and assistance from her human owner. As our cat thus has both phenomenological consciousness and subjective interests, she is a subject-of-a-life, on Regan’s view.

As Mary Anne Warren (2000: 91) emphasises, Regan’s above arguments defend a “minimalist definition of personhood”. By this Warren means that Regan’s account extends personhood to “...most sentient human beings – including some who are not even potentially capable of moral agency...and... many non-human animals” (Warren 2000:

108). Regan's account is thus a WSI account because both human and non-human marginal cases can be persons, on his account.

Alasdair Cochrane (2013) also accepts that the relevant kind of sentience is intimately connected to both having interests (657) and conscious experience (658). See, for example, the following statement which follows shortly after Cochrane's claim that only sentient beings have interests (657):

consciousness is necessary for the possession of interests. Moreover, whilst it is true that sentient creatures have interests in biological goods which they do not consciously desire – such as a newborn's interest in clean air – conscious experience still grounds that interest. After all, by breathing clean air newborns experience better lives *for those individuals themselves* (658).

Given the above, I take it that he is defining 'sentience' in a similar way to Regan. Consequently, the above, more detailed, discussion of Regan's definition of 'sentience' should be viewed as also applying to Cochrane.<sup>133</sup>

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<sup>133</sup> The above is only one way of defining 'sentience'. Many have defined the relevant kind of sentience as phenomenological consciousness plus the ability to feel pain and suffering, thus drawing on Bentham's oft-repeated quote on moral considerability: "... the question is not, can they reason? Nor, can they talk? but, can they suffer?" (Bentham 1789: 320-321, note a). For examples, see DeGrazia (1996: 226:231), and Singer (2011). This view – that nonhuman animals have moral standing because they can suffer – is also discussed by Hooker (2000: 71).

Others, like Francione (2008), have argued that the sort of 'similar-minds approach' used by WSI accounts is overly restrictive. Like the theorists listed above, Francione argues that the relevant kind of sentience ought to be defined simply as the capacity to experience pain and suffering (2008: 130). He acknowledges that this sort of sentience does involve the sort of subjective awareness that is characteristic of phenomenological consciousness (141-145). However, Francione argues that the relevant kind of sentience does *not* require that a being possess subjective interests or any other cognitive characteristics (130, 137-141).

Consequently, Francione (2008) would argue that Cochrane's and Regan's definitions of sentience are overly demanding, because they take the capacity for subjective interests to be necessary for sentience. Indeed, Francione argues that the sort of sentience accounts used by Regan and Cochrane "...will do nothing more than create new speciesist hierarchies in which we *may* move some nonhumans, such as the

## Claim Two: Sentience, so defined, grounds human rights

Both Regan and Cochrane conclude that all beings who are sentient in the relevant way (above) have human rights. Regan (2004) does this via his ‘Rights View’ (xvi-xviii; xxxiv-xxxvi; lii-liiii; 266-329; 398-399). The Rights View begins by arguing that all entities that are subjects-of-a-life have an equal inherent value. For Regan, all mammals (human and nonhuman) over the age of one are subjects-of-a-life (78, as described above). Because all subjects-of-a-life have equal inherent value, Regan argues that all subjects-of-a-life must be treated the same (232-248; 258-265). The upshot of this, on Regan’s view, is that all subjects-of-a-life have the same basic moral rights (266-329). These are rights to respectful treatment (266), to not be harmed (266), to life, etc. (273). Importantly, for Regan, all rights-holders (whether nonhuman or human) have these rights *equally*. As he explains, “this means that if any two individuals have the same moral right (e.g., the right to liberty), then they have this right equally. Possession of moral rights does not come in degrees” (Regan 2004: 267-268). Regan’s view is thus committed to the claim that, because most nonhuman animals and humans have the same moral status (subjects-of-a-life), they ought to have the same moral rights.

So far, all Regan’s view has shown is that nonhumans and humans can have the same *moral* rights. For our purposes what is more important is whether they have the same

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great apes or dolphins, into a preferred group but continue to treat all other nonhumans as things that lack morally significant interests” (Francione 2008: 144).

I acknowledge that the above discussions are prominent within the animal rights, moral standing, and sentience literature. However, I will not discuss them any further in this chapter because none of the above arguments are concerned with explicitly defending the claim that nonhuman animals can have *human* rights (which is part of my thesis focus). Instead, I will be accepting that Cochrane and Regan *have* offered an account of sentience, according to which nonhuman animals who are sentient in the relevant way can be persons and rights-holders for human rights. I do, however, acknowledge that the definition of sentience used by Regan and Cochrane may be controversial, incorrect, or overly demanding.

*human* rights. I posit that Regan's characterisation of 'moral rights' is compatible with our understanding of human rights. Regan characterises the relevant moral rights as claim rights (271-273) that are weakly universal (267), are connected to basic welfare needs (90-92, 94-120), and are high priority norms (286-287). Regan also accepts that these rights are primarily moral rights, to which legal rights ought to correspond (268). This characterisation of moral rights matches our definition of human rights (chapter 1). Indeed, Regan emphasises that his 'Rights View' "seeks to describe and ground a family of basic human rights" (xiii). Therefore, although Regan does not explicitly state that all subjects-of-a-life have equal human rights, it seems compatible with his view to interpret equal moral rights as human rights.

Alasdair Cochrane (2013) explicitly argues for the above position in his article, 'From human rights to sentient rights'. His central argument can be seen in the following quote:

This paper...challenges the exclusivity of human rights. In particular, it argues that basic universal entitlements cannot justifiably be limited to the human species, for such entitlements are possessed by all sentient non-human creatures. Moreover, it claims that the basic rights of sentient non-humans are not qualitatively distinct from human rights. As such, it argues that in language, theory and practice, human rights should be reconceptualized as 'sentient rights' (Cochrane 2013: 655-656).

On this view, there is a morally important similarity between most humans and nonhuman animals (they are sentient in the relevant way) and, in virtue of this similarity, they should be treated the same and have the same protections (human rights, as sentient rights).

Cochrane argues that, as a result, all sentient beings (human and nonhuman) have qualitatively identical basic rights, even if the content of these rights differ (664-668). This may initially sound puzzling, and requires explanation. Consider the right to healthcare. The content of this right may vary when applied to a standard adult human, a human infant, and a nonhuman animal (due, in part, to their different biological makeup, and the different medical threats that apply to them). For instance, we can suppose that the standard adult human is entitled to *mental* health care, whilst the nonhuman animal is not. Cochrane claims that, despite this difference in *content*, the rights of humans and nonhumans are qualitatively identical. This is because both sets of rights share the quality of ‘protecting the individual in question’. I will argue for a similar view in chapter 5.

Using the above outlines, I take both Regan and Cochrane to be committed to the claim that all sentient beings (human and nonhuman) have (at least) the same *basic* human rights, even if the content of these rights differ. This is reflected in Regan’s (2004) claims that “...if any individual (A) has such a right, then any other individual like A in the relevant respect also has this right” (267), and “...like us, animals have certain basic moral rights, including in particular the fundamental right to be treated with the respect that, as possessors of inherent value, they are due as a matter of strict justice” (329). Cochrane (2013) makes similar points via his assertions that “...all sentient creatures possess their basic rights on the same grounds: to protect those basic interests necessary to lead a minimally decent life” (668), and “...obviously human and animal rights do differ in content – that is no good reason to maintain that human rights are qualitatively different from the basic rights of other sentient creatures” (665). I interpret the above as entailing that all entities that pass the low binary threshold ought to be treated the same; they have an equally high moral status (personhood) and the same equally important basic

rights. For these reasons, I take Cochrane and Regan to be WSI accounts as, on their views, both human and nonhuman entities can be persons and rights-holders for (basic) human rights.

#### 4.4 Evaluating the inclusive binary accounts

The previous sections have outlined the basic structure of inclusive binary accounts (4.1), and also the key arguments of paradigmatic inclusive binary accounts (4.2 and 4.3). Using these outlines, we can develop the following case study to represent the key features of the inclusive binary accounts. Suppose that we have two subjects: Michael and Sarah. Michael is a marginal case and Sarah is a standard adult human.<sup>134</sup> On the inclusive binary accounts, we have a low threshold for personhood (understood in terms of being sentient, etc.). The inclusive binary accounts accept that both Michael and Sarah pass this low threshold. Michael just passes the threshold, in the sense of having a threshold amount of the requisite property (e.g. sentience). Conversely, we can assume that Sarah is well over the threshold – as a standard adult human, she has high levels of the requisite property.<sup>135</sup> On the inclusive binary accounts, both Michael and Sarah are persons, and they are persons for the same reason; both have the threshold property. Because Michael and Sarah are both persons, the inclusive binary accounts also accept that they are both rights-holders for human rights (see 4.2 and 4.3). Inclusive binary accounts conclude that both Michael and Sarah have (at least) the same *basic* human rights (where these rights can differ in content, but not quality). Using the above case study, we can identify the key features of the inclusive binary accounts as (i) the use of a low binary threshold, and (ii)

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<sup>134</sup> I am purposefully not defining what type of marginal case Michael is. This is so that the evaluation that follows can apply to both NSI accounts (where Michael would need to be human) and WSI accounts (where he could also be a nonhuman animal). All that is important for the following evaluation points is that Michael is not a standard adult human.

<sup>135</sup> Indeed, Sarah (but not Michael) will also pass the high binary threshold for personhood set by exclusionary binary accounts (chapter 3).



a similarity assumption – all those who pass the binary threshold are persons (for the same reason) and have qualitatively identical basic human rights.

In some significant respects, the inclusive binary accounts are highly morally commendable. By emphasising the similarities between marginal and non-marginal cases, they promote an admirable inclusivity and equality that could have serious, positive moral repercussions for human rights theory. For example, if we adopt an inclusive binary account, then it follows that those with psychological impairments and nonhuman animals ought to be treated much better than they currently are (e.g. by having human rights). I will argue for a similar view throughout chapters 5 and 6.

However, whilst I acknowledge the laudable moral aims and potential applications of the inclusive binary accounts, I will argue that we ultimately should not accept inclusive binary accounts. To argue for this position, this section will present three key problems that affect all inclusive binary accounts (WSI and NSI accounts). In 4.4.1 I will argue that the low binary threshold used by inclusive binary accounts includes either too many or too few marginal cases as persons with human rights. In 4.4.2 I will argue that, on the inclusive binary accounts, some marginal cases either have too few basic human rights, or too many. Finally, in 4.4.3 I will argue that inclusive binary accounts cannot adequately resolve rights conflicts between marginal and non-marginal cases, or between different marginal cases.

#### **4.4.1 Problems with the low binary threshold**

This subsection will argue that there are problems with the low binary threshold used by inclusive binary accounts. To show this, I will modify the above case study (Michael and Sarah) in order to explain how the use of a low binary threshold could either include too

many or too few entities as persons with human rights. I will argue that there is no way for the inclusive binary accounts (or any binary account) to resolve this problem whilst retaining a binary threshold for personhood.

Recall our above case study. Michael is a marginal case and Sarah is a standard adult human. On the inclusive binary accounts, Michael and Sarah both pass a low binary threshold and so are persons with human rights. In a modification of this case study, let us imagine that there is a third subject: Jane. Like Michael, Jane is a marginal case. Also like Michael (and Sarah), Jane has some degree of the requisite threshold property (sentience, the capacity to care, etc.).<sup>136</sup> However, unlike Michael, Jane does not have a threshold level of the property; she is just *below* the threshold. Therefore, because Jane does not pass the low binary threshold, she is *not* a person with human rights, according to the inclusive binary accounts.

The above outcome (Jane's exclusion) is problematic if there is some good reason to suppose that, like Michael, Jane *ought* to be classed as a person with human rights. This supposition follows if we accept that Michael and Jane are very similar in morally important ways. Both Michael and Jane are marginal cases, and both only have a low degree of the requisite threshold property. The only difference is that Jane has a fractionally lower amount of the requisite property (and so falls just below the binary threshold), whilst Michael has fractionally more of the property (and so falls just above the binary threshold).<sup>137</sup>

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<sup>136</sup> One might object that 'sentience' is not a scalar property. I will be accepting that there can be degrees or levels of sentience, as implied in footnote 133.

<sup>137</sup> I identified a similar problem with the exclusionary binary accounts (see 3.4). I explained how the threshold used by exclusionary binary accounts can lead to arbitrary discrimination amongst otherwise similar marginal cases.

It is both arbitrary and overly restrictive to accept that such a minor difference in the degree to which a threshold property is held can have such major implications for the moral statuses of Michael and Jane (where the former is a person with human rights, whilst the latter is not). Yet this is precisely what the inclusive binary accounts would have to accept. On the inclusive binary accounts, it is all and only those subjects who are *above* the threshold (by whatever degree) who are persons with human rights. All who are below the threshold (by even the smallest degree) cannot be persons with human rights. As demonstrated in our Jane example, this has morally problematic implications as there are some entities (like Jane) who have the morally relevant property (sentience etc.), and yet are still excluded from being persons and rights-holders. As explained throughout chapter 3, such exclusion can lead to the permissible mistreatment of the marginal cases.

An obvious response to the above problem would be to lower the binary threshold. The inclusive binary accounts could accept that the binary threshold is *not* set at the level of Michael, but at the level of Jane. In other words, they could accept that the requisite threshold property is more basic than they had been supposing. As such, they could argue that there is no reason to exclude Jane from being a person with human rights simply because she has a more basic or less developed version of the requisite property than Michael. This response would (initially) solve our above problem as, on this modified inclusive binary account, Jane, Michael, and Sarah would *all* be persons with human rights.

However, the above solution (lowering the threshold) would only really be addressing a symptom of an underlying problem with their position. This is because we could imagine

a fourth subject: Steven. Steven has slightly less of the threshold property than Jane, and so falls just below the new threshold. Of course, we could respond by again lowering the threshold – this time to Steven’s level. However, if we do this, then we can imagine a fifth subject who falls just below this threshold, and so on. The crux of the issue is that, however low we set the inclusive binary threshold, there will be marginal cases who fall just below this threshold and who are thus not persons with human rights.<sup>138</sup> If we want a truly inclusive account, that can accommodate most if not all of our marginal cases, then this exclusion is morally problematic.

At this point, it is worth also noting an additional issue that follows from the ‘lowering the threshold’ strategy. In the above cases, the inclusive binary accounts could lower the binary threshold in order to accommodate some marginal cases that we *want* to include as persons and rights-holders (e.g. Jane). However, every time that the inclusive binary accounts lower the threshold in this way, there would be an increased risk that they would also have to include some entities that we intuitively do *not* want to include as persons and rights-holders. For example, suppose that our threshold property is sentience. Suppose also that the inclusive binary accounts defined the relevant kind of sentience as phenomenological consciousness plus subjective interests (in Regan and Cochrane’s sense, 4.3). Now imagine that, in order to accommodate Jane, the inclusive binary accounts had to revise this definition of sentience so that the relevant kind of sentience was just phenomenological consciousness. And then to accommodate Steven, they had to adopt an even more basic definition of sentience, and so forth. At some point in this series

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<sup>138</sup> This will presumably be true up to a certain point. When we have a very low threshold (perhaps only slightly above a non-zero point) most, if not all, marginal cases will be persons with human rights. However, when we have such a low threshold, there is a further problem of overinclusion. This is discussed in the main text, below.

of developments, the definition of morally relevant sentience would be basic enough to include any entity that has basic awareness of, and responsiveness to, its environments.<sup>139</sup> This more basic definition of sentience arguably applies to a very wide range of things. For example, thermostats could be supposed to have this basic sentience because they can respond to temperature changes in their environment. Others have argued that basic sentience applies to all living things (Chan 2011), which would include (i) insects, (ii) plants, and (iii) bacterium.<sup>140</sup> In 6.2.3 and 6.2.4 I will argue that it is overinclusive and morally problematic to include inanimate objects (like thermostats) and certain living things (like plants) as persons with human rights.<sup>141</sup>

The inclusive binary accounts are thus faced with a dilemma. If they maintain a strict low binary threshold for personhood, then at least some marginal cases who ought to be persons with human rights will be excluded. The low binary threshold will consequently be too restrictive. Conversely, if inclusive binary accounts further lower the binary threshold, in order to accommodate more marginal cases as persons and rights-holders, then they risk making their account overinclusive by also accommodating plants and inanimate objects. This problem follows from the use of a *binary* (all-or-nothing)

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<sup>139</sup> This minimal definition of sentience is connected to base consciousness. By base consciousness we mean a very minimal, low level of awareness, typically restricted to the generic ability to sense and respond to the world *in some way*. For example, I demonstrate base consciousness if I can sense that there is an object in front of me and respond by moving around the object. On this minimal definition, a being is sentient if it can respond to the world in *any way* (Van Gulick 2018: section 2.1; Siewert 2017: section 5).

<sup>140</sup> For i) see Barron and Klein (2016), and Perry, Barron, and Chittka (2017). For ii) see Harries-Jones (2017), and Thompson (2019). For iii) see Margulis (2001).

<sup>141</sup> There is no obvious way for the inclusive binary accounts to avoid this problem. Indeed, Regan (2004: 391) seems to bite the bullet and suggest that inclusive binary accounts should take the risk of overinclusion. As explained above, Regan originally argued that all mammalian animals over the age of 1 pass the binary threshold and are subjects-of-a-life (78). However, he also concedes that “because we do not know exactly where to draw the line, it is better to give the benefit of the doubt to mammalian animals less than one year of age who have acquired the physical characteristics that underlie one’s being a subject-of-a-life” (391). Regan’s ‘benefit of the doubt’ strategy seems to add to the problem of overinclusion, rather than resolve it, as there will always be new (and even more basic) entities to whom it could seem reasonable to extend the benefit of the doubt to. Further, there is no reason why we ought to only extend the benefit of the doubt to mammalian animals, as Regan suggests.

threshold. Wherever the binary threshold is set, it is possible to retort that the threshold is either overinclusive or underinclusive. In chapters 5 and 6 I will argue that inclusive accounts (like mine) can avoid this problem by abandoning binary thresholds.<sup>142</sup>

#### 4.4.2 Problems with basic rights

This subsection will argue that the rights view presented by inclusive binary accounts is unsatisfactory. To show this, I will again draw on our case study where Michael is a marginal case, and Sarah is a standard adult human. On the inclusive binary accounts, because both Michael and Sarah pass the low binary threshold (sentience, etc.) they are rights-holders and have the same qualitatively identical *basic* human rights. I will argue that, on this view, Michael can have either too many or too few rights.

One obvious concern about the inclusive binary accounts is that, if both Michael and Sarah are rights-holders for human rights, then Michael might end up having too many human rights. This is because there are some rights that Sarah has that seem counterintuitive or unfitting when applied to Michael. The inclusive binary accounts are aware of this problem. For example, Alasdair Cochrane (2013) explicitly states that “...it would be absurd to assign to sentient non-humans the right to a fair trial, the right to a nationality, or the right to freedom of thought, conscience and religion” (665). All of the

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<sup>142</sup> In 4.1 I outlined two ways that we can understand the use of a binary threshold on inclusive accounts. First, we could suppose that there is a single, binary property that subjects must have in order to be persons with human rights. Second, we could assume that the threshold property is scalar, and subjects must have a certain amount of the relevant property in order to be a person with human rights. The problems outlined in 4.4.1 work particularly well on the second understanding of the ‘binary threshold’, whereby the relevant personhood properties come in degrees. I have consequently used this second understanding to inform the examples and discussions used in 4.4.1. Note, however, that we could also make the arguments of 4.4.1 using the first understanding of ‘binary thresholds’. To do this, we would simply need to state that, on inclusive binary accounts, there is a single, binary property that subjects must have in order to be persons with human rights. The accounts under discussion will be underinclusive if some subjects who ought to be persons are not, on these accounts, in virtue of not possessing the relevant binary property. The accounts under discussion will be overinclusive if the chosen binary property is held by subjects who we intuitively do not want to classify as persons.

inclusive binary accounts discussed above (4.2 and 4.3) thus accept that there can be a differentiation between the rights of standard adult humans and the rights of marginal cases. Sarah, but not Michael, can have certain extensive non-basic rights (e.g. freedom of religion, a right to vote, etc.).

That being said, inclusive binary accounts do *not* accept that there can also be such differentiation at the level of basic rights. As explained throughout 4.2 and 4.3, inclusive binary accounts accept that any and all entities that pass the low binary threshold have qualitatively identical basic rights. On this view, both Michael and Sarah ought to have basic rights (where these rights can differ in content, but not quality). This is because, on the inclusive binary accounts, it is *not* absurd to assign basic rights (to life, against torture, etc.) to both Sarah *and* Michael; as both pass the low binary threshold, they are the right sorts of entities to warrant these protections (e.g. because, as sentient beings, they share interests in staying alive, avoiding pain, etc.). In what follows, I will argue that it is this failure to differentiate between marginal cases' basic rights that causes problems for the inclusive binary accounts. To see this, let us begin by examining how the inclusive binary accounts understand 'basic rights'.

Although the inclusive binary accounts largely agree on some elements of 'basic rights' – for instance, that they protect especially important interests against pain and suffering, etc. – they disagree on precisely what these basic rights are. For example, on Agnieszka Jaworska and Julie Tannenbaum's (2019: 68) NSI view, "...the claim-right not to be killed...a claim-right not to be forced into medical experimentation and a claim-right not to be severely harmed" are basic rights. On his WSI view, Alasdair Cochrane (2013) accepts that "...all sentient creatures possess the basic right not to be inflicted with

excruciating pain simply for the amusement of others” (659). He also lists the right to life, to basic health, and to not be tortured as basic rights (665). Finally, Tom Regan’s (2004) WSI view argues that “...both human and nonhuman subjects-of-a-life...have a basic moral right to respectful treatment” (xvii), broadly understood. It is this list of basic rights that I shall use to evaluate the inclusive binary accounts.

On one reading of the above list of basic rights, Michael (our marginal case) has too few rights. This is at least partly because there are some rights that many of us would consider to be basic that are not included on the above list. For example, take the right to liberty. Even the most simple, conservative accounts of human rights typically include the right to liberty as a basic human right. For instance, John Rawls (1993: 58) accepts a notably reduced view of human rights where the only human rights are to life, *liberty*, personal property, and equal treatment under the law. And Henry Shue (1996: 19) argues that there are three basic rights: *liberty*, subsistence, and physical security.<sup>143</sup> If we too acknowledge the moral importance of liberty, then it seems like liberty ought to be a basic human right.

However, Alasdair Cochrane (2013: 666-667) has argued that the right to liberty does not (and cannot) extend to nonhuman animals, infants, or the severely cognitively impaired (the marginal cases, like Michael). This is because Cochrane takes the right to liberty to follow from the capacity for autonomous agency (667). As nonhuman animals, infants, and the severely cognitively impaired lack the capacity for autonomous agency, they do not meet the moral conditions for being a rights-holder for the right to liberty. Because the marginal cases are otherwise rights-holders (see 4.2 and 4.3), but do not have the right

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<sup>143</sup> Shue’s (1996) view of basic rights is also discussed in Cochrane (2013: 666).



to liberty, Cochrane concludes that “we therefore have good reason to question whether liberty is a basic right of all humans” (667).

There are two main problems with Cochrane’s response. First, his response is far too quick to group the marginal cases together.<sup>144</sup> Cochrane may be correct to suggest that *some* nonhuman animals, infants, and the severely cognitively impaired lack autonomous agency and thus a right to liberty (though this, in itself, is contestable). It surely does not follow from this, however, that *all* nonhuman animals, infants, and the severely cognitively impaired similarly lack a right to liberty. As I will argue in 6.1.1 and 6.1.2, there are some humans with severe psychological impairments (like dementia), and some types of nonhuman animal, that *do* seem to have basic liberty rights. By denying that liberty is a basic human right (whilst simultaneously suggesting that marginal cases *only* have basic rights), the inclusive binary accounts deny *some* marginal cases rights that they ought to have.<sup>145</sup>

A second problem with Cochrane’s response (and with the inclusive binary accounts in general) is that to deny that liberty is a basic right requires us to use ‘basic right’ in a different sense to the standard usage employed by Rawls and Shue. Cochrane acknowledges this in the following quote: “Shue defines basic rights in a more precise way than I have been using the term in this paper” (2013: 666). This is important as the central claim made by inclusive binary theorists is that all those who pass the binary threshold have qualitatively identical basic rights (4.2 and 4.3). For this to work, we need

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<sup>144</sup> As the other inclusive binary accounts discussed above also seem to group marginal cases together, this problem would also extend to inclusive binary accounts in general.

<sup>145</sup> Note that the above problem – where some marginal cases lack rights that they seemingly ought to have – applies to all of the senses of ‘basic right’ under discussion. If we adopt Shue’s and Rawls’ definition (above), then marginal cases would lack basic rights to medical care. If we adopt the inclusive binary account definition, then marginal cases would lack basic rights to liberty and political representation.

a clear and consistent understanding of what ‘basic rights’ are, and also a non-ambiguous understanding of what the scope of these rights are (i.e. do they contain liberty, political representation, etc.). Cochrane’s above quote implies that the inclusive binary accounts are using ‘basic rights’ in an imprecise, flexible way. This is problematic as it means that, at present, we lack a concrete understanding of which basic rights the marginal cases have, and which they lack, on an inclusive binary account.

Above I have argued that there are problems with the definition of ‘basic rights’ and, on the preferred definition, at least some marginal cases have too few rights. Below I will argue that there are also converse cases where, using the list of basic rights outlined above, some marginal cases would have too many basic rights.

Suppose that Michael is a child or a dog. In these instances, it seems fair to say that he *does* have the basic rights listed above (to life, against torture, etc.). But now suppose that he is an embryo or an early-stage foetus. On some NSI accounts (such as those grounded in human dignity), Michael would pass the low binary threshold. Yet it would be highly controversial to suggest that he has a right to not be killed or harmed (given the implications that this would have for the abortion debate).<sup>146</sup> I discuss this further in 6.2.5. Similar issues could affect *all* of our inclusive binary accounts. As mentioned in 4.4.1, there are problems with the low binary threshold as, when it gets low enough, there is a risk of overinclusion, and entities like bacterium and plants could feasibly pass the

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<sup>146</sup> This specific problem would not affect Regan’s (2004) account for, as mentioned, he restricts his subject-of-a-life view to “...mentally normal mammals of a year or more” (xvi). Embryos and early-stage fetuses would thus not be accommodated on his account. Note, however, that Regan’s approach is itself problematic as it is morally arbitrary to only consider mammals that are over one year old. It would have the bizarre implication that a mammal that is sentient, and is also 11 months and 29 days old, is not a subject-of-a-life and does not have basic rights. Three days later, however, the mammal *would* be a subject-of-a-life and *would* have basic rights. For further problems with Regan’s approach (and with a modification of it) see footnote 141.

threshold and class as persons and potential rights-holders. Unless the inclusive binary accounts can resolve the problem with the threshold (which I do not believe they can), there is a risk that they would have to concede that bacterium and plants also have these basic rights to life, health care, etc. This is counterintuitive, and is discussed further in 6.2.3 and 6.2.4.

This subsection has critiqued the rights view used by inclusive binary accounts. I have explained that the notion of ‘basic rights’ being employed by inclusive binary theorists is non-standard, imprecise, and overly flexible. I have also argued that, by failing to differentiate between marginal cases, some marginal cases have too many or too few basic rights, on the inclusive binary accounts. In chapters 5 and 6, I will outline my non-binary view which takes a more nuanced approach and can explain how *individual* marginal cases have the rights that they do (where these rights can be both basic and non-basic, and where it is not *necessary* for any one marginal case to have the same rights as any other marginal (or non-marginal) case).

#### **4.4.3 Problems resolving rights conflicts**

This subsection will argue that inclusive binary accounts cannot adequately resolve rights conflicts.<sup>147</sup> I begin by outlining what rights conflicts are, and why it is important for *any* human rights account to be able to deal with these conflicts. I explain how, given that inclusive binary accounts are committed to *equality*, one might naturally suppose that they ought to resolve rights conflicts using a fair decision procedure (e.g. a coin toss or a lottery). I outline the problems with this strategy and acknowledge that, because of these problems, inclusive binary accounts reject fair decision procedures in favour of priority

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<sup>147</sup> As with 6.2.6, by ‘rights conflict’ I mean a conflict between 2 (or more) human rights.

setting. Contra the inclusive binary theorists, I argue that in many cases, the proposed priority setting view does not work and, in these cases, it seems like inclusive binary accounts *would* have to rely on the fair decision procedures (e.g. coin tosses) that they claim to reject.

Rights conflicts will be discussed in depth in 6.2.6. For now, it will suffice to say that rights conflicts occur in cases where two (or more) rights-holders have competing rights claims, which cannot both be fulfilled at the same time. For example, Amanda's right to free speech could conflict with David's right to privacy. In order to resolve this conflict, we need some fair way to determine whose right ought to win the conflict (Amanda's or David's). For inclusive binary accounts, such conflicts are more complex as conflicts can occur between standard adult humans, between standard adult humans and marginal cases, and between marginal cases.<sup>148</sup> Importantly, inclusive binary accounts must be able to offer responses to *all* of these potential conflicts.

As outlined above (4.2), a central tenet of the inclusive binary accounts is their commitment to *equality*. On these accounts, all those who pass the binary threshold have an *equal* moral status, and *equally important* (and qualitatively identical) basic (human) rights. Given this focus on equality, it is natural to suppose that inclusive binary accounts ought to resolve rights conflicts using a fair decision procedure (e.g. a coin toss or a lottery) that would treat each rights claim equitably. That this is a natural supposition is acknowledged by both Cochrane (2013) and Regan (2004), though both ultimately reject the use of fair decision procedures.<sup>149</sup> In what follows, I will briefly outline (i) how fair

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<sup>148</sup> This is also true of my account, and is discussed in depth in 6.2.6.

<sup>149</sup> For example, see the following quotes: "Under a principle of equal consideration, would we just have to toss a coin to see who wins out? Certainly not." (Cochrane 2013: 671). "If all have an equal right to be

decision procedures work, and (ii) why these procedures are problematic for conflict cases involving marginal cases. I do this because, whilst inclusive binary accounts want to reject the use of fair decision procedures, I will argue that they must ultimately rely on them in at least some conflict cases.

Fair decision procedures are well discussed in the literature, and are typically explained in terms of tossing a coin or holding a lottery.<sup>150</sup> The central idea is that, by tossing a coin, holding a lottery, etc., we can ensure that all rights-holders in a conflict have a fair chance of winning the rights conflict.<sup>151</sup> This is because the use of such fair decision procedures enables us to (i) accept that there are no intrinsic differences between each party's rights, and (ii) leave the decision about whose right to prioritise to chance, rather than deciding on the basis of bias or favouritism.

The use of fair decision procedures becomes problematic when marginal cases are involved. This is because, in at least some conflict cases, the use of a coin toss, etc. would seem to give the marginal cases either too much or too little moral protection. I explain both of these outcomes below.

First, there are some conflict cases where it seems morally irresponsible to toss a coin or hold a lottery. Suppose we have a conflict between a standard adult human's (Sarah's) right to life, and a marginal case's (Michael's) right to life. In this scenario, let us also suppose that Michael is a nonhuman animal, like a dog or a chicken. In line with inclusive

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treated respectfully, must we draw straws? Would it not be unjust, given the right view, to choose to sacrifice the dog in preference to one of the humans?" (Regan 2004: 285).

<sup>150</sup> See Huseby (2011), Saunders (2008), and Taurek (1977).

<sup>151</sup> Note that the use of fair decision procedures is not simply a hypothetical idea; it is used in some real-world cases as well. For instance, local councils sometimes use a lottery to allocate oversubscribed school places.

binary accounts, we can accept that both Michael and Sarah pass the low binary threshold and are persons with human rights. However, Michael only just passes the threshold, whereas Sarah is well above the threshold. It is uncontroversial, on this view, to claim that Sarah is (typically) more directly morally considerable than Michael is – she has more of the morally relevant threshold property (sentience, etc.). Consequently, it would seem morally permissible to claim that Sarah’s right to life ought to be prioritised over Michael’s. This is because, as Sarah is more directly morally considerable than Michael, we would arguably do a greater moral wrong to Sarah if we allow her to die. The opposing idea – that we ought to treat Michael (a chicken) and Sarah (a standard adult human) the same and toss a coin to determine who lives – would seem morally problematic for many.<sup>152</sup>

Second, and converse to the above, there may be conflict cases where it seems intuitive that a marginal case (Michael) ought to win the conflict. For example, suppose that Michael is a human child, whilst Sarah is a standard adult human. Once again, there is some scenario in which their rights to life conflict, and so only one of them can be saved. Many of us would claim that Michael’s right to life ought to be prioritised, and so he ought to win the conflict case. This is because Michael is a child, and we have especially strong moral duties to protect children. As such, it would again seem morally problematic

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<sup>152</sup> Note that this will not necessarily be true for those who adopt strong animal rights views, and who would argue that Michael and Sarah *are* equally morally important. For them, tossing a coin may seem like an appropriate strategy. My contention is that a coin toss would *never* be an appropriate strategy in a rights conflict as, on my account (chapters 5 and 6), there are always important differences between i) the extent to which rights-holders are persons and ii) the rights that individual rights-holders have. In 6.2.6 I will develop a priority setting response to rights conflicts, on my view. My account allows that, in some cases, a nonhuman animal *will* win a rights conflict against a standard adult human (and that this could include cases where a nonhuman animal’s right to life trumps a standard adult human’s right to life). In other cases, the nonhuman animal will lose a rights conflict against a standard adult human. I will argue that my conflict resolution strategy is fair and morally permissible.

to resolve the conflict by tossing a coin. We already know which outcome ought to be favoured – the child (Michael) ought to be saved.

Because of the problems with fair decision procedures, many inclusive binary theorists deal with rights conflicts by weighting the conflicting rights. On this view, we can say that Michael has a stronger right than Sarah (or vice versa), and so this stronger right ought to be prioritised. Both of our WSI theorists – Tom Regan (2004: 324-327) and Alasdair Cochrane (2013: 670-671) – argue in favour of this priority setting strategy.<sup>153</sup>

Their basic argument can be outlined as follows:

P1) All sentient creatures have morally important interests (4.3, above).

P2) These interests can differ in strength.

P3) Basic rights protect these interests.

P4) There can be conflicts between the rights of sentient creatures.

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<sup>153</sup> Cochrane (2013: 670-671) states that “the interests which the competing rights protect must be identified and weighed against one another – and if all else is equal, the stronger and more important interests must win out over the weaker and less important interests. What is of crucial and utmost importance is that the interests are judged on their own merits, and not on the basis of the characteristics of the individuals to whom they belong.” He does not explain how to judge an interest on its own merit.

Regan (2004) presents a similar view in his ‘lifeboat’ scenario in which we have a lifeboat and four standard adult humans and one dog (xxvii-xxxii, 324-327, 351-353). The lifeboat can only hold four entities, so one of the five will need to be thrown overboard. Regan argues that we ought to throw the dog overboard, and he explains this as follows: “The selection of the dog does not conflict with recognizing the animal’s equal inherent value or the dog’s equal prima facie right not to be harmed. It does not conflict with the former because the animal is not harmed on the grounds that the aggregate of the harm spared the four humans, as a group, outweighs the individual animal’s losses. And it does not conflict with the latter because recognition of the equal prima facie right not to be harmed requires that we not count unequal harms equally. To save the dog and to throw any one of the humans overboard would be to give to the dog more than is his due. It would be to count the lesser harm done to the dog as equal to or greater than the greater harm that would be done to any of the humans if one of them was cast overboard” (Regan 2004: 324). It is unclear precisely why the dog experiences a lesser harm than the human being, in this scenario. It is also unclear how ‘degree of harm’ can be used to weight rights when one of the rights under consideration is the right not to be harmed.

C1) All else being equal, in cases of conflict, we ought to prioritise whichever right protects the strongest interests.

Note that this strategy – weighting the underlying interests and using this to resolve the rights conflict – is compatible with the commitment to equality shown by inclusive binary accounts. Accepting that Michael’s and Sarah’s interests can vary in strength does not preclude also accepting that Michael and Sarah have an equal moral status, assuming that both pass the inclusive binary threshold (e.g. by being sentient in the relevant way). Nor does it prevent inclusive binary theorists from accepting that Michael and Sarah have qualitatively identical basic rights, or that their respective rights are equally important.

At first glance, the above strategy does *seem* to work, and can resolve rights conflicts. For instance, consider Cochrane’s following example:

...some human beings associate to enjoy such things as dog-fighting, where dogs are set upon each other in pits to fight to the death. Just because the interest that the right to free association protects belongs to humans, that does not mean that it must be prioritized over the important interests of other sentient creatures (Cochrane 2013: 670).

In this example, we have a conflict between a standard adult human’s (Sarah’s) right to free association and a marginal case’s (Michael’s) right to life. As Cochrane explains, Sarah’s interest (dog-fighting) does not outweigh Michael’s interest (staying alive), and so Michael’s right ought to be prioritised (ibid). This is clear and intuitively acceptable. However, it is also an easy case for the inclusive binary theorists. The interests under



discussion are very obviously not of the same strength, and very few people would disagree with the outcome (that Michael's right ought to be prioritised).

Things become more difficult when the interests are of similar strength. To see this, let us revise the above Cochrane example as follows: *Some human beings have life-threatening medical conditions that require the development of new drugs and medical treatments. To develop these treatments, researchers experiment on nonhuman animals, where this experimentation leads to the death of the nonhuman animals.* In this case, we have a conflict between a standard adult human (Sarah)'s right to life-saving medical treatment, and a marginal case (Michael)'s right to life. Importantly, in this example, the underlying interests appear the same – both Sarah and Michael have a strong interest in staying alive.<sup>154</sup> Unlike the dog-fighting example, above, it is not obviously clear whose interests and rights are strongest (and so ought to be prioritised). As such, we could end the above vignette in either of two ways. First, *although the interests that Sarah's right to medical treatment protects belongs to a human, they ought not be prioritised over the important interests of Michael (a sentient nonhuman).* Or second, *although the interests that Michael's right to life protects belongs to a sentient being (a nonhuman animal), they ought not be prioritised over the important interests of Sarah (a human being).* In this case, where either option could be argued for, the priority setting view does little to resolve our conflict. It is still not clear whose right ought to be prioritised.

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<sup>154</sup> Consider the following quote by Regan (2004: 397): *“The rights view abhors the harmful use of animals in research and calls for its total elimination.* Because animals have a kind of value that is not the same as, is not reducible to, and is incommensurate with their having utility relative to the interests of others, because they are owed treatment respectful of their value as a matter of strict justice, and because the routine use of laboratory animals in research fails to treat these animals with the respect they are due, their use in research is wrong because unjust.” This quote implies that, in our above example, Michael's interest is just as strong as Sarah's (despite the fact that he is a nonhuman animal and she is a standard adult human).

This difficulty becomes even more pronounced when we consider conflicts where there appear to be *no* relevant differences in play. For example, suppose that two dogs both have a basic right to medical care. Their respective rights both protect the same interest (staying alive, etc.), where these interests are of comparable strength (neither dog will be harmed more than the other if its interests are ignored). Suppose also that we are in a conflict case, where we only have the medical resources to save one dog. In this case, the above priority setting view can, again, provide no answer about how to proceed. The same problem would apply to any conflict where the underlying interests are similar (if not the same).<sup>155</sup>

In the above difficult cases, there seem to be three options open to the inclusive binary theorist. First, they could retain the priority setting view outlined above and concede that it cannot provide responses to difficult conflict cases. This would be problematic as it would entail that inclusive binary accounts are incomplete as they cannot fully explain how to resolve rights conflicts.

Second, they could abandon the priority setting view and concede that, despite their earlier protestations, fair decision procedures (coin tosses, lotteries, etc.) are the correct way to resolve rights conflicts. Fair decision procedures *would* be able to deal with *both* easy and difficult cases (e.g. in our above dog example, we would simply toss a coin to see which dog gets medical treatment). Additionally, as both Regan and Cochrane admit (above), fair decision procedures are natural bedfellows with the equality view (or similarity assumption) that underlies inclusive binary accounts. However, this option is

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<sup>155</sup> Jaworska and Tannenbaum (2019: 71) have a similar objection to Regan's WSI view, which they claim fails to consider how humans with psychological impairments would fair in his lifeboat scenario (outlined above in footnote 153).

also problematic because, as mentioned above, fair decision procedures can cause marginal cases to be given either too much or too little moral consideration in conflict cases.

Finally, inclusive binary accounts could argue that the priority setting view works in *most* conflict cases, but in particularly difficult conflict cases we would toss a coin or hold a lottery, etc. The difficulty with this option is that there are now two responses to conflict cases – inclusive binary accounts would lack a simple, consistent response to *all* conflict cases (easy and difficult). In 6.2.6 I will argue that my inclusive account can provide a consistent response to both easy and difficult conflict cases.

## **Conclusion**

This chapter critically assessed the inclusive binary accounts. In 4.1 I explained that inclusive binary accounts work by using a low binary threshold that, as a consequence, includes most marginal cases as persons with (basic) human rights. In 4.2 I explained that there are two types of inclusive binary account: narrow scope inclusive (NSI) and wide scope inclusive (WSI). NSI accounts argue that most, if not all, human marginal cases are persons with human rights, whilst WSI accounts argue that both human and nonhuman marginal cases can be persons and rights-holders. I clarified that this chapter will focus mainly on WSI accounts, and in 4.3 I outlined two example WSI accounts by Alasdair Cochrane (2013) and Tom Regan (2004). In 4.4 I evaluated the inclusive binary accounts and argued that all inclusive binary accounts (NSI *and* WSI) suffer from three problems. First, wherever the low binary threshold is set, either too many or too few entities will be included as persons with human rights (4.4.1). Second, on inclusive binary accounts, some marginal cases will have either too many or too few basic human rights (4.4.2).

Third, inclusive binary accounts cannot provide a satisfactory response to difficult cases of rights conflicts (4.4.3).

More broadly, part two of the thesis (chapters 3 and 4) has outlined the problems with existing binary accounts. I have argued that neither exclusive nor inclusive accounts can satisfactorily explain the moral status and rights of the marginal cases. Many of the problems with these accounts stem from their claims that (i) there is a strict binary threshold for personhood, and (ii) the marginal cases either have no human rights (chapter 3) or the same qualitatively identical basic rights (chapter 4). In part three of the thesis (chapters 5 and 6) I will develop an account that rejects these claims. I will argue that there is no strict threshold for personhood; instead, personhood is plural and non-binary. Additionally, I will argue that human rights are not all-or-nothing, and so it is possible for rights-holders to have some rights (e.g. to life, to liberty, etc.) but not other rights (e.g. to vote, to privacy, etc.). Importantly, I will argue that rights-holders can have different rights to one another, and so a marginal case can have different rights to a standard adult human *and* different rights to other marginal cases. A consequence of my account is that most marginal cases have some degree of personhood and some human rights. I will argue that my account is the best way of explaining the moral status and rights of the marginal cases, as it avoids the problems of existing accounts.

## **PART THREE: MY ACCOUNT**

## CHAPTER FIVE. NON-BINARY PERSONHOOD

### Introduction

Part one of this thesis explained the basic notions of ‘human rights’ (chapter 1), ‘personhood’ (2.1 & 2.2) and ‘the marginal cases’ (2.3), as they are understood throughout this thesis. Part two (chapters 3 & 4) then critically assessed the binary personhood accounts of human rights. I argued that these accounts cannot satisfactorily explain the moral status and human rights of the marginal cases. In reaction to the problems of the binary accounts, part three of this thesis (chapters 5 & 6) will develop my new non-binary personhood account of human rights (hereafter ‘my account’). I will argue that my account *does* satisfactorily explain the moral status and human rights of the marginal cases.

To argue for the above, part three of this thesis will be divided into two chapters. Chapter five will outline my theory. I will explain (i) how there can be many different properties which can each ground personhood, and (ii) how these properties can come in degrees. I will then clarify how personhood (so understood) grounds human rights.<sup>156</sup> Chapter six

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<sup>156</sup> My account, so outlined, is a pluralistic account, in the sense that I deny that there is any one value that grounds personhood or human rights. There are other pluralistic accounts in the literature. For example, Buchanan (2013: 50-84) grounds human rights in a plurality of moral rights, moral duties, and moral values. Tasioulas (2002: 93-97; 2015: 50-60) grounds human rights in a variety of human interests, as do Barry and Southwood (2011: 380-382). Perring (1997, and discussed in 5.1, below) accepts that there are many different grounds for personhood. And Warren (2000: 148-178) argues that a subject’s moral status is tied to a combination of intrinsic properties (life, sentience, and moral agency) and relational properties (social and ecological properties).

There is not space to critically evaluate each of these existing pluralistic accounts. Instead, I will only explicitly discuss Perring’s account (5.1). This is because Perring’s account is the closest to the sort of account that I want to develop – a non-binary personhood account of human rights. Unlike Buchanan (2013), who adopts a legalistic focus, Perring accepts that human rights are primarily moral rights (as I argued in chapter 1). And unlike Tasioulas (2002, 2015) and Barry and Southwood (2011), Perring does not explicitly adopt an interest view of rights (I too explained that I will not focus on interest views in chapter 1, footnote 43). I will use the evaluation of Perring’s account (5.1.2) to explain what my account needs to do in order to be successful. The account that I develop (5.2-5.7) should be seen as belonging to this larger family of pluralistic accounts, but as also presenting new arguments that existing pluralistic accounts may not accept.

will then consider the applications and implications of my account. 6.1 will apply my account to a number of paradigmatic marginal cases. I will outline how my account understands the personhood and human rights of subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3). 6.2 will then defend my account against potential objections, including that my account is both over and underinclusive (6.2.3-6.2.4), and that it cannot deal with rights conflicts (6.2.6).

The present chapter (chapter 5) proceeds as follows. 5.1 outlines Christian Perring's (1997) 'Degrees of Personhood' as an example of an existing account of plural, non-binary personhood. I argue that Perring's account is missing an explicit discussion of the connections between plural, non-binary personhood and human rights. In response, my account (5.2–5.7) aims to provide a non-binary account that can provide the details and the arguments missing from Perring's account. 5.2 clarifies how there can be many different properties, each of which can ground personhood. 5.3 develops a test for personhood which allows us to determine which of the many properties listed in 5.2 *are* personhood properties. I argue that, if a property passes my test, then it is a personhood property. All properties that pass my test (and which are thus personhood properties) are then individually sufficient for personhood. 5.4 explains how personhood properties are typically scalar. 5.5 outlines how personhood (so understood) grounds human rights. 5.6 argues that we get all of the familiar, widely accepted human rights on the basis of my account. Finally, 5.7 discusses the connections between a subject's degree of personhood and their human rights.

## **5.1 Perring and degrees of personhood**

This section outlines the view presented in Christian Perring's (1997) article 'Degrees of Personhood'. Perring explicitly considers the connections between non-binary personhood and moral (human) rights. His account thus provides a useful touchstone on the basis of which I can develop my account (5.2–5.7), which has a similar focus. Whilst I agree with the central ideas of Perring's account, I will argue that he leaves a number of important questions open (which my account will attempt to answer).

The section proceeds as follows. 5.1.1 presents four claims which Perring seems to accept, and which are sufficient to generate a basic non-binary personhood account. 5.1.2 then locates the theoretical gaps in Perring's account, and identifies what other claims would need to be made in order for a non-binary personhood account to work.

### **5.1.1 Perring's accepted claims**

Christian Perring (1997) begins by accepting that there are many properties that can ground personhood (hereafter 'personhood properties'). On Perring's account, none of these properties are necessary for personhood, though each is individually sufficient for a degree of personhood. Perring explains how, particularly in the literature on marginal cases, the following have been suggested as possible personhood properties:

...human birth, and the capacity for rationality, consciousness, self-consciousness, language, membership in a community of persons, or the possession of personality, emotions, and beliefs (181).

Perring immediately denies that 'human birth' is a valid personhood property. He does this by rejecting the idea that species membership can be a morally important



consideration in the assignment of personhood (181).<sup>157</sup> He then concedes that the remainder of the properties on the above list *could* be personhood properties. Although Perring does not specify *which* of these properties are the correct criteria for personhood (see 5.1.2), he does commit himself to the more general claim that at least *some* of these properties are genuine personhood properties. In accepting this, Perring rejects the monistic claim that there is only one ground for personhood, i.e. some property or cluster of properties that form the standard for personhood (chapters 3 & 4). On Perring's view, subjects can be persons in different ways.

Perring's second claim is that all of these personhood properties "...admit of degrees" (181). To clarify this, Perring considers how the listed capacities develop throughout childhood (181-182). For example, in most typical cases, a child (Lucy) will become more rational as she ages. This is because her capacities for understanding and reasoning will become more developed, allowing her to make increasingly rational choices. Similarly, her language skills will increase as she learns more words and the rules of grammar. And so on for the other listed properties.<sup>158</sup> As Perring (183) explains, his view of scalar personhood is influenced by Derek Parfit's (1984) Reductionist View, which accepts that there is no sharp borderline for personhood; instead, the acquisition of personhood is gradual.<sup>159</sup>

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<sup>157</sup> I made a similar claim in chapter 2 in my rejection of humanism (2.1).

<sup>158</sup> Perring's view has similarities to Griffin's (2008) claims about the normative agency of children (discussed in 3.3 & 3.4.1, above). Like Perring, Griffin accepts that, as Lucy learns and develops, her personhood properties increase. Where Perring differs is in his rejection of the binary claim that Lucy must have a threshold level of a named property (i.e. rationality) in order to be a person. Instead, Perring accepts that Lucy (and all other relevant subjects) can have a degree of personhood.

<sup>159</sup> Perring (1997: 183) uses the following Parfit quote to explain this: "On the Reductionist View, we do not believe that at every moment I either do or don't exist. We can now deny that a fertilized ovum is a person or a human being. This is like the plausible denial that an acorn is an oak-tree. Given the right conditions, an acorn slowly becomes an oak-tree. This transition takes time, and is a matter of degree. There is no sharp borderline. We should claim the same about persons, and human beings" (Parfit 1984: 322).

Perring's third claim is that a subject can be more or less of a person, depending on the amount of personhood properties they possess. Specifically, Perring (183) speculates that a subject will have a higher degree of personhood if they have a "... richer...bundle of psychological properties". Whilst Perring, again, does not specify how this bundle is to be determined (see 5.1.2), the general idea seems to be that the bundle of psychological properties creates a scale that allows us to rank personhood.<sup>160</sup> Those with a rich bundle have a high degree of personhood, whilst those with a poor bundle have a low degree of personhood. To illustrate this, Perring (184) imagines a case in which we could mathematically quantify personhood. In this case, we suppose that there is a "standard degree of general personhood" (ibid) which relates to the bundle of psychological properties that are held by a typical adult human in a community. Each individual then has a degree of personhood relative to that standard. If a subject has a richer than average bundle, then they are more of a person than the standard person; if they have a poorer than average bundle, then they are respectively less of a person.

Perring's fourth claim is that moral protections, including human rights, vary in relation to a subject's degree of personhood. Specifically, Perring tentatively suggests that degrees of personhood entail degrees of rights (186). To explain this, Perring considers how the right to life could be gradable. He claims that a subject's degree of personhood links to the strength of their rights claim, and he defines a rights claim as strong if it could only be trumped in very demanding circumstances (if at all) (190-191). Perring posits that subjects with a high degree of personhood have a strong right to life because their right

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<sup>160</sup> Perring discusses this entirely in terms of psychological properties (1997: 183-184). In 5.2 I will argue that personhood properties are not solely psychological properties; there can also be emotional, social, physical, or phenomenal properties.

to life could be trumped only in exceptional circumstances. He also suggests that subjects with a low degree of personhood have a weak right to life because it would take less to justify violating their right to life (ibid).<sup>161</sup>

Perring thus accepts the following four main claims: (i) there are many personhood properties, (ii) all of these personhood properties are scalar, (iii) a subject's degree of personhood depends on how rich their bundle of psychological properties is, and (iv) subjects with a higher degree of personhood have stronger moral protections. It is these four claims that Perring wants us to accept, and together they form the beginnings of an argument. Given that personhood properties come in degrees, it would be arbitrary to have a binary threshold for personhood and to make moral decisions on the basis of this threshold. As I stated above, this is the sort of argument that I want to accept. However, as 5.1.2 will argue, Perring currently gives us no reason why we *should* accept this argument. This is because, as I will argue below, there are three open questions that Perring leaves unanswered. I will claim that, to work, any account of plural, non-binary personhood (including mine) will need to provide answers to these open questions.

### **5.1.2 Perring's unanswered questions**

The first question that Perring's view raises is what properties actually are personhood properties. Specifically, Perring fails to clarify both *why* certain properties are *personhood* properties, and *which* properties are personhood properties. In other words, Perring leaves it as an open question as to which (if any) of the properties on his list (5.1.1) are sufficient for a degree of personhood.

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<sup>161</sup> McMahan (2008: 92-100) argues for a similar view. For an outline of McMahan's account, see footnote 195.

Perring notably claims that the resulting indeterminate view of personhood is acceptable. He states that "...it is not my purpose here to settle what are the correct criteria of personhood, because whatever they are, they nearly all admit of degrees" (Perring 1997: 181). Whilst it is true that Perring's main purpose *is* to establish degrees of personhood, the quoted response is nevertheless unsatisfactory for reasons explained below.

First, Perring's response suggests that it can make sense to talk about degrees of personhood *without* first identifying what the correct criteria of personhood are. This is theoretically questionable. If none of the properties that Perring lists are actually *personhood* properties then the fact that each property is gradable does nothing to support the degrees of *personhood* view. We would have a scalar view, but not necessarily a degrees of personhood view. To ensure a degrees of personhood view, we must be able to state that the properties used to generate the relevant scale *are* personhood properties. To do this, it is necessary to make some claim about what the correct criteria of personhood are.

In response, Perring could argue that the reason we do not need to identify the correct criteria of personhood is because his degrees of personhood view would apply to *any* criteria of personhood. Thus, I would be wrong to claim that Perring's view of personhood is not sufficiently grounded; it has purposefully been left open to allow for a plurality of personhood properties to be considered. I argue that this response is also unsatisfactory. Whilst it is good for a scalar view to be able to consider many personhood properties, it is still necessary for a scalar view to make *some* claim about the correct criteria for personhood. Without making some claim (however broad and accommodating) we would have to accept that any property, such as having blue eyes, could be relevant for

personhood. This is counterintuitive according to our earlier definition of ‘personhood’, where ‘personhood’ denotes a particularly strong moral status (2.2). ‘Having blue eyes’ is not morally significant, and so cannot be sufficient for moral personhood.

The second reason why Perring’s quoted response is unsatisfactory is because we want ethical views (like Perring’s) to be explanatory and illuminating. We want to be able to use an ethical view to determine what we ought to be doing (morally speaking). In order for an ethical view to *be* explanatory and illuminating, we must (at least) be able to understand the underlying ethical concepts and ideas being employed by the view in question. In Perring’s case, this means that we must be able to understand what ‘personhood’ consists of. If we do not yet know what the personhood properties are on Perring’s view, then we currently lack this understanding. As the underlying concept (personhood) is unclear, Perring’s ‘degrees of personhood’ view currently fails to be explanatory or illuminating.

In response, Perring could retort that his account is only trying to explain how *degrees* of personhood work. Thus, as long as his discussions of scalarity (claims 2 and 3, 5.1.1) are sound, then his account *does* have explanatory force – it has explained what it set out to explain. The fact that he does not *also* explain what personhood actually consists of - and so which properties are genuine personhood properties - is irrelevant (on this response). In what follows, I will argue that this response is not open to Perring as his discussions of ‘degrees of personhood’ also lack clarity and explanatory force.

As explained in 5.1.1, Perring discusses degrees of personhood in relation to the bundle of psychological properties that a subject possesses. This discussion leaves two open

questions. How should the bundle of psychological properties be understood? And, more importantly, how does this bundle correlate with degrees of personhood?

The first question arises because Perring never specifies what he means by a ‘bundle of psychological properties’; he simply states that the bundle can be richer or poorer (Perring 1997: 183). There are several ways in which this ‘richness’ could happen. For example, it may be that a subject has a richer bundle because they have more personhood properties in their bundle than others do. Alternatively, it could be that the personhood properties themselves are not equally important, and so a person with a richer bundle has more (or all) of the important properties. Or perhaps a person has a rich bundle if they have a high degree of the relevant personhood properties. Any of these interpretations would be consistent with Perring’s claim, but would lead to very different views on what it takes to have a rich bundle of psychological properties. Unless Perring can specify which, if any, of these interpretations is correct, it is hard to make sense of his central claim that “the richer the bundle of psychological properties a person possesses, the more of a person he or she is...” (Perring 1997: 183).

A second, and more important, question is how this ‘bundle of psychological properties’ relates to a subject’s degree of personhood. As the above quote suggests, Perring seems committed to the idea that there is a correlation between the richness of the bundle and degrees of personhood. What he does not explain is what kind of correlation this is, and how the correlation works.

At a glance, the correlation in question seems to obtain because Perring is using two scales: degrees of personhood and richness of the bundle of psychological properties.

Perring appears to want to say that the latter affects the former, and so the richer the bundle, the higher the degree of personhood. What is missing is an explanation of how this relationship is to be understood. It may be that the correlation is summative so we simply add up the richness of the bundle to get a subject's degree of personhood. Or the relation may be more complicated than simple addition. In either case, we would need to know more about how Perring is understanding both personhood and the bundle of psychological properties in order for this correlation to make sense.<sup>162</sup> It is important that Perring be able to clarify this correlation as his final claim about degrees of personhood entailing degrees of rights depends on 'degrees of personhood' being understandable.

However, even if Perring could make 'degrees of personhood' understandable, we would still be left with a final question regarding how human rights depend on the degrees of personhood. As explained in 5.1.1, Perring is committed to the idea that degrees of personhood entail degrees of rights, as illustrated by his right to life example.<sup>163</sup> What he fails to explain is how this connection between degrees of personhood and (degrees of) human rights works. Specifically, Perring leaves it open whether degrees of rights refers to the strength of the rights, the scope of the rights, or both.<sup>164</sup> If it refers to strength, then in saying that a subject has a low degree of the right to life, we would be saying that they have a weak or substandard right to life. If it refers to scope, then we would be saying that a subject with a low degree of the right to life has a typically strong right to life, but is entitled to less than someone with a high degree of the right to life. If it refers to both

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<sup>162</sup> Perring's discussion of the mathematical quantification of personhood (5.1.1) does nothing to help clarify this relationship. As Perring (1997) admits, such mathematical quantification may not actually be implementable as it "...would be absurdly precise" (184).

<sup>163</sup> An additional problem is that Perring (1997) only considers the right to life (190-191). Consequently, Perring never actually explains what rights we get as a result of his degrees of personhood view.

<sup>164</sup> It could also refer to the number of rights, but as Perring only considers the right to life (footnote 163, above), it is unclear how many rights he takes rights-holders to have in the first place.

strength and scope, then a subject with a low degree of the right to life would have a weak right that only entitles them to a limited number of protections. Each of these interpretations would lead to different views of how degrees of personhood affect a person's status as a holder of human rights. It is consequently important that Perring clarify the relationship between degrees of personhood and rights in order for his view to have the practical implications that he suggests it has (Perring 1997: 186-193).<sup>165</sup>

In sum, Perring's view is problematic because it leaves open questions about the relationships between the many personhood properties, degrees of personhood, and human rights. These relationships *must* be clarified in order for a non-binary account to pose a viable alternative for the binary accounts of chapters 3 and 4 (which *do* offer clear statements about the relationship between personhood and human rights). As Perring's (1997) view is largely speculative (174), it seems clear that his account cannot provide the necessary clarifications. In response, the remainder of this chapter will develop a new non-binary account that *can* clarify the relationships between the many personhood properties, degrees of personhood, and human rights.

## **5.2 Many different properties can ground personhood**

This section will defend the claim that personhood is plural, in the sense that many different properties can ground personhood. I begin by listing potential personhood properties. For extra clarity, I will refer to this list of properties as 'personhood\* properties', indicating that we do not yet know whether these properties are, in fact, personhood properties. Once a personhood\* property has passed my test for personhood

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<sup>165</sup> We can also question the inherent linearity of Perring's view, i.e. his claim that those with a low degree of personhood have fewer and weaker rights, whilst those with a high degree of personhood have more and stronger rights. I will argue against this view in 5.7, and throughout chapter 6.



(5.3), I will refer to it as a ‘personhood property’.<sup>166</sup> After presenting this list of personhood\* properties, I explain two ways in which personhood can be plural. I end by responding to two potential objections: i) my list of personhood\* properties is too extensive, and ii) it is unclear why any of the personhood\* properties are morally significant enough to ground personhood.

In order to present a list of personhood\* properties, I will draw on the existing personhood and moral status literature.<sup>167</sup> There are two reasons for this. First, both the personhood and moral status literature focus on identifying morally relevant properties that many subjects have. The personhood views claim that persons have a certain special property that distinguishes them from non-persons (though they disagree about what this special property is). The moral status views claim that subjects can have certain other properties that give the subject a moral status, but not necessarily personhood. Both views have used these claims to try and justify the rights of the property-holders. In sum, both views have focused on identifying properties that subjects have which give them some type of moral status and some rights. This is a good starting point for my account, which has a similar focus.

Second, I am attempting to use the personhood properties in a potentially controversial way. Namely, I am going to use the personhood properties to argue that both humans and non-humans can be persons and have human rights, at least to some degree (chapter 6). Given that this will already be hard for some readers to accept, it will make it easier for

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<sup>166</sup> I suggest this distinction in order to avoid any pre-test presumptions that the properties listed in this section (5.2) are personhood properties.

<sup>167</sup> Examples of the personhood literature can be seen throughout chapters 3 and 4. Examples of the moral status literature can be seen in work on animal rights (e.g. DeGrazia (2002), Hursthouse (2000), and Singer (1975, 2011)) and bioethics (Bortolotti (2007), DeGrazia (2014b), and Douglas (2013)).

me and my readers if the personhood properties that I discuss are already familiar and established, rather than new and contentious. Reference to existing properties will help to ground my more unusual theory. I consequently want to use the existing literature to say that the properties identified by both personhood and moral status views *are* personhood\* properties.<sup>168</sup>

With the above in mind, we can draw on the personhood and moral status literature to suggest the following properties as personhood\* properties:

1. Rationality/Reason
2. Consciousness
3. Self-consciousness
4. Decision-Making
5. Autonomy
6. Agency
7. Free Will
8. Intentionality

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<sup>168</sup> Here, there is an assumption of charity. The existing literature on personhood and moral status is extensive and well-researched, and I want to accept that the existing literature does (typically) get the personhood\* properties correct. At least some of the properties will pass my test (5.3) and be genuine personhood properties. Where I want to challenge the existing literature is in its standard claim that personhood is unitary and binary (see chapters 3 and 4).

9. Desires
10. Beliefs
11. Communication/Language
12. Understanding
13. Excellence and the fulfilment of potential. This can include creative achievement
14. Future-directed concerns
15. Feelings
16. The capacity to suffer
17. Emotions
18. Social practices – customs, conventions, and institutions
19. Social activities
20. Relationships and reciprocal care
21. Reciprocal duties
22. Social recognition – being recognised as a person by others and being treated accordingly

23. Morality – being part of the moral community

24. Embodiment

25. Having a central nervous system

26. Sentience

27. Felt experiences, e.g. pleasure and pain

28. Perceptions.<sup>169</sup>

For ease of reference, these properties can be roughly divided into categories. The first 14 properties are psychological properties that a subject can have, and which (typically) depend on the subject having a mind or certain mental states. Properties 15–17 are

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<sup>169</sup> The personhood and moral status literature is extensive. For examples of theorists who argue for the above personhood\* properties see the below list. For 1) see Dennett (1976: 177), Frankfurt (1971: 11-12), Griffin (2008: 32-33), Jaworska and Tannenbaum (2014: 246), Perring (1997: 181), Rawls (1999: 12), Schechtman (2014: 112, 116), and Wilkes (1988: 23). For 2) see Cochrane (2013: 658), Dennett (1976: 177), Perring (1997: 181), Regan (2004: 243-248), and Wilkes (1988: 23). For 3) see Dennett (1976: 178), Harris (1998: 52), Perring (1997: 181), Regan (2004: 243-248), Schechtman (2014: 112, 116), Singer (2011: 96, 101, 119), and Wilkes (1988: 23). For 4) see Frankfurt (1971: 6). For 5) see Griffin (2008: 33-37), McMahan (2002: 260), and Regan (2004: 84-86). For 6) see Evnine (2008: 14-15), Gewirth (1978a: 1150, 1978b: 176, 1984: 15), Griffin (2008: 32-36, 44-46), and Jaworska and Tannenbaum (2014: 246). For 7) see Frankfurt (1971: 14-20). For 8) see Dennett (1976: 177), Evnine (2008:11), Regan (2004: 70, 74-75), Singer (2011: 97-98), and Wilkes (1988: 23). For 9) see Evnine (2008: 11), Frankfurt (1971: 6-14), and Regan (2004: 34, 46, 58-60). For 10) see Evnine (2008:11-14), Perring (1997: 181), and Regan (2004: 34, 46, 58-60). For 11) see Dennett (1976: 178), Perring (1997: 181), Singer (2011: 95-96), and Wilkes (1988: 23). For 12) see Liao (2015: 81). For 13) see Liao (2015: 81), and Wolf (1982). For 14) see Regan (2004: 74), and Singer (2011: 95). For 15) see Singer (2011: 60, 68). For 16) see Bentham (1789: 320-321, note a), DeGrazia (1996: 226-231), and Francione (2008: 130). For 17) see Perring (1997: 181), Regan (2004: 75), and Schechtman (2014: 116). For 18) see Evnine (2008: 2, 4), and Schechtman (2014: 113). For 19) see Schechtman (2014: 112). For 20) see Dennett (1976: 178), Jaworska and Tannenbaum (2014, 2019), Liao (2015: 81), Schechtman (2014: 112), Wilkes (1988: 23), and Zeiler (2014). For 21) see Donaldson and Kymlicka (2011: 240). See also Scanlon (1982: 115) for a discussion of the extent to which the capacity for reciprocity affects a subject's inclusion in the moral sphere. For 22) see Dennett (1976: 177-178), Jaworska and Tannenbaum (2014, 2019), Nelson (2002), Schechtman (2014: 110-118), Wilkes (1988: 23), and Zeiler (2014). For 23) see Perring (1997: 181), and Schechtman (2014: 112). For 24) see Schechtman (2014: 124). For 25) see Singer (2011: 58-60). For 26) see Cochrane (2013), Regan (2004: 243-248), Schechtman (2014: 112), and Singer (2011: 50, 119). For 27) see Francione (2008: 130), and Singer (2011: 49-50, 51, 59-60). For 28) see Regan (2004: 74).

emotional properties, and depend upon the subject having some capacity to feel and to react emotionally. Properties 18–23 are social properties that a subject can have on the basis of their interactions with others. Properties 24 and 25 are physical properties that result from a subject having a body. Properties 26–28 are phenomenal properties that relate to the unique first-person experiences that a subject can have, and to the individual qualities of these experiences.<sup>170</sup>

It is important to clarify two things about the above. First, the 28 properties listed above do not exhaust the full range of possible personhood\* properties. They are simply given as *examples* taken from the extant literature, and should not be seen as constituting a definitive list. It is likely that, once we develop the test for personhood (5.3), we will both lose some of the above properties and gain some other personhood\* properties. For instance, ‘having a central nervous system’ (property 25) may fail to pass my test for personhood, and so will not be a personhood property on my account. And perhaps new properties – like ‘imagination’ and ‘learning’ – *will* pass my test and *so* will be personhood properties. My account accepts plurality, and so there is no limit to the amount or type of personhood\* properties that we could consider.

Second, although I suggested that the properties could be divided into five categories (above), this should not be seen as a binding schema. There are some properties – like ‘pain’ and ‘sentience’ – which could feasibly belong to multiple categories. For example, we could see ‘pain’ as a psychological property, an emotional property, a physical property, and/or a phenomenal property. This is not a problem. My use of the five

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<sup>170</sup> I accept that some properties (like pain and sentience) can belong to many different categories. This will be discussed in more detail below.

categories is intended as a reference aid rather than an explanatory device, and so no part of my argument *depends* on the personhood\* properties being classifiable as psychological, emotional, social, physical, or phenomenal properties.<sup>171</sup>

The above has used the existing literature on personhood and moral status to present a list of what the personhood\* properties could be. I have attempted to categorise this list and explain its limitations. I will now suggest how, contrary to the claims of binary accounts (chapters 3 and 4), these properties could be used to show that personhood is plural.

The above properties could be used to show plurality in two senses. First, personhood could be plural if more than one property passes our test (5.3) and is a personhood property. This would entail that subjects *could be persons for different reasons* (i.e. by having different personhood properties). Note that this view is also consistent with the idea that personhood is grounded on a single property; it is just that the grounding property can vary depending on the person or type of person involved. For instance, a non-marginal person might be a person because they are rational, whereas a marginal person might be a person because they are sentient.<sup>172</sup>

Second, personhood could be plural if a subject is a person because they have a variety of *different* personhood properties. We could understand this in a number of ways. First,

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<sup>171</sup> I also accept that which category a personhood\* property belongs to may well depend on what type of entity the property-holder is. For example, 'pain' may be a solely physical property (relating to bodily damage) when experienced by a robot; but be a phenomenal property when experienced by a nonhuman animal, and so forth.

<sup>172</sup> This suggestion - a non-marginal person might be a person because they are rational, whereas a marginal person might be a person because they are sentient - is made for example purposes only. I do not mean to imply that marginal cases cannot be rational. Nor do I mean to imply that there can only be two grounding properties – one for marginal cases, and one for non-marginal cases. The claim that I am defending is instead that there can be many different properties, each of which can ground personhood. So a subject (Jane) with any one of these properties is a person. And Jane can be a person for different reasons than Tom is a person (depending on which personhood properties Jane and Tom have).

a subject could have a number of *unconnected* personhood properties. For example, they could have rationality, felt experiences, and perception; all of which ground their personhood. Alternatively, a subject could have a series of *connected* personhood properties. To understand how these connections could work, we can refer back to my idea of the personhood categories – psychological, emotional, social, physical, and phenomenal. There could be *intra-category connections*. For example, within the psychological category, we could suppose that rationality, decision-making, and the capacity for choice are connected, and so if a subject has one of these properties, then they will have the others. There could also be *inter-category connections*. For example, the emotional properties might be connected to certain social properties, such as having meaningful relationships. So perhaps the latter typically do not occur without the former. This is a plausible supposition because it is difficult to imagine how a subject could have a *successful* relationship without some level of emotional intelligence (for instance, the capacity for empathy).

There is also a further sense in which the properties could be interconnected. Some properties, like consciousness and embodiment, could be basic properties that are a prerequisite for having other properties. For example, we could accept that it is typically (but perhaps not necessarily always) true that a subject needs to be conscious in order to have interests, or embodied in order to be susceptible to pain, and so on. I discuss these connections further in 6.2.3-6.2.5.<sup>173</sup>

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<sup>173</sup> In saying this, I do not mean to imply that consciousness or embodiment are somehow thresholds for personhood. On my account, a property is only a personhood property if it passes my test for personhood (5.3). As explained throughout 6.2.3-6.2.5, it is possible for subjects to have consciousness or embodiment in ways that *do not* pass my test for personhood. As such, consciousness and embodiment are not always *sufficient* for personhood; one can be conscious without being a person, on my account.

If any of the above connections exist, then personhood could be plural in interesting ways. To show this second sense of plurality, however, I need to establish the first sense of plurality (that there is more than one personhood property). To do this, we need to determine when a property is a personhood property. This will be explained in the test of 5.3.

Before moving on to develop this test for personhood (5.3), it is worth pausing to respond to two potential objections that could be levelled at my list of personhood\* properties. This is because if these objections hold, then my test for personhood would be starting from a faulty base – my list of personhood\* properties would be wrong. Below I will outline each objection and explain how my account can avoid it.

First, my opponent could object that ‘personhood’ and ‘moral status’ are different things. By using both I could be accused of supplementing ‘personhood\* properties’ with ‘moral status properties’; the latter of which may not be enough for personhood. This is important because I am using personhood to ground human rights and the corresponding duties, and so it is necessary that we get the scope of personhood correct. We do not want either too many or too few subjects to be persons with human rights.

This first objection may be true on most standard conceptions of personhood. To see this, we can look at David DeGrazia’s (2002: 1-54) discussion of animal rights, which includes an extended assessment of personhood and moral status. DeGrazia explains that, on the standard view, ‘personhood’ denotes a special high form of moral status. A human is a person because they have some threshold level of rationality. On DeGrazia’s summary, rationality is thus seen as *the* ground for personhood. DeGrazia states that on most animal



rights views, an animal has moral status, *but not personhood*, because it only has a low degree of rationality, or because it has some other morally important property (such as feelings), but not rationality (ibid). On such views, which see personhood as unitary and binary, it is a mistake to conflate personhood properties and moral status properties. This is because ‘having moral status’ is insufficient for ‘having personhood’.

My view challenges the above by claiming that ‘having moral status’ *can* be sufficient for ‘having personhood’.<sup>174</sup> I accept that some subjects who would otherwise only be granted moral status (on standard accounts) are actually persons, on my account.<sup>175</sup> To argue for this, I will explain how properties from both the moral status and personhood literature can pass my test and be genuine personhood properties (5.3). On my view, it is not a mistake to combine moral status and personhood\* properties; this combination is necessary in order to identify the full range of potential personhood properties, and, by extension, the full class of persons and rights-holders for human rights.

A second objection could be that the properties listed in the current literature are often debated, with different theorists accepting different properties for different reasons. For example, James Griffin (2008: 32-34) argues that the capacity for rational choice is required for normative agency, whereas Marya Schechtman (2014: 112, 116) argues that rationality is morally important because it enables one to live a characteristic life of a person.<sup>176</sup> It may be argued that I need to engage with these debates *before* I can accept

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<sup>174</sup> Note the emphasis on ‘can’ here. I am not suggesting that ‘having moral status’ is *always* sufficient for ‘having personhood’, nor do I mean that the two concepts are equated.

<sup>175</sup> For example, in 6.1.2 and 6.1.3 I will argue that nonhuman animals and robots can both be persons, on my account. In contrast, in 6.2.4 I will explain how plants and ecosystems might have a moral status, but are not persons with human rights, on my account. This is because the nonhuman animal and the robot, but not the plants or the ecosystems, have properties that can pass my test for personhood (5.3).

<sup>176</sup> For further discussions of Griffin’s view, see 3.1. For an overview of Schechtman’s person life view, see 2.1 (under the ‘Problem 2: Speciesism’ subheading), and particularly footnote 58.

any property as a personhood\* property. This is because I need to say *why* a property should be a personhood\* property before I can use it in any substantial way.

There is some force to this objection. I *do* need to provide some explanation of why a property is a personhood property. This is because we must be able to finish the sentence ‘x is a personhood property because ...’ to have a valid personhood criteria. *My* personhood criteria (below) will not appeal to *existing* explanations and justifications for personhood, and so I will not engage any further with the current debates in the literature (as these are not my focus). Instead, I will develop a new test for personhood (5.3) which will allow us to determine why certain properties are genuine personhood properties. I will leave my justification for the personhood properties until *after* this test has been presented.

In sum, this section has used the personhood and moral status literature to create a list of personhood\* properties. I have explained two ways in which these many personhood\* properties could be used to show that personhood is plural. I have also indicated how my test for personhood (5.3) will respond to worries that we cannot determine when a personhood\* property is a genuine personhood property.

### **5.3 A test for personhood**

The previous section used the personhood and moral status literature to identify a list of personhood\* properties. I argued that personhood is plural if more than one of these properties turns out to be a genuine personhood property, and I proposed that we need to develop some test to determine which properties are personhood properties. This section will develop this test. I will argue that x is a personhood property if and only if, and to the degree that, it is conducive to (i) the subject being an agent, or (ii) the subject

satisfying their basic needs, or (iii) the subject having a good life. I will explain how a personhood\* property can pass this test three times, twice, or once.

In order to work, my test will need to show that at least some of the personhood\* properties are individually sufficient to make the property-holder a person with human rights. I need this human rights focus in order to be able to apply my theory to the problem of marginal cases (chapter 6). In the next chapter I will need to show that marginal cases are *persons with human rights*, and that this attribution of personhood and rights-holder status is appropriate. In what follows, I will use substantive accounts of human rights to inform my account of personhood.

Within the human rights literature, there is a background assumption that the role of human rights and their corresponding duties is to protect, promote, and sometimes enhance something valuable.<sup>177</sup> There are different main views on what this valuable thing is, and this is where the substantive accounts come in. The three main substantive accounts are the agency, basic needs, and good life accounts (Cruft, Liao, and Renzo 2015: 11). I will summarise each of these accounts below, before challenging the standard way that they are understood in the literature.<sup>178</sup>

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<sup>177</sup> This assumption is accepted and discussed by, amongst others, Beitz (2009: 109-117), Griffin (2008: 2, 33, 47, 200), and Woods (2014: 43-65).

<sup>178</sup> There may be a worry that the three fundamentally valuable goods – agency, basic needs, and the good life – only apply to human beings. As I draw on these fundamentally valuable goods in both my test for personhood (5.3) and my personhood account of human rights (5.5), there may thus be a concern that I will end up restricting personhood and human rights to human beings (and so exclude many of our marginal cases (2.3)). This is not the case. In 6.1 I will explain how subjects with dementia, nonhuman animals, and robots are all persons with human rights, on my account. I also discuss how my account does not show arbitrary discrimination against nonhumans in 6.2.1.

In essence, agency accounts argue that there is a certain kind of special moral agency that is inherently valuable.<sup>179</sup> A subject will be an agent in this way if they can make autonomous choices and (ideally) go on to act on the basis of these choices. Defenders of this view think that this type of agency is so valuable that it deserves to be protected by human rights and the corresponding duties. Consequently, agency accounts accept that all subjects who are agents in the relevant way have human rights. Human rights are (primarily moral) rights to the minimum standards required for functioning as an agent (e.g. being free to make one's own choices). Human rights, so understood, are also high priority norms in the senses that (i) governments have strong duties to provide subjects with the minimum standards required to be an agent, and (ii) the human rights of agents can only be trumped in extreme circumstances.

Basic needs accounts accept that there are certain morally important things that a subject *needs* in order to function as a person.<sup>180</sup> Drawing on the work of Harry G. Frankfurt (1984: 6), we can suppose that a need is both a basic need and morally relevant if a failure to meet this need will harm a subject.<sup>181</sup> In this sense, at least food, shelter, and basic medical care are morally relevant basic needs. If a subject cannot meet her basic needs for food, shelter, and basic medical care, then she will be harmed – she will be malnourished, homeless, and ill. According to the basic needs accounts, it is thus the satisfaction of the morally relevant basic needs that is valuable. Defenders of this view argue that it is so bad if these basic needs are not met, that the satisfaction of these needs

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<sup>179</sup> Examples of agency accounts include Forst (2012), Gewirth (1978 a & b, 1984), and Griffin (2008).

<sup>180</sup> Examples of basic needs accounts include Acevedo (2018), Braybrooke (2014), Floyd (2011), and Gasper (2007).

<sup>181</sup> This is discussed in more depth in 6.2.3. There, I explain how a banana's need for sunlight is a basic need, but not a morally relevant basic need. I consequently argue that, whilst a banana has needs, it is not a morally relevant person with human rights, on my account. In 6.2.4 I then expand on what it means for a subject to be harmed if a need is not met.

ought to be protected by human rights. Consequently, basic needs accounts accept that all subjects who have morally relevant basic needs have human rights. Human rights protect the minimum standards required to satisfy these basic needs (e.g. minimum levels of health care, basic shelter, etc.). Human rights, so understood, are high priority norms in the senses that (i) governments have strong duties to provide subjects with the minimum standards required to satisfy basic needs, and (ii) these rights can only be trumped in extreme circumstances.

Finally, good life accounts argue that there are some objective goods, the having of which enables a subject to have a characteristically good life.<sup>182</sup> Typically, the defenders of good life accounts clarify that the good life should be understood in a minimal sense. For example, both S. Matthew Liao (2015: 82) and Gillian Brock (2012: 4) argue that a good life is one in which subjects have the ability to pursue a decent existence.<sup>183</sup> Such a ‘decent life’ goes beyond the satisfaction of basic needs, but is well below what would be required for a maximally excellent life. For instance, we might suppose that a decent existence is one in which a subject can pursue deep personal relationships, meaningful work, and

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<sup>182</sup> Examples of good life accounts include Brock (2012), Liao (2015), and Wolf (2016). Nussbaum’s capabilities approach (1997;1999) could also reasonably be included as a good life account.

<sup>183</sup> Brock (2012: 4) argues as follows: “...global justice requires that all are adequately positioned to enjoy prospects for a decent life, which entails that we attend especially to (i) enabling need satisfaction, (ii) protecting basic freedom, (iii) ensuring fair terms of cooperation in collective endeavours, and (iv) social and political arrangements that can underwrite the important goods outlined in (i) – (iii).”

Liao (2015: 82) argues that “...a characteristically good human life, or a good life, for short, is one spent in pursuing certain valuable, basic activities. “Basic” activities are activities that are important to human beings *qua* human beings’ life as a whole.....basic activities are ones that if a human life did not involve the pursuit of any of them, then that life could not be a good life. In other words, a human being can have a good life by pursuing just some, and not all, of the basic activities. Some of the basic activities are as follows: deep personal relationships...knowledge of, for example, the workings of the world, of oneself, of others; active pleasures such as creative work and play; and passive pleasures such as appreciating beauty”. He concludes that “The fundamental conditions for pursuing a good life are various goods, capacities, and options that human beings *qua* human beings need, whatever else they (*qua* individuals) might need, in order to *pursue* the basic activities” (82-83).

hobbies and interests.<sup>184</sup> On good life accounts, it is the subject's ability to pursue these goods (rather than necessarily to obtain them) that is morally valuable.<sup>185</sup> Consequently, good life accounts accept that all entities who can be subjects of a good life have human rights. Human rights are minimum standards in the sense that they protect what is required for any subject to have a minimally decent existence.<sup>186</sup> Human rights, so understood, are again high priority norms in the senses that (i) governments have strong duties to provide subjects with that which enables them to pursue minimally decent lives, and (ii) these rights can only be trumped in extreme circumstances.<sup>187</sup>

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<sup>184</sup> This list of goods would be supported by Wolf (2016: 253) who argues that "an adequate conception of a good life should recognize, in addition to happiness and morality, a third dimension of meaningfulness." Wolf would thus support the idea that, in order to have a minimally good life, Christine needs to be able to pursue things that give her life meaning – like relationships, hobbies and interests, and meaningful work.

One may worry that the list of goods that we are considering is human-centric, in the sense that the goods are typically important to humans. In response to this worry, I suggest that some goods will be shared across species (e.g. it is also good for nonhuman animals to have strong interpersonal relationships). Other goods may be species-specific. There may be human-specific goods, nonhuman animal-specific goods, robot-specific goods, etc. I consider the possibility of species-specific goods further in 6.2.1, but will essentially leave it as an open question. In 6.2.6 I will outline a method which could help us to answer this question, by helping us to understand the personhood properties, fundamentally valuable goods, vulnerabilities, and rights that apply to different entities.

<sup>185</sup> Here we might question what it means to 'pursue a good life'. I take it that, in order to pursue a good life, there must be some level of active involvement on the part of the subject. The subject must themselves pursue some good. This seems consistent with the quotes of footnote 183, and particularly Liao's (2015:82) claim that "...a human being can have a good life by pursuing just some, and not all, of the basic activities". Here, it is the human being themselves that pursues the good – the good is not simply bestowed on them. This seems like a sensible claim, and is one that we could extend to our marginal cases. I will consequently be accepting that a person (human or nonhuman) has the ability to pursue a good life if *they* can pursue some good (however this good is defined, see footnote 184).

The above might raise a new question: in order to pursue some good, does the subject need specific psychological capacities? I am willing to concede that some goods (e.g. pursuing a certain hobby) may require intentionality and other high-level psychological capacities. Other goods, like being in a caring relationship, may not. To my mind, what *does* seem necessary for the pursuit of all goods is that the subject be conscious (in some form and at least to some minimal extent), and/or have a mind (of some form). I struggle to see how subjects that are not conscious (in any way) and/or which do not have a mind (of any type) can actively pursue a good life. (Note: I do not think that this needs to be human-like consciousness. In 6.1.2 and 6.1.3 I will accept that nonhuman animals and robots could be conscious and could actively pursue a good life). I discuss the importance of consciousness further in 6.2.4 and 6.2.5. In footnote 316 I explain why accepting the importance of consciousness is compatible with my test for personhood (5.3).

<sup>186</sup> For example, Brock (2012: 4) argues that, in order to ensure a good life (in its minimal sense), the state must ensure the equal provision of goods and opportunities, e.g. equal access to education and voting.

<sup>187</sup> Two points of clarification may be helpful. First, I take the above to suppose that there are *morally relevant* forms of agency, basic needs, and the good life which ground human rights. As emphasised in footnote 181, there may be other types of basic needs (and perhaps also 'goods' and types of agency) that are not morally relevant, in the sense described in the main text, and so which do not ground human rights. It is only the *morally relevant* forms of agency, basic needs, and the good life that I will use in my test for personhood (5.3).

As used in the standard literature, the above substantive accounts are viewed in two main ways. First, they are viewed as extensionally equivalent. This means that they are all thought to generate the same output (persons have a certain set of widely accepted human rights), but use different inputs (agency, basic needs, or the good life) to generate that output. The mechanics of the three accounts are thus the same. They all take some fundamentally valuable good that persons have (being an agent, satisfying basic needs, and having a good life), and use this valuable feature to explain why persons have human rights. Further, all three views are thought to agree on *which* human rights persons have. All three accounts generate the same human rights, where these rights correspond to standard views on what human rights there are (e.g. life, liberty, freedom of speech, etc.).

Second, the three accounts are viewed as mutually exclusive. This means that, if you accept one substantive account, you typically do not also accept the others. On the standard view, if we can satisfactorily explain why Steve is a person with human rights using an agency account, then we do not *also* need to appeal to basic needs or good life justifications. If the substantive accounts are standalone accounts, then any one of them should be sufficient to justify human rights.

It is this notion of mutual exclusivity that I want to challenge. Below I will explain how the substantive accounts are not mutually exclusive because the fundamentally valuable goods (agency, the satisfaction of basic needs, and the good life) are interconnected. If

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Second, the above discussions of agency, basic needs, and the good life should be seen as consistent with our previous discussions of human rights (chapters 1 – 5.1), rather than a replacement of them. I take it that the previous claims about what grounds human rights can all be understood as falling under the umbrella terms of ‘agency’, ‘basic needs’, or ‘good life’ accounts. For example, will theory (chapter 1, footnote 43) and the exclusionary accounts of chapter 3 are obvious agency accounts. Interest theory (chapter 1, footnote 43) seems to be compatible with the good life accounts. And the inclusive accounts of chapter 4 seem to contain elements of agency, basic needs, and good life accounts.

correct, this challenge allows me to accept that there is no one *correct* fundamentally valuable good, but rather many.

Mutual exclusivity only applies *if* the substantive accounts are independent from one another, and so agency is distinct from basic needs and the good life, and vice versa. Yet this does not seem to be so. The three fundamentally valuable goods (agency, the satisfaction of basic needs, and the good life) are interconnected in important ways. To see this, consider a subject, Daisy. In at least some cases, Daisy cannot be a successful agent if her basic needs are not satisfied. For instance, suppose that Daisy is starving and that there are no resources available for her to not starve. Suppose also that Daisy would *choose* to not starve. In this scenario, because Daisy's basic need for food is not satisfied, her capacity for autonomous choice is restricted and/or she cannot act on the basis of her choices (to not starve). Here, Daisy's agency and the satisfaction of her basic needs are connected. Similarly, it seems that Daisy cannot be a successful agent without at least some of the goods required for living a minimally good life. This is because many of the choices that she makes will be about relationships, work, interests, etc. (i.e. the goods of a minimally good life). She cannot make these choices, or action them, if these goods are not present or available to her. Daisy's agency is thus also connected to the good life. Finally, Daisy arguably cannot satisfy her basic needs, or have a good life, if she is not an agent; her capacities for choice and action play an important role in the realisation of both needs and goods. This is because she will typically need to reason about what is valuable and how to obtain this if she is to satisfy a basic need or gain a feature of the good life.



The above suggests that the substantive accounts can be interconnected. In some cases, no one fundamentally valuable good (agency, the satisfaction of basic needs, or the good life) can fully explain why a subject is a person with human rights. If we must instead accept that all three fundamentally valuable goods play a role in the explanation (as interconnectedness suggests), then we must accept that all three fundamentally valuable goods are valuable.<sup>188</sup>

A second, related challenge to mutual exclusivity comes from value pluralism.<sup>189</sup> In its simplest form, value pluralism is the view that there are a plurality of moral values which cannot be reduced to one another. If value pluralism is true, then we should not expect that only one fundamentally valuable good (agency, the satisfaction of basic needs, or the good life) grounds human rights. Nor should we expect that the three fundamentally valuable goods under discussion can be reduced to one another (e.g. that the good life and the satisfaction of basic needs can ultimately be reduced to discussions of agency).

As I do not accept that the substantive accounts are mutually exclusive, I am not going to choose between the accounts. Instead, I am going to accept that all three fundamentally valuable goods (agency, the satisfaction of basic needs, and the good life) are worth

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<sup>188</sup> My claim that all of the fundamentally valuable goods are valuable does not necessarily entail that they are all *equally* valuable. It may be that, in some circumstances, agency is more important than basic needs, or vice versa. I will discuss this further in 6.2.6 in relation to rights conflicts. For our present purposes, all that matters is that each of the fundamentally valuable goods (agency, basic needs, and the good life) *is* morally valuable, and *is* worth protecting and promoting.

<sup>189</sup> When I am talking about ‘value pluralism’ I am referring to ‘moral value pluralism’ rather than ‘political pluralism’ (which is often also termed ‘value pluralism’). Political pluralism is more concerned with discussions of liberty and the proper limits of governmental intervention. For a full discussion of the different types of pluralism, see Mason’s (2018) ‘Value Pluralism’.

The main discussion of value pluralism in ethics comes from Ross (2002), but we can also see it in the work of others, like Scanlon (1998; particularly 141-143), and Stocker (1990).

protecting and promoting. I will thus use all three fundamentally valuable goods to help formulate my test for personhood.

In essence, my test for personhood (below) will argue that a property is a genuine personhood property (and thus passes my test) if it can stand in a certain important relation to at least one of the fundamentally valuable goods, discussed above. Recall that I am using the fundamentally valuable goods because they identify some valuable good that subjects have which is sufficient to make them a person with human rights. Recall also that I am not seeing the fundamentally valuable goods as mutually exclusive, and so all three fundamentally valuable goods (agency, the satisfaction of basic needs, and the good life) can play a role in my test. In what follows, I will consider what the relation between the personhood properties and the fundamentally valuable goods could be. I will propose one strong relation and one weak relation, and identify problems with both of these. I will then suggest that a mid-way relation (which is neither too strong nor too weak) is the best option. I will argue that the correct relation between the personhood properties and the fundamentally valuable goods is one of assistance.

In order to propose a strong relation between the personhood properties and the fundamentally valuable goods, we could suppose that the former must *guarantee* the latter. On this view, the presence of the personhood properties *ensures* that the property-holder also has the fundamentally valuable goods. There are two ways in which we could understand this relation. First, we could see some personhood property as *necessary* for a given fundamentally valuable good. For instance, we might suggest that a subject will be an agent in the relevant sense (a fundamentally valuable good) if and only if they have rationality (a personhood property). Alternatively, we could see the personhood

properties as *sufficient* for the fundamentally valuable goods. For instance, we might suppose that having the capacity for felt experiences (a personhood property) is sufficient for the subject to have basic needs (a fundamentally valuable good). In both cases, the fundamentally valuable goods follow *because* the subject has certain personhood properties.

A benefit of this strong view is that it does make the relation between the personhood properties and the fundamentally valuable goods clear. However, a key problem with the strong view is that it would create a test for personhood that would be very difficult to pass. Many of the properties of 5.2 would fail to be personhood properties because they are neither necessary nor sufficient for agency, the satisfaction of basic needs, or the good life. Excluded properties would arguably include: language (11), creativity (13), social practices (18), reciprocal duties (21), social recognition (22), morality (23), sentience (26) and perceptions (28). Note that it is not automatically a bad thing for properties to fail to pass my test for personhood; I want my personhood criteria to have the correct scope, and this may necessitate rejecting some personhood\* properties from being genuine personhood properties. However, in the above case, the exclusion of the above properties does seem problematic. Most of the properties listed above *do* seem to be *related* to agency, the satisfaction of basic needs, and/or the good life. They are just neither *necessary* nor *sufficient* for agency, the satisfaction of basic needs, or the good life. Consequently, I suggest that the strong view makes the relation between the personhood properties and the fundamentally valuable goods too restrictive.

Due to the problems with the strong view, we might be tempted to instead propose a weak relation between the personhood properties and the fundamentally valuable goods. Here,

we could suppose that the relation is one of *connection*, rather than necessity or sufficiency. Perhaps the personhood properties are linked to the fundamentally valuable goods because they are concurrent, and so the properties and the fundamentally valuable goods will typically occur together. For instance, we could suppose that the emotional and social types of personhood property (5.2) always occur alongside the satisfaction of basic needs (a fundamentally valuable good). Or perhaps the connection is even weaker than this. Maybe the personhood properties and the fundamentally valuable goods are connected simply because they are both present in the same subject, or type of a subject. There are consequently many ways in which we could present a weak relation.

The weak view does avoid the main problem with the strong view: the weak relation is not restrictive. However, the weak relation is itself problematic, for two main reasons. First, the weak relation lacks clarity and precision. It is hard to determine precisely what the weak relation between the personhood properties and the fundamentally valuable goods would be, and how this relation would function and/or manifest itself. This is because, as explained above, there are many ways in which the properties and the fundamentally valuable goods could be weakly connected to one another. For the weak view to work, we would need to identify which of these weak connections correctly identifies the relation between the personhood properties and the fundamentally valuable goods. At present, there does not seem to be any non-arbitrary reason to favour one weak connection over another.

A second, related problem is that the weak relation lacks theoretical weight. Even if we could identify what the weak relation is, it is unclear how this relation could be used to justify the claim that a subject with the personhood properties is a person with human

rights. The relation would simply be *too* weak and easy to dismiss to provide this justification. Consequently, the weak relation could not be used to create a viable test for personhood.

Above, I have explained the problems with using either a strong or a weak relation. The strong relation makes the relation between the personhood properties and the fundamentally valuable goods too restrictive and hard to satisfy. The weak relation cannot explain why the connection between the properties and the fundamentally valuable goods is important enough to justify the claim that property-holders are persons with human rights. To create a viable test for personhood, we need a relation that falls between these two extremes, and avoids the problems with each. We need a relation that is *important*, but which is not as strong as entailment.

I suggest that an assistive relation would fulfil the above criteria. I will consequently argue that the personhood properties should be *conducive* to the satisfaction of the fundamentally valuable goods (explained more below). By ‘conducive’ I mean that if a subject has (some of) the personhood properties, then it is more likely that they will also have the fundamentally valuable goods (agency, the satisfaction of basic needs, and/or the good life). This assistive relation is *important* because the personhood properties *help* the subject to realise the fundamentally valuable goods, where these valuable goods are valuable enough to be protected by human rights. The relation also avoids the sort of entailment relations seen in the strong view (above).

On my view, x is a personhood property if and only if, and to the degree that, it is conducive to

- a) The subject being an agent, or...
- b) The subject satisfying their basic needs, or...
- c) The subject having a (minimally) good life.

In the rest of this section I will explain how my test, so defined, works. To do this, I will use example properties from 5.2 and assess whether they pass my test. Recall that I am not seeing the fundamentally valuable goods as mutually exclusive, and so a property could pass my test three times, twice, or once.

A property will pass my test three times if it is conducive to the subject being an agent, satisfying their basic needs, and having a good life. Rationality (property 1, 5.2) can do this. Here, I am defining rationality in the standard sense as relating to the subject's capacity to use reason, understand evidence, make informed decisions, etc. Rationality is conducive to agency because a subject typically needs to be able to reason to make informed choices. Rationality is conducive to the satisfaction of (morally relevant) basic needs because, to satisfy their basic needs, the subject should be able to rationally assess how to fulfil their needs (find food, shelter, etc.). Similarly, rationality is conducive to the subject having a (minimally) good life because it allows the subject to understand the importance of certain goods, and identify how to achieve them. Note that it is likely that most of the properties listed in 5.2 would pass the test three times when they are held by a standard adult human. As will be discussed below, it is typically when a property is held by a marginal case that it will pass the test either twice or once.

A property will pass my test twice if it is conducive to two fundamentally valuable goods. For instance, it might be conducive to the subject satisfying their basic needs and having a good life, but not be conducive to being an agent. An example of a property that might pass my test twice is ‘relationships’ (property 19, 5.2). Eva Feder Kittay (2005) has argued that children with severe psychological impairments are persons because they are part of morally valuable caring relationships. Kittay explains that, in virtue of being in these relationships, children with severe psychological impairments can satisfy at least some of their basic needs and have some of the aspects of a minimally good life (138, 147, 153-155). However, such children would not typically be classed as agents in the standard sense of the word, whereby agents have high level psychological properties (like rationality, autonomy, etc.) (see chapter 3). In at least this case, it seems that relationships are conducive to the subject meeting their basic needs and having a minimally good life, but are not conducive to the subject being an agent.

A property will pass my test once if it is conducive to a single fundamentally valuable good. Suppose that we have a subject with advanced dementia, Sarah. Let us also suppose that Sarah is creative (property 13, 5.2) and takes great pleasure from painting. In *Sex & Social Justice* (1999: 40-41) Martha Nussbaum lists the ability to engage in pleasurable activities as an objective social good. On this basis, Sarah’s ability to pursue her creativity seems conducive to her having a (minimally) good life.<sup>190</sup> It is not, however, also conducive to her being an agent or satisfying her basic needs. Her ability to pursue her creativity does not assist with her ability to make rational choices or take care of her own

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<sup>190</sup> Creativity would also be accepted as an element of a minimally good life by both Liao (2015) and Wolf (2016). Liao (2015) lists “active pleasures such as creative work and play” (82) as one of the basic activities that people can pursue in order to have a minimally good life. Wolf (2016: 253) accepts that a minimally good life features happiness, morality, and meaningfulness. Sarah’s creativity would bring her some level of happiness and meaning.

morally relevant basic needs; both of these abilities are impaired by her advanced dementia.

Above, I have proposed a simple test for personhood and explored how this test works using some of the properties listed in 5.2. On my account, *x* is a personhood property because it is conducive to the property-holder having agency, or satisfying their basic needs, or having a good life. As shown above, properties can pass my test three times, twice, or once. A property will fail to pass my test if said property is *not* conducive to *any* of the fundamentally valuable goods. Such a property would not be a personhood property on my account.

A benefit of my account is that it is relatively simple. Via my test, we have a clear statement of when a property is a personhood property, and we can apply the test to any conceivable personhood\* property. Note that, despite this simplicity, we still have a level of explanation that was missing from Perring's personhood account (5.1). Namely, unlike Perring, we can determine what is required for a property to be a personhood property, and we can do this in a way that still seems to accept plurality. Many of the properties listed in 5.2 pass my test and, from this, we can feasibly state that there are many different ways in which a subject can be a person (related to the different personhood properties that they have). This plurality will play an important role in the discussions of degrees of personhood (5.4 and 5.7), how human rights relate to the personhood properties (5.5), and how my account can be applied to the marginal cases (chapter 6). The test developed in



this section, and the explanation of personhood that results from it, thus play an important role in the development of my new account.<sup>191</sup>

#### **5.4 Most personhood properties come in degrees**

The previous section argued that many personhood\* properties pass my test for personhood and are consequently genuine personhood properties. This section will briefly argue that most, if not all, of these personhood properties come in degrees (and so are scalar rather than binary). To defend this claim, I will use the marginal cases to illustrate four ways in which the personhood properties can be scalar.

Let us consider the property of rationality (property 1, 5.2). There are four main ways in which this property could be held to different degrees. First, it could gradually be gained over time as a subject develops. This could be seen in children, infants, and perhaps some trained animals.<sup>192</sup> Second, it could gradually be lost. This could be seen in some sufferers of dementia who lose their rationality over time. Third, it could statically be held at a low level. This could be seen in those with psychological impairments, who may never develop their rationality beyond a certain point. Fourth, it could statically be held at a high level. This could be seen in robots and perhaps some technologically enhanced superhumans. In these cases, the robot and the superhuman would have an excellent or

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<sup>191</sup> Whilst I am developing a *new* personhood account, the explanation of personhood developed above could be accepted by theorists who already accept either agency, basic needs, or good life accounts. As most properties pass my test three times, someone who accepts only one of the fundamentally valuable goods (and thus one test) would still be able to accept most of my personhood properties. Consequently, whilst I reject the mutual exclusivity of the substantive accounts (discussed above), my explanation could nevertheless be accommodated into the standard literature on substantive justifications.

<sup>192</sup> This claim – that subjects can gain personhood properties as they mature – has also been presented in the ‘making exceptions’ response, discussed in relation to exclusionary binary theorists (3.3), and Christian Perring’s (1997) ‘degrees of personhood’ view (5.1, above). These previously discussed views imply that this is the main (or indeed the only) way in which personhood properties come in degrees. As I argued in 3.4.1, this view is not expansive enough, and should be extended to accommodate other ways in which the personhood properties can be held to different degrees.

exemplary level of rationality. The central idea being presented in all of these examples is that there is a scale for each personhood property. Each property can be held at any point on the scale, and it is possible to move through the scale by either developing or losing the personhood property.<sup>193</sup>

The same sort of argument can also be extended to other personhood\* properties (5.2) if we can show that subjects can have more or less of these properties. This seems to be intuitively true for *most* of our personhood\* properties. For example, take the capacity for language (property 11). In most standard cases, a typical adult human will have more of this property than a human child who, in turn, will have a higher capacity for language than a non-human animal. The typical adult human has more of the relevant property (language) because they have a wider vocabulary, and a better understanding of grammar and syntax, than either the child or the non-human animal. Similar arguments – that subjects can have more or less of a given property – could be developed for most, if not all, of our personhood\* properties.<sup>194</sup>

An implication of the above is that ‘personhood’ becomes more accommodating. Unlike the binary accounts (chapters 3 and 4), there is no standard or threshold for personhood that a subject must meet.<sup>195</sup> On my view, it is relatively easy for a subject to have a

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<sup>193</sup> A similar view is presented by McMahan (2008) who considers the degree to which children and those with psychological impairments can hold personhood properties. See footnote 195, below, for a discussion of how my account differs from McMahan’s.

<sup>194</sup> My claim is that *most*, but not necessarily all, of the personhood properties can come in degrees. I have qualified this statement because some may object that properties like ‘embodiment’ (property 24) and ‘having a central nervous system’ (property 25) are not scalar in the way that I suggest. In other words, it may be objected that Jack cannot be more embodied than Sally, or that Nick cannot have less of a central nervous system than Will. This is not a problem for my account. Whilst the idea that the personhood properties come in degrees is *helpful* for my account, it is not *necessary* for it (see 5.7). Thus, I can accept the above qualified statement because it does not matter on my account if some of the personhood properties turn out to be binary rather than scalar.

<sup>195</sup> My account is also different to the sort of *scalar* threshold account presented by McMahan (2008). McMahan allows for personhood properties (specifically those connected to rationality) to come in degrees,

personhood property, at least to some degree. This will become important in the next section (5.5) where I will posit a direct relationship between the personhood properties and human rights. I will argue that if a subject has a personhood property – *to any degree* – then they have *some* human rights.

## 5.5 My new personhood account of human rights

Sections 5.2–5.4 have been concerned with defending the claim that personhood is plural and non-binary. This section focuses on explaining the relationship between plural, non-binary personhood and human rights. I will defend two main claims. First, human rights can be grounded in many different personhood properties (most of which come in degrees). Second, human rights are not all-or-nothing. I will argue that a subject can have *some* human rights; which rights they have will depend upon the personhood properties that they have, and also upon the threats and vulnerabilities that apply to the subject. To

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but uses this to develop a two-tier (92- 95) and later, a three-tier account of moral status (97-100). On this tiered account: “...there are two thresholds along the spectrum of levels of psychological capacity. Individuals below the lower threshold are conscious but uncontroversially lacking higher psychological capacities such as self-consciousness, rationality, and autonomy. Individuals above the second threshold are uncontroversially self-conscious, rational, and autonomous. Individuals between the two thresholds are at various stages in the gradual development of the higher psychological capacities, or are permanently arrested at one of these intermediate levels of psychological development” (97-98).

McMahan uses the above to present a tiered view of moral status and rights (92-100). Those above the high threshold have equal moral status and equal rights, and these rights are largely inviolable in the sense that they can only be violated in very extreme circumstances. Those below the lowest threshold do not have equal worth, do not have rights, and we determine their treatment on consequentialist grounds. For example, McMahan claims that “...the degree to which it is wrong to kill individuals below the threshold varies with the strength of their time-relative interest in continuing to live...” (94). Those in-between the two thresholds have intermediate rights – so stronger than those below the low threshold (who lack rights), but weaker than those above the high threshold.

I reject McMahan’s scalar view on three grounds. First, McMahan relies on the use of thresholds and standards, and I have already explained that the use of these devices leads to arbitrary discrimination and moral dilemmas, and cannot guarantee marginal cases an appropriate amount of moral protection (chapters 3 and 4). Second, McMahan seems to only accept the existence of *psychological* personhood properties (rationality, autonomy, etc.). In 5.2 and 5.3 I argued that many other types of property are also genuine personhood properties – namely, emotional, social, physical and phenomenal properties. I thus take McMahan’s account to have an overly limited view of the personhood properties. Finally, McMahan’s view entails that a subject with a low degree of personhood will necessarily have fewer or weaker rights. I reject this in 5.7.

argue for the above, I begin by presenting an outline of the argument to be defended. I then discuss each premise of the argument, in order to clarify and justify each claim.

The argument that I will be defending in this section can be outlined as follows:

P1) There are three fundamentally valuable goods: agency, the satisfaction of basic needs, and the good life.<sup>196</sup>

P2) There are many different personhood properties, the having of each of which helps subjects to secure the aforementioned goods (or, more specifically, at least some of the fundamentally valuable goods).

P3) Because different subjects have different personhood properties, different things will threaten their ability to secure the aforementioned goods of agency, the satisfaction of basic needs, and/or the good life.<sup>197</sup>

P4) Human rights are protections against these threats.<sup>198</sup>

C1) Different subjects have different human rights on the basis of their different personhood properties, and the different threats that apply to them.<sup>199</sup>

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<sup>196</sup> Where agency, basic needs, and the good life are understood in the senses discussed in 5.3. Note also that P1 is consistent with the idea that there are other valuable goods as well. It is just that agency, the satisfaction of basic needs, and the good life are so *fundamentally* valuable that they are protected by human rights (see 5.3).

<sup>197</sup> Below I will clarify this statement by explaining the *types* of threat that apply on my account.

<sup>198</sup> The idea that human rights protect against certain threats is supported by, amongst others, Beitz (2009: 109-113), Nickel (2007: 70-74, 108, 145, 188), Pogge (1995), and Scanlon (2003: 116-117).

<sup>199</sup> Both Beitz (2009: 189) and Nickel (2007: 37, 74) support the idea that different people or groups of people can have different human rights depending on the different threats that concern them. My C1 further develops this idea by bringing in the personhood properties (P3). On my view, different subjects will be susceptible to different threats due to the different personhood properties that they have. In accepting C1 I am challenging the idea that all persons have exactly the same human rights and, by extension, I am challenging the idea of strict equality that is central to many human rights accounts. For example, the importance of equality and equal rights is defended by Buchanan (2010), Feinberg (1973: 85), Pogge (1995:

P1 and P2 have already been extensively argued for in 5.2–5.3, and so I do not need to add anything new to these earlier arguments here. Instead, I will briefly recap these earlier arguments in order to ensure the clarity of the current line of argument. In 5.3 I argued that agency, the satisfaction of basic needs, and the good life are the three fundamentally valuable goods. Contra the existing literature, I argued that these three fundamentally valuable goods are not mutually exclusive, and so all three can be valuable at the same time. I then used these three fundamentally valuable goods to generate my test for determining which properties are personhood properties. On my view, *x* is a personhood property if and only if, and to the degree that, it is conducive to the subject being an agent, or satisfying their basic needs, or having a minimally good life. I argued that many different properties pass this test, and I explained how properties can pass my test three times, twice, or once. This entails that personhood properties can be conducive to subjects having three fundamentally valuable goods, two fundamentally valuable goods, or one fundamentally valuable good. The arguments of 5.2–5.4 thus provide the justifications for accepting P1 and P2.

P3 introduces the notion of ‘threat’, and before explaining how P3 connects to the rest of my argument, it is worth explaining the *types* of threat that apply on my account. First, there are direct threats to agency, the satisfaction of basic needs, and/or the good life. For example, suppose that the state closes all medical, social, and support services. This would be a direct threat to the satisfaction of basic needs as it would prevent most, if not all, citizens from realising their basic needs (to healthcare, etc.).

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107), Rawls (1999), and Scanlon (2003: 26-42, 202-218). Equality also played a central role in the inclusive views of chapter 4. Throughout chapter 6, I will explain why abandoning the commitment to equal, identical rights is not problematic. My arguments there will have some similarities to those of McMahan (2008) and Pojman (1992), who also challenge egalitarian views.

Second, there are direct threats to the personhood properties. For example, consider ‘social practices’ (property 18, 5.2). We can suppose that ‘social practices’ are a personhood\* property if a subject (Jeff) can be deemed to be a person (in some way) in virtue of participating in certain customs, conventions, and institutions that make up standard social practices. There can be a direct threat to ‘social practices’ if the state bans these customs, conventions, and institutions. This is because the ban would prevent Jeff from being able to engage in important social practices.<sup>200</sup>

Finally, there are indirect threats to the processes through which a subject can use their personhood properties to secure the fundamentally valuable goods. For example, suppose that communication (property 11, 5.2) is conducive to subjects having a minimally good life.<sup>201</sup> There will be indirect threats if the state makes it hard to *use* communication in order to realise the goods of the good life. For example, the state may ban social media and other communication technology. These state-mandated bans would make it harder for citizens to communicate with one another and this would, in turn, affect citizens’ abilities to realise the goods of a minimally good life (e.g. the goods of freedom of association, maintaining meaningful relationships, etc.). All three types of threat are relevant to my account, though I may reference specific types of threat in the discussions that follow.

Now that we have clarified the types of threat under discussion, we can see how P3 connects to the rest of my argument. P3 follows from the acceptance of P1 and P2. This

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<sup>200</sup> For instance, suppose that the social practices that Jeff wants to engage in are also religious practices. Suppose also that he belongs to a minority religion, and that the county that he lives in becomes a theocracy and enforces a different state religion. We can easily imagine the state banning the customs, conventions, and institutions of the minority religion, and so banning the social practices that Jeff engages in.

<sup>201</sup> Here, and in the discussions that follow, I am accepting the sort of minimal good life accounts discussed in 5.3.

is because, to accept P3, we need to accept the underlying assumptions that different subjects can have different personhood properties, and that these different personhood properties are conducive to subjects having the three fundamentally valuable goods in different ways. To explain this further, imagine three subjects: Amy, Bill, and Charlie. For simplicity, suppose that they all have a different personhood property that is conducive to them having a good life. Amy is creative (property 13, 5.2), Bill is in a caring relationship (property 20, 5.2), and others view Charlie as a person and treat him accordingly (property 22, 5.2).<sup>202</sup> These three properties are conducive to Amy, Bill and Charlie having minimally good lives because they help each subject to pursue a valuable good – hobbies and interests, successful relationships, and good treatment respectively.

Because Amy, Bill, and Charlie have different personhood properties, different things will threaten their good lives.<sup>203</sup> Amy's good life will be threatened by threats to her creativity. For instance, suppose that the state bans or censors certain creative pursuits, or removes all funding from the arts; making it harder for Amy to pursue her creativity. Bill's good life will be threatened by threats to his relationships. For example, suppose that the state forcibly separates him from his family, or decrees that certain relationship

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<sup>202</sup> Amy's creativity and Bill's being in a caring relationship would constitute aspects of a minimally good life on Liao's (2015) good life account. Charlie's being viewed as a person and treated accordingly would constitute an aspect of a minimally good life on Brock's (2012) good life account. For further details on the accounts of Liao and Brock see 5.3, and particularly footnote 183.

In the discussions that follow I will be talking about 'creativity', 'being in a caring relationship', 'and being seen as a person and treated accordingly' as if they are each a single property. One might, however, object that they are not single properties and so, for example, creativity is actually a cluster of properties (containing things like inspiration, creative agency, abstract thought, etc.). I have already explained how properties can be interconnected in my discussion of plurality (5.2), and so this cluster view does not pose a problem for my account. I will, however, continue to talk about 'creativity', 'being in a caring relationship' and 'being seen as a person and treated accordingly' as if they *are* single properties for simplicity, and to make the discussions that follow easier to understand.

<sup>203</sup> The threats discussed in this paragraph refer to indirect threats to the processes through which a subject can use their personhood property to secure the fundamentally valuable goods, and to direct threats to the personhood property.

types are illegal (e.g. those that are polygamous or homosexual in nature). Finally, Charlie's good life will be threatened by threats to his social recognition. For instance, imagine that Charlie, or a socio-cultural group that he is part of, is subject to state-mandated ostracization, so that he is outcast from society and treated as a non-person.

The above examples are admittedly very simple – they reference a single personhood property and a single fundamentally valuable good for each subject. This simplicity is purposeful and is used to help to clarify and explain P3. I am, however, aware that things are more complex in real life. Subjects will typically have multiple personhood properties that are conducive to multiple fundamentally valuable goods. Nevertheless, I am confident that the claims made in the above simple examples can be extended to more complex cases, and I will discuss this further in 5.6. In any case – simple or complex – P3 works by stipulating that it is because subjects have different personhood properties that different threats (in the three senses discussed above) will apply to different subjects. As I take the above simple examples to have supported this claim, I maintain that we should accept P3.

P4 is a statement that would be uncontested by most, if not all, human rights accounts. Human rights do seem to be protections of the ability to secure agency, the satisfaction of basic needs, and/or a minimally good life.<sup>204</sup> Variants of this statement have been defended throughout this thesis, and I will not rehearse the arguments again here. If my opponent wants to *disprove* P4, then the burden of proof is on them. For instance, they could simply deny that there are such things as human rights. Or they could present a convincing alternative account of human rights, where human rights are not grounded in

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<sup>204</sup> For examples, see the earlier discussions of agency, basic needs, and good life accounts in 5.3.



(at least one of) the three fundamentally valuable goods (agency, basic needs, or the good life). Or they could attempt to show that human rights are *not* protections against the above-mentioned threats (P3). Using the examples from my discussion of P3, my opponent would need to explain why things like censorship, forced separation, and ostracization are not human rights issues. Unless my opponent can meet this burden of proof in some way, we should accept P4.

C1 follows from P3 and P4. It claims that different subjects have different human rights on the basis of their different personhood properties, and the different threats that apply to them. The basic impetus behind C1 is that different subjects *need* different rights in order to have (all and only) the protections that we intuitively take them to have. To explain this further, let us return to our earlier example of Amy, Bill, and Charlie. In the table below (Fig. 2), I have reiterated the threats that apply to Amy, Bill, and Charlie on the basis of their different personhood properties. I have then identified the human rights which each subject would need to have to protect them against these threats.<sup>205</sup>

**Fig. 2** <sup>206</sup>

	<b>Amy</b>	<b>Bill</b>	<b>Charlie</b>

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<sup>205</sup> I am understanding ‘human rights’ in the sense discussed in chapter 1. Human rights are claims, privileges, powers, and immunities in the Hohfeldian sense (1.1). They are weakly universal, minimum standards, and high priority norms (1.2). And they are primarily moral rights, to which legal rights ought to correspond (1.3).

<sup>206</sup> As explained in footnote 205, I view Amy’s, Bill’s, and Charlie’s human rights as primarily moral rights, to which legal rights ought to correspond. The moral rights listed in Fig.2 thus roughly correspond to the following articles from the *Universal Declaration of Human Rights*. Amy has Article 19 (freedom of opinion and expression) and Article 27 (freedom to participate in the life of the community). Bill has Article 16 (the right to marry) and Article 12 (freedom from arbitrary interference). Charlie has Articles 6 and 7 (recognition before the law), and Articles 9-11 (rights against arbitrary arrest or exile, and rights to a fair trial). For a copy of the *Universal Declaration of Human Rights* see United Nations General Assembly (1948).

<b>Personhood property</b>	Creativity	Relationships	Social recognition
<b>Threats to this property</b>	Censorship. State bans on creative pursuits.	Forcible separation from family/loved ones. State bans on certain relationship types.	State-mandated ostracization.
<b>Human rights needed to protect against these threats</b>	Freedom of opinion and expression  Freedom to participate in arts, culture, and science.  Moral rights of ownership to any and all creative materials that Amy might develop.	Freedom to marry.  Freedom from arbitrary interference with one's relationship choices, family, privacy, correspondence, etc.	A moral right to be recognised as a person before the law.  Freedom from arbitrary arrest, detention, or exile. (Note: this right will apply to Charlie if his potential ostracization contains a threat of exile).

In the above examples, each subject has the human rights that protect them against relevant threats. For example, Amy has rights to freedom of opinion and expression, and to participate in the cultural life of the community, because they protect against threats that apply to her (where these threats are understood in the three senses defined earlier). The rights protect against direct threats to her creativity because for her creativity to

develop and be nurtured, she needs access to information and ideas, and to the wider artistic community. The rights protect against direct threats to the good life because without freedom of opinion and expression, and at least basic access to culture, arts, and sciences, Amy cannot pursue some of the goods of a minimally good life (like meaningful discussions, hobbies and interests, being part of a wider community, etc.). Finally, the rights protect against indirect threats to the processes through which a subject can use their personhood properties to secure the fundamentally valuable goods (in this case, the good life). They do this by ensuring that Amy *can* use her creativity to help pursue the goods of a minimally good life. This is done by, for example, mandating the need for a free and open media, and by offering Amy ownership rights to artistic material. Whilst I have focused on Amy here, we could make the same sort of arguments for Bill and Charlie to explain why they have the rights that they do. In each case, Fig.2 shows that different subjects *will* have different human rights on the basis of their different personhood properties, and the different threats that apply to them. For this reason, I claim that we should accept C1.

At this point, it is worth emphasising an important implication of C1. C1 aims to ensure that each subject has whatever human rights are appropriate to, and relevant for, them. To ensure that human rights protections are *appropriate* and *relevant* for each subject, we must account for both context and vulnerability, discussed more below.<sup>207</sup>

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<sup>207</sup> The argument that follows has some similarities to Griffin's (2008: 37-39) practicalities ground of human rights. In sum, Griffin's practicalities aim to ensure that human rights are not too broad or demanding, and that they can be effectively implemented. To see if a right *could* be implemented in a certain state, Griffin argues that we need to address contextual information about how the state (and the people in it) function; what belief system the state accepts; and what policies and ideals the state protects and prohibits as a result.

‘Context’ means that we need to acknowledge any contextual information that is relevant to the realisation of a right. For example, reconsider Bill (above). Suppose that Bill is a child. Bill’s status as a child is an important piece of contextual information that may offer morally relevant reasons as to why certain human rights do not apply to him. For instance, in Fig.2 I outlined a view that could be made whereby, because Bill is in a caring relationship (property 20, 5.2), he has a positive right to marry and a negative right against arbitrary interference with his relationship choices, family, privacy, correspondence, etc. It seems clear that, as a child, Bill does not *currently* have either of these rights (though he will have them in the future). This is not simply for legal reasons (i.e. that, as a child, Bill does not reach the legal age of consent to marry). The key reasons for denying these rights to Bill are *moral*. In at least most Western cultures, we typically accept that the state has a special moral duty of care to protect children. Part of this protection may extend to preventing child marriage and to *permitting* arbitrary interference with privacy, family, correspondence, etc. In the latter case, ‘arbitrary interference’ refers to interference that is not ‘justified’ in the sense of having sufficient evidence behind it. We can suppose that, even without evidence of definite risk of harm, states may nevertheless interfere with children’s correspondence by, for example, blocking children from accessing certain social media. This may be to protect against (i) certain moral threats (such as cyber bullying, and/or exposure to immoral behaviours), or (ii) to protect children against predatory adults.<sup>208</sup> In all cases, the state has a *moral* duty, rather than a solely legal duty, to protect children.

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<sup>208</sup> For (i) see Morgan (2016). For (ii) see NSPCC (2017).

‘Vulnerability’ is well discussed in the existing vulnerability literature, which broadly accepts that there are some members of society who are particularly vulnerable in the sense of (i) being socially stigmatised and (ii) being recipients of historical injustice and discrimination.<sup>209</sup> It is argued that such vulnerable subjects require additional or stronger rights protections in order to counterbalance this systematic discrimination and oppression. Many of the marginal cases that I discuss are vulnerable in this sense.

To see how this sense of vulnerability connects to human rights (and so C1), reconsider Charlie (above). Referring back to Fig.2, imagine that Charlie lives in a country that practices social stratification, so a caste or a class system. Suppose that Charlie is part of the lowest caste or class, and that lower castes/classes are systematically oppressed and treated with less respect and dignity than those of higher castes/classes. It seems clear that Charlie will need more protections of his social recognition (property 22, 5.2) than someone of a higher caste/class. This is because Charlie already experiences a lack of social recognition, and related mistreatment, as a result of his lower caste/class. In this example, Charlie faces unique threats because of the oppressive, discriminatory attitudes and practices of his society. Consequently, for Charlie to successfully have the rights listed in Fig.2, there will need to be cultural and structural changes in his society to prevent (or at least counteract) said discrimination and oppression.

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<sup>209</sup> For examples of the (legal) vulnerability literature, see Cullet (2010), Fineman (2010), Francis and Smith (2017), Peroni and Timmer (2013), and White (2015). For philosophical accounts of vulnerability, see Hoffmaster (2014: 32) in relation to bioethics, and Warren (2000: 103) in relation to her arguments against grounding moral rights solely in rational moral agency.

It is important to also acknowledge intersectionality – the idea that some subjects might be vulnerable in more than one sense (see Bernstein (2020), Haslanger (2012), Jones (2014), and Ruíz (2018)). For example, Melissa might be discriminated against because she is black *and* because she is a woman *and* because she is a lesbian. Using our marginal cases examples, Joe might be vulnerable because he is a child *and* because he has psychological impairments. In her 2018 TEDx talk on this topic, Eugenia Cheng uses abstract mathematics to plot structural and societal imbalances in various contexts in order to determine who classes as a ‘vulnerable’ subject in different contexts.

Alongside this sense of ‘vulnerability’, my account suggests a new, different sense in which subjects can be vulnerable. It is consistent with my account that the same human rights can be grounded in many different personhood properties (discussed more in 5.6). For instance, consider a right to freedom of opinion and expression. This right seems to be relevant to those with at least the psychological personhood properties (5.2), so rationality, free will, beliefs, etc. This is because the psychological properties relate to the subject’s capacity for choice, opinion, and expression, and these capacities can be threatened in ways that require protection by a right to freedom of opinion and expression.<sup>210</sup> It is compatible with my account that a subject would *not* need to have *all* of these psychological properties in order to have a human right to freedom of opinion and expression. Consequently, let us imagine a subject, Chloe, who only has some of these properties but lacks others. Suppose that Chloe has motor neurone disease. She is rational and has beliefs but, as a consequence of the disease, lacks the capacities for verbal communication and physical autonomy. By lacking these properties, and having fewer personhood properties than others, Chloe is vulnerable in two senses.

First, there are increased risks to Chloe’s agency, the satisfaction of her basic needs, and her ability to pursue a minimally good life. Although Chloe can make choices and decisions, she cannot communicate her choices to others, or act autonomously to realise her choices. This means that there is an increased risk that the choices that Chloe makes will be misinterpreted or left unactioned. Chloe thus experiences specific threats that do not apply to subjects who have the capacities for communication and autonomy (alongside the other personhood properties).

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<sup>210</sup> A similar view is presented by Griffin (2008: 49, 193).

Second, Chloe is vulnerable because she experiences unique barriers to the realisation of her rights. Because she lacks the capacities to communicate and act autonomously, Chloe will need more protections and assistance in order to realise her right to freedom of opinion and expression. For example, Chloe could be encouraged to use non-standard communication methods (e.g. sign language, drawing, gestures, etc.) and be given an interpreter to help her express her choices. She could also be given a guaranteed carer or assistant to help counterbalance her lack of autonomy.<sup>211</sup> Unless she is provided with these additional forms of assistance, Chloe's right cannot be fully realised, and she will be vulnerable to threats that do not apply to other rights-holders.<sup>212</sup>

Given that my account is sensitive to context and vulnerability, it intuitively ensures that subjects have the human rights that are morally fitting and relevant for them. By

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<sup>211</sup> One may object that my suggestions here are extremely idealistic and set a very high bar of provision. At present, there are no actual states that would legally implement my suggested provisions, and so guarantee Chloe assistance as a human right. This is not a problem for my account. In 1.3 I used Nussbaum's (1997: 291) notion of political goals to explain how we ought to respond to cases where subjects (like Chloe) have moral human rights to some provision, but where this moral right is currently not recognised in law. I argued that we should see the process of turning the moral right into a legal right as a political goal that we should be working towards.

<sup>212</sup> We could also present a slightly more complicated vulnerability argument using degrees of personhood properties (5.4). Let us again consider the property of creativity (as per the Amy example earlier in this section). Let us suppose that Amy has a lot of the property, whilst a second subject, Matt, has little of the property. In normal circumstances, Amy has enough of the personhood property (creativity) to get her some of the goods of a minimally good life. Some of the threats that are relevant to Amy will be threats to this personhood property (creativity). For example, if the state censors certain creative pursuits or arbitrarily removes arts funding. In Matt's case, an additional threat will be that, because he has little of the personhood property, the property itself does not help him enough to get the goods of a minimally good life. Matt is vulnerable in a way that Amy is not, and will need additional things (assistance, resources, etc.) to help him get the creative goods that Amy has.

Note that, in both this example and the Chloe example in the main text, we could also explain vulnerability in terms of positive and negative rights. In normal circumstances, the subject has negative rights. For example, in our Amy example, the state has a negative duty to not engage in censorship etc. In cases of vulnerability, the vulnerable subject also seems to have positive rights. For instance, in our Matt example, the state has a positive duty to help Matt get the goods required for the good life. Whilst this reference to positive and negative rights may be dialectically helpful for some, by providing a reference point from which to understand my claims about vulnerability, I have chosen to not explain vulnerability in terms of negative and positive rights in the main text. This is because the above could be taken to entail that only vulnerable subjects have positive rights. I do not want to commit myself to this claim as I want to leave it as an open possibility that all rights-holders (marginal and non-marginal; vulnerable and non-vulnerable) can have both positive and negative rights. I will explore this further in 5.6 and chapter 6.

considering context, we ensured that Bill does not have *too many* redundant rights (e.g. the right to marry) that would be morally irrelevant for him as a child. By considering vulnerability, we ensured that Chloe does not have *too few* rights, and is not at risk of the sort of morally permissible mistreatment discussed throughout chapters 3 and 4. I term this the ‘Goldilocks Approach’ because my account ensures that each subject has the human rights that are intuitively ‘just right’ for them, morally speaking.

Above, I have outlined my account of the relationship between human rights and the personhood properties. I have presented simple, specific examples throughout to try and illustrate this relationship, but I have acknowledged that these examples do not reflect real-world complexities. In the real world, subjects will typically have multiple personhood properties and multiple human rights. In order to address this real-world complexity, the next section (5.6) will explain what human rights we get on my account. I will argue that, if we accept my account (above), we get all of the familiar, widely accepted human rights. I will outline how these rights can be held in many different, complex ways.

## **5.6 Human rights on my account**

This section will clarify what human rights we have according to my account. I will argue that, whatever rights subjects have on my account, these rights are human rights (rather than moral rights, legal rights, civil rights, etc.).<sup>213</sup> To show this, I will draw on James Nickel’s (2007: 11) six-part categorisation of human rights, which provides a particularly

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<sup>213</sup> Again, I am understanding ‘human rights’ in the sense discussed in chapter 1. Human rights are claims, privileges, powers, and immunities in the Hohfeldian sense (1.1). They are weakly universal, minimum standards, and high priority norms (1.2). And they are primarily moral rights, to which legal rights ought to correspond (1.3).



clear overview of familiar, widely-accepted human rights. I will argue that all persons (marginal or otherwise) can have at least some of these six types of right, on my account.

James Nickel (2007: 11) argues that there are six main categories of human rights. They are as follows:

- 1) Security Rights. This category contains positive rights to life, liberty, and security of person, and negative rights against torture and cruel punishment.
- 2) Due Process Rights. This category contains various protections surrounding criminal convictions (e.g. a right to a trial in criminal cases). It also contains protections against the state arbitrarily depriving subjects of various goods (e.g. a nationality, property, etc.).
- 3) Basic liberties. This category contains positive rights to do certain things, like join a trade union or seek asylum. It also contains negative rights against the removal of basic liberties, e.g. provisions against slavery.
- 4) Rights of political participation. This category allows subjects to participate in government, and to engage with democratic policies, like voting.
- 5) Equality rights. This category protects against arbitrary discrimination and inequality. For example, it contains rights to equal pay for equal work.
- 6) Economic and social rights. This category protects subjects' access to various economic and social goods. For example, it includes rights to health care, and to rest and leisure.

As explained in the previous section, my account sees human rights as protections against three main types of threat. To recap, the three types of threat are: direct threats to the three fundamentally valuable goods (agency, the satisfaction of basic needs, and the good life), direct threats to the personhood properties, and indirect threats to the processes through which a subject can use their personhood properties to secure the fundamentally valuable goods. To show that we have the above human rights according to my account, I thus need to show that the above rights protect us from the previous three types of threats.

There are many ways in which I could argue for the above. I could take all of the properties listed in 5.2, explain how the three types of threats apply to each property, and then map each property on to the above rights types. Or I could take each of the above rights types and explain how they protect against each of the three types of threats. Either of these options would offer a detailed discussion, but would likely be over-expansive and repetitive. Due to a need for brevity, I am instead going to give a single example of each type of a threat, and explain how the rights types listed above protect against this threat. Whilst the discussion that follows will not cover every possible relation between the personhood properties, the threats, and human rights, it will suffice to show that we can get the above familiar, widely accepted human rights, on my account.

#### Direct threats to the three fundamentally valuable goods:

As an example of this type of threat, let us consider direct threats to agency. I previously defined agency in terms of subjects' abilities to make reasoned choices, and to act on the basis of these choices. There are two main ways in which agency, so defined, can be directly threatened. First, an agent, call him Jack, could be forced to make certain choices,

or perform certain actions, against his will. For example, suppose that Jack is an anti-government protestor, and that the state tortures him until he swears his allegiance to the government. Here, Jack's agency has been directly threatened by the state's use of torture. Security rights (above) protect against this threat by ensuring that Jack has the right to protest without the threat of physical punishment or torture.

Second, Jack's agency could be directly threatened if the state removes certain choices and freedoms from him. For example, suppose that the state mandates that Jack *must* follow a certain religion. Basic liberties (above) protect against this threat by ensuring that Jack can *choose* which religion, if any, to follow.

In the above examples, it is because Jack is an agent that he has familiar, widely accepted human rights.<sup>214</sup> Namely, Jack's agency entails that he has (at least) security rights and basic liberties. We could continue listing examples to see how Jack's agency also links to the other types of right, listed above. For example, we could suppose that, because Jack can make reasoned choices and have considered opinions, he ought to have a right to vote (rights of political participation). And so on. The important point is that Jack's agency is linked to a *wide range* of familiar, widely accepted human rights.<sup>215</sup>

### Direct threats to the personhood properties

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<sup>214</sup> Griffin (2008) makes a similar claim. On Griffin's view, explained throughout chapter 3 of this thesis, "human rights... are possessed by human agents simply in virtue of their normative agency" (Griffin 2008: 48).

<sup>215</sup> Whilst the above has considered how Jack has familiar, widely accepted human rights to protect against direct threats to his agency, we could make similar claims about the other fundamentally valuable goods. For example, we could suppose that security rights, and social and economic rights, protect against direct threats to Jack's basic needs. And we could assume that basic liberties, and equality rights, protect against direct threats to his ability to pursue a minimally good life. And so on. The important point is that, whatever fundamentally valuable goods a subject has (whether it is agency, basic needs, and/or the good life), the subject will have at least some familiar, widely accepted human rights, on my account.

Suppose that Jack is in a caring relationship. Let us also suppose that being in a caring relationship (property 20, 5.2) does pass my test for personhood (5.3) and is thus a personhood property. There are two main ways in which this property – being in a caring relationship – can be directly threatened. First, the state could change Jack’s circumstances in ways that would forcibly separate him from his partner, family, friends, etc. For example, the state could exile him or falsely imprison him, and so forth (in order for this to clearly be a human rights issue, we can presume that Jack has not committed any crimes which could justify exile or imprisonment). Numerous human rights protect against this threat. Due process rights protect Jack from arbitrary exile or imprisonment by the state. Further, security rights and basic liberties protect Jack’s status as a ‘free man’ (which include protections against exile and imprisonment, in the absence of a criminal conviction).

A second way in which Jack’s relationships can be directly threatened is if the state prohibits certain relationship types. For example, the state might ban relationships that are homosexual or polygamous in nature, and/or introduce harsh penalties and deterrents for those who are in these relationships. Equality rights protect against this threat by protecting Jack against discrimination on the basis of gender, race, or sexual orientation. Similarly, basic liberties ought to protect Jack’s freedom to choose a partner(s) and marry, without governmental intervention.

As the above examples demonstrate, subjects with a single personhood property (in this case ‘being in a caring relationship’) can have many familiar, widely accepted human

rights.<sup>216</sup> This is because the human rights under discussion protect against direct threats to the personhood properties. An implication of the above is that, on my account, if a subject has *any* personhood property, then they ought to have at least some familiar, widely accepted human rights.

Indirect threats to the processes through which a subject can use their personhood properties to secure the fundamentally valuable goods

As a final example, suppose that it is useful for Jack to have future directed concerns (property 14, 5.2) in order to have a good life (one of the fundamentally valuable goods, 5.3). By having future directed concerns, Jack can plan what would be good for him in the future and work out how to achieve that good. There are two main ways in which the state could frustrate the process between Jack having future directed concerns and him using these concerns to get the goods of a minimally good life. First, the state could arbitrarily detain Jack, or remove certain freedoms from him. This would make it harder for Jack to realise his future directed plans. In order to be protected against this threat, Jack needs due process rights and basic liberties. Both of these types of right protect Jack by ensuring that he cannot be arbitrarily detained or have important freedoms denied to him.

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<sup>216</sup> We can also argue for the converse of this: that a single right can be grounded in many different personhood properties. Here, different subjects can have the same right for different reasons, depending on the personhood property that they have (and the direct threats that apply to this property). For example, consider a right against torture. This right will be held by those with psychological properties (rationality, autonomy, etc.) in order to protect against direct threats to the subject's ability to make free choices. It will be held by those with phenomenal properties (the capacity for felt experiences, etc.) in order to protect against the threat of pain. It will be held by those with physical properties (embodiment, etc.) in order to protect against threats to the body. It will be held by those with emotional properties in order to protect against the negative emotions generated by torture. It will be held by those with social properties in order to protect against threats to the subject's status as a social agent/recognised person. For a more detailed discussion of psychological, phenomenal, physical, emotional, and social properties, see 5.2.

Second, the state could discriminate against Jack and deny him certain economic and social services. This would make it harder for Jack to have the goods of a minimally good life at all. For example, he might be denied fair pay for his work, or be banned from state-sponsored social and leisure activities. Equality rights protect against this threat by stipulating that Jack cannot be arbitrarily discriminated against. Jack is also protected by economic and social rights, which ensure that Jack has fair access to the economic and social services that are typically required to pursue a minimally good life.

In sum, this section has argued that subjects have familiar, widely accepted human rights on my account. To show this, I gave examples of each of the three types of threat that apply on my account (5.5), and I explained how familiar types of human right protect against these threats. I will explore this idea further in 6.1, where I will discuss the personhood and human rights of subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3). There, I will argue that each of these marginal cases has at least some of the familiar, widely accepted human rights discussed in this section.<sup>217</sup>

### **5.7 Exploring connections between the personhood properties, degrees of personhood, and human rights**

5.2–5.6 focused on explaining the relationship between the personhood properties and human rights. This section will briefly consider how degrees of personhood relates to the personhood properties and human rights.<sup>218</sup> After clarifying why we need to consider this

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<sup>217</sup> On my account, subjects with dementia, nonhuman animals, and robots will turn out to *not* be marginal cases – they will be persons with human rights. Until I have made this argument (6.1), I will continue to refer to them as ‘marginal cases’.

<sup>218</sup> It is important that I consider this relationship as in 5.1.2 I criticised Perring’s (1997) account for failing to explain the relationship between the personhood properties, degrees of personhood, and human rights. At the end of 5.1 I promised to explain what this relationship could be, on my account.

relationship, I will outline three ways in which we could understand said relationship. I will remain neutral as to which of these three ways is preferable.

Imagine two subjects, Juliet and Matt. For the sake of argument, suppose that they have different personhood properties and different human rights, according to my account. For instance, Juliet may have 9 personhood properties and 12 human rights, whilst Matt has 4 personhood properties and 6 human rights. Further, on my account, Juliet and Matt could hold the personhood properties to different degrees (5.4). Juliet could be more rational than Matt, whilst Matt is more creative than Juliet.<sup>219</sup> Finally, on my account, there may be certain circumstances in which Juliet has stronger or further human rights protections than Matt (C1, 5.5). For instance, if Juliet is vulnerable, then she may have additional moral protections to counterbalance the unique, systematic threats that she faces as a vulnerable subject.

The point of rehearsing the above arguments is to emphasise the importance of *difference* and *variability* on my account. It is consistent with my account that Juliet and Matt can be persons and rights-holders in different ways. Because there is no strict equality between Juliet and Matt, this seems to allow for the possibility of degrees of personhood. Using the differences highlighted above, perhaps Juliet is more of a person than Matt, or vice versa.

This possibility of degrees of personhood could become morally important if it has the implication that those with a low degree of personhood *necessarily* have fewer or weaker

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<sup>219</sup> Both rationality and creative achievement were listed as personhood\* properties in 5.2. Rationality was property 1; creative achievement was part of property 13: 'excellence and the fulfilment of potential'.

human rights.<sup>220</sup> In what follows, I will argue that my account does not have this implication. To show this, I will suggest three ways of understanding ‘degrees of personhood’ that are all consistent with my account (as presented in 5.2–5.6). I will argue that none of these ways of understanding ‘degrees of personhood’ requires us to accept that those with a low degree of personhood (which would include some of the marginal cases) must have weaker or fewer rights than others.

First, we could argue that neither my account of the personhood properties that ground human rights (5.2–5.3), nor my view of which human rights these properties ground (5.5–5.6), depend upon the existence of degrees of personhood. Juliet does not need to first have a certain degree of personhood, in virtue of which she will then have the personhood properties or the relevant human rights. As my entire account of both the personhood properties and the human rights they ground can be understood *without* a reference to degrees of personhood, we might want to claim that ‘degrees of personhood’ is nothing more than a figure of speech and does not need any further discussion.

Second, we could argue that degrees of personhood are a function of how many personhood properties you have, and the degree to which you hold these properties. In other words, we could develop a summative view. On this view, Juliet has a high degree of personhood if she has many personhood properties, and if she has a high degree of those properties. Note that the correlation here is between degrees of personhood and the personhood properties. There is no similar correlation between degrees of personhood and human rights. Juliet does not need a certain degree of personhood to have human

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<sup>220</sup> As mentioned previously, this implication is accepted by Perring (1997: 186-192) and McMahan (2008: 92-100).



rights, and her having a high degree of personhood does not entail that she will thereby have more or stronger human rights. Instead, on this view, the personhood properties link to degrees of personhood and human rights separately.

In order to develop a view in which degrees of personhood *does* correlate with human rights, we would need to argue as follows. Subjects get degrees of personhood from the personhood properties, and human rights from degrees of personhood, and so those with a low degree of personhood will have weaker or fewer human rights. Note, however, that this view is *not compatible* with my account, for two reasons. First, my account (5.5) posits a direct link between the personhood properties and human rights. The view under consideration disrupts this direct link by connecting the personhood properties and human rights to one another only indirectly via the degrees of personhood. As explained above, I do not accept that degrees of personhood play this key explanatory role.

Second, the view under consideration contrasts with my discussion of vulnerability (C1, 5.5). The view under consideration posits that those with a low degree of personhood always have weaker or fewer human rights. My discussion of vulnerability argued that those who are vulnerable, in virtue of having a low degree of personhood, can have more and stronger human rights than others. As the view under consideration *is* incompatible with my account (for the reasons given), we ought to reject it. Consequently, we ought to see the second way of understanding degrees of personhood (above) as *only* postulating a correlation between degrees of personhood and the personhood properties, but *not* between degrees of personhood and human rights.

Finally, we could argue that degrees of personhood are a function of how many human rights you have and how strong these human rights are. On this view, subjects get human rights from the personhood properties, and a degree of personhood from the amount (and strength) of human rights that they have. For example, Matt gets 6 human rights from the 4 personhood properties that he has. He will have a low degree of personhood in comparison to Juliet if she has more (and stronger) human rights than him. He will have a high degree of personhood in comparison to Juliet if his 6 rights are stronger than her rights – for instance, if he has very strong protections as a result of being a vulnerable subject.

As the above examples demonstrate, this final view sees degrees of personhood as being intimately connected to the subject's status as a rights-holder. Subjects whose status as a rights-holder is more secure – because they have stronger or more extensive rights – are *more* of a person. Note that, unlike the view that I rejected above (where there was a correlation between degrees of personhood and human rights), this final view does not problematically claim that subjects have human rights on the basis of their degree of personhood, nor does it ignore the importance of vulnerability.

All three of the above views are compatible with my account (5.5) and avoid the problematic implication that those with a low degree of personhood necessarily have fewer or weaker human rights than others.<sup>221</sup> We could consequently accept any of the above views as showing the correct relationship between degrees of personhood, the personhood properties, and human rights. As such, I will leave it as an open question as

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<sup>221</sup> In chapter 6 (and especially 6.2.6) I will instead argue for a more nuanced position where those with a low degree of personhood (like the marginal cases) *sometimes* have fewer or weaker rights than others, but on other occasions will have more and stronger rights.

to what the correct relationship is. All that matters for my purposes is that subjects can (i) have different personhood properties, (ii) have different amounts or degrees of the personhood properties, and (iii) have different human rights (see 5.2–5.6).

## **Conclusion**

This chapter introduced non-binary personhood accounts of human rights. In 5.1 I critically assessed Christian Perring’s (1997) ‘Degrees of Personhood’. I outlined the claims that Perring accepts (5.1.1), before identifying the theoretical gaps in his view (5.1.2). I argued that whilst Perring provides the start of a good non-binary personhood account, his view needs more development in order to present a strong alternative to the binary accounts of chapters 3 and 4.

The remainder of the chapter then developed my own non-binary account. I argued that personhood is plural, in the sense that many different properties can ground personhood (5.2). I then developed a test for personhood (5.3), in order to determine which of the many properties listed in 5.2 are, in fact, personhood properties (the morally relevant properties in virtue of which a subject is a person). I argued that most of the properties that pass my test come in degrees (5.4). I then presented the argument for my personhood account of human rights (5.5). I concluded that different subjects have different human rights as a result of having different personhood properties, and in reaction to the different threats and vulnerabilities that apply to them. In 5.6 I argued that the rights that subjects get on my account are the familiar, widely accepted human rights. In 5.7 I briefly outlined the various ways in which a subject’s degree of personhood can affect their human rights. I clarified that, however we understand this connection, it does not follow on my account

that subjects with a low degree of personhood necessarily have weaker or fewer human rights.

Overall, this chapter should be seen as providing the theoretical part of my non-binary personhood account of human rights. The next chapter (chapter 6) will consider the applications and implications of my account. 6.1 will explain how, on my account, we can understand the personhood and human rights of paradigmatic marginal cases: subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3). 6.2 will defend my account against six key objections. Namely, that my account allows for arbitrary discrimination (6.2.1), and the permissible mistreatment of the marginal cases (6.2.2); that it is overinclusive (6.2.3), underinclusive (6.2.4), and cannot deal with problem cases, like foetuses (6.2.5); and finally, that it cannot adequately deal with rights conflicts (6.2.6). As I levelled many of these objections against other human rights accounts (chapters 3-5.1), and will claim that my account *can* avoid these objections, I will conclude that my account should be favoured over the other human rights accounts discussed in this thesis.

## CHAPTER SIX. APPLICATIONS AND IMPLICATIONS OF MY PERSONHOOD ACCOUNT

### Introduction

The previous chapter presented the theory of my new non-binary personhood account (hereafter ‘my account’). I explained the connections between the personhood properties, human rights, and degrees of personhood. I concluded that different subjects have different human rights on the basis of their different personhood properties, and the different threats that apply to them. I argued that, because my account is sensitive to context and vulnerability, it intuitively ensures that subjects have the human rights that are ‘just right’ for them, morally speaking. I termed this the ‘Goldilocks Approach’.

This chapter examines what follows if we accept my account. 6.1 considers the applications of my account. I will take three paradigmatic marginal cases: subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3), and explain how my account can offer an intuitively plausible way of thinking about their personhood and human rights.<sup>222</sup> I will argue that my account also provides a new way of thinking about ongoing debates about marginal cases’ rights.

6.2 responds to objections to my account. Specifically, I will discuss the potential objections that my account allows for arbitrary discrimination (6.2.1), and the permissible mistreatment of marginal cases (6.2.2); that it is both overinclusive (6.2.3), and

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<sup>222</sup> I have chosen to focus on these three marginal cases for two reasons. First, in 2.3 I identified three groups of marginal case: atypical humans, non-humans, and posthumans. By focusing on subjects with dementia, non-human animals, and robots, I can consider a representative example from each group of marginal case. Second, and as explained in 6.1, there is currently a lot of controversy and debate about what human rights (if any) subjects with dementia, non-human animals, and robots have. I will argue that, if we adopt my account, we can begin to move forwards with these debates.

underinclusive (6.2.4); and that it cannot address the problem cases of fetuses and embryos (6.2.5), or deal with rights conflicts (6.2.6).

## **6.1 Applications**

On most current views, subjects with dementia, nonhuman animals, and robots are marginal cases. We can see this in existing debates (discussed below) which show disagreement and confusion about a) whether the above subjects are persons, and b) how we ought to treat them (in regards to their status as rights-holders). In this section I argue that we can make progress on these debates if we accept my account. As outlined below, an upshot of accepting my account is that most subjects with dementia, nonhuman animals, and robots will *not* be marginal cases, but persons with at least some human rights.

### **6.1.1 Subjects with dementia**

This subsection discusses the human rights of subjects with dementia. I begin by clarifying what happens when a subject has dementia, and why we should be concerned about the human rights of subjects with dementia. I then outline current views on the human rights of subjects with dementia, and argue that no existing view is satisfactory. I conclude by explaining how my account provides a better framework for understanding the human rights of subjects with dementia.

Dementia is not a disease. The medical term ‘dementia’ refers to a cluster of different symptoms, illnesses, and conditions (e.g. memory loss) that are related to a gradual decline in brain functioning. Although there are many different causes of dementia, all subjects with dementia have some form of neurological damage. The type of dementia that a subject has, and the unique symptoms and behaviours that follow, vary depending

on which area of the brain is damaged.<sup>223</sup> For example, imagine two subjects: Jean and Peter. Jean has damage to her frontal lobes, which control behaviour and personality. Because of this damage, Jean has ‘frontotemporal dementia’, and her symptoms include confusion, psychosis, obsessions, changes in behaviour and beliefs, and a lack of inhibition. Peter has nerve damage to the areas of his brain concerned with thinking and movement. Because of this damage, Peter has ‘dementia with Lewy bodies’. Unlike other subjects with dementia, Peter will not necessarily have difficulties with his memory.<sup>224</sup> Instead, his symptoms include difficulties controlling his bodily movements, visual and auditory hallucinations, and a decline in his sense of smell.<sup>225</sup>

In the UK, there were 820,000 subjects with dementia in 2010 (Kelly and Innes 2013: 61), and this had risen to 850,000 by 2014.<sup>226</sup> Typically, decisions about the treatment of subjects with dementia are made by external bodies, such as care providers and policy makers. Many of these treatment decisions relate to human rights issues, for example, whether subjects with dementia have a right to life (Persad 2019: 244-245) or a right to privacy (Tarzia, Fetherstonhaugh, and Bauer 2012: 609-610). It is consequently vital that we are correct about which human rights subjects with dementia have. If we are wrong,

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<sup>223</sup> The following discussion of dementia, and the various types of dementia, has been informed by these sources: Alzheimer’s Research UK (2018) ‘A quick guide to dementia’ and ‘Types of dementia’; DementiaUK (2018) ‘What is dementia?’; and NHS (2017) ‘About dementia: Dementia guide’.

<sup>224</sup> This idea – that a subject with dementia may not necessarily have memory problems – may seem questionable as we often collate ‘having dementia’ with ‘having memory problems’. Peter’s case, as I have defined it, would however be supported by DementiaUK (2018: 5) who claim the following about dementia with Lewy bodies: “Memory is often less affected than with other types of dementia, but a person might experience sudden bouts of confusion which can change on an hourly basis.”

<sup>225</sup> The above examples demonstrate that, whilst all subjects with dementia experience some changes to their personhood (in terms of personhood properties, e.g. memory, rationality, etc.), they will not all experience the same changes. There are in-group differences that mean that ‘subjects with dementia’ are not one homogenous group. Consequently, when I use the term ‘subjects with dementia’, it should be taken to refer to subjects with any type of dementia, and with any combination of dementia symptoms.

<sup>226</sup> For this 2014 statistic, see Alzheimer’s Research UK (2018) ‘Dementia statistics hub.’

and subsequently fail to respect the rights of subjects with dementia, then upwards of 850,000 subjects with dementia are at risk of mistreatment.

Despite the importance of the above, little attention has been given to the human rights of subjects with dementia (Kelly and Innes 2013: 61). Consequently, there has not been much debate about what rights, if any, subjects with dementia have. As a result of this lack of debate, many of the positions discussed below have remained largely unchallenged, despite being theoretically weak and morally questionable.<sup>227</sup>

In what follows, I will focus on the few theorists who *have* discussed the human rights of subjects with dementia. I will begin by discussing two general human rights accounts. Whilst not explicitly focused on subjects with dementia, these general accounts briefly explain how subjects with dementia would be affected by the human rights account in question. I will then consider two bioethical accounts which *do* focus exclusively on the human rights of subjects with dementia. Throughout, I will use the aforementioned examples of Jean and Peter to argue that none of the current views present an acceptable account of the human rights of subjects with dementia.

### General Accounts

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<sup>227</sup> The accounts discussed below also conflict with law and practice surrounding the treatment of subjects with dementia as, at best, they accept that subjects with dementia have limited, restricted rights. This contrasts with the ‘dementia statements’ created by The Dementia Action Alliance and promoted by the UK department of health (Alzheimer’s Society 2020a: ‘Dementia statements and rights.’). These dementia statements are grounded in human rights law and argue that subjects with dementia should not be treated differently because of their dementia.

I will accept that, whilst non-ideal, it is not necessarily problematic for the below accounts to conflict with law and practice. This is because, as explained in 1.3, I am viewing human rights as basic moral rights to which basic legal rights ought to correspond. The direction of explanation is from moral considerations to legal considerations, rather than from legal considerations to moral considerations. On this view, it is acceptable for a human rights view to go against current law and practice if there are good moral reasons for doing so. However, I will argue (below) that the current moral arguments about the human rights of subjects with dementia are unsatisfactory. The current arguments fail, not only because they go against law and practice, but because they are also morally unjust.



When discussing his human rights account, James Griffin (2008: 95, my italics) argues that "... I am inclined to conclude that human rights should not be extended to infants, to patients in an irreversible coma or *with advanced dementia*, or to the severely mentally defective." His reasoning for this is that such subjects do not meet a requisite binary threshold for personhood (normative agency), and so cannot be persons and do not have human rights. I have already discussed the problems with this view elsewhere (3.4). In sum, Griffin's view either requires us to arbitrarily discriminate against subjects with dementia, or to say that subjects with dementia have some other moral rights. I argued that neither of these options are sustainable (3.4.1 & 3.4.2). As I have already argued that Griffin's account *does not* provide a viable account of marginal cases' rights, I shall not consider it further in relation to the human rights of subjects with dementia.

The human rights accounts of both Alan Gewirth (1978a & b) and Jeff McMahan (2008) offer a more accommodating view in which subjects with dementia have some degree of human rights.<sup>228</sup> Like Griffin, Gewirth accepts that there is a single binary threshold for personhood (human action) which is connected to subjects having certain psychological properties (linked to rationality).<sup>229</sup> Gewirth (1978a: 1157-1158) argues that those with psychological impairments (which would include subjects with dementia) have a low degree of the relevant psychological properties, and so have some degree of personhood (understood in terms of human action).<sup>230</sup> He concludes that marginal cases (including

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<sup>228</sup> Perring (1997) also presents a degrees of rights view that would extend to subjects with dementia. I will not consider Perring's account again here as it has already been discussed at length in 5.1.

<sup>229</sup> For a discussion of Gewirth's account, and its applications to the marginal cases, see 3.1-3.4.1.

<sup>230</sup> Gewirth does not actually use the term 'dementia'. However, he does consider how his account of human action would apply to those humans that are "...incapable of agency in one degree or another...Examples of such humans include children, mentally deficient persons, paraplegics, persons with brain damage, fetuses and so forth" (1978a: 1157). As all subjects with dementia have some form of brain damage (see my earlier definition), they would be included in Gewirth's 'persons with brain damage' category.

subjects with dementia) have degrees of human rights that are proportionate to the degree to which they possess the capacity for human action (1978a: 1157-1158; 1978b: 122, 140-145).<sup>231</sup>

Jeff McMahan (2008: 83) argues that there are two thresholds for personhood.<sup>232</sup> Those who are below the lowest threshold are conscious but lack important psychological capacities (such as rationality). Those above the highest threshold are conscious *and* have standard levels of the relevant psychological capacities. Those in-between the two thresholds (and this includes subjects with dementia) are conscious and have some non-standard level of the psychological capacities. McMahan argues that subjects have degrees of human rights relative to their place on the thresholds. Those above the high threshold have strong human rights. Those below the low threshold have no rights, their treatment is determined solely by “a proper concern for their good, or time-relative interests” (98), and these interests can be violated on consequentialist grounds (e.g. if doing so would bring about the greatest good for the greatest number) (ibid). Because subjects with dementia are between the thresholds, they have intermediate rights. As McMahan explains,

They are neither wholly sacrificeable in the service of the greater good nor maximally inviolable. The treatment of these individuals is governed by

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<sup>231</sup> This idea is particularly well explained in the following quote: “[In the case of]...mentally deficient persons and persons with brain damage, their possession of the generic rights must be proportional to the degree to which they have the abilities of agency, and this must be with a view of taking on the fullest degree of generic rights of which they are capable so long as this does not result in harm to themselves or others” (Gewirth 1978a: 1157-1158).

<sup>232</sup> For further discussion of McMahan’s threshold view, see footnote 195.

constraints, but the strength of these constraints varies with the level of psychological capacity of the individual to whom they apply (98).<sup>233</sup>

The above ‘degrees of rights’ views have important implications for the human rights of subjects with dementia. First, let us consider subjects with dementia who have a *low* degree of personhood. Reconsider Jean. Her dementia causes her to have confusion and psychosis which, in turn, have a detrimental effect on her capacities for human action (Gewirth) and autonomy (McMahan). Because she only has a low level of the relevant psychological capacities, Jean has a low degree of personhood on the above accounts. She consequently has a low degree of human rights, and so she has fewer or weaker rights than others (standard adult humans).

One outcome of the above is that Jean’s rights will typically be too weak to win in conflict cases.<sup>234</sup> Suppose that Jean and a standard adult human (Lucy) are both ill. Lucy has a minor illness, whereas Jean has a serious illness. In the scenario under discussion, there are low medical resources, so we can only treat Jean *or* Lucy (but not both). Assuming that both Jean and Lucy have a human right to basic medical care, this means that we will

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<sup>233</sup> McMahan initially discusses subjects with dementia in his 2002 book *The Ethics of Killing*. Here, McMahan presents an account of moral status whereby “...autonomy must be a significant element of the basis of the worth that demands respect” (2002: 261). Those with autonomy deserve moral respect; those without do not. McMahan explains that subjects with dementia “...are worthy of respect (or continue to be worthy of respect) by virtue of their *having been* autonomous” (2002: 261). As subjects with dementia neither have full autonomy nor completely lack autonomy, they have an indeterminate moral status. McMahan explains this using an analogy – like a car being gradually dismantled, a subject with dementia gradually loses part of themselves (2002: 495). In both cases, they have an indeterminate status – the gradually dismantled car is an indeterminate car; the subject with dementia is an indeterminate person (ibid).

The three-tiered account discussed in this section (and presented in McMahan’s 2008 paper ‘Challenges to Human Equality’) aims to develop this indeterminate status view. As explained in the main text, above, on this three-tiered account, an individual’s moral status and rights vary depending on the degree to which they have psychological capacities (graded in terms of a low and a high threshold) (2008: 98). Given McMahan’s arguments in *The Ethics of Killing*, we can suppose that subjects with dementia are between the high and low thresholds, and have an intermediate moral status (and intermediate rights) as a result.

<sup>234</sup> I discuss rights conflicts in more detail in 6.2.6.

have to violate either Jean's or Lucy's right. The above degrees of rights view entails that we should *always* violate Jean's rights and give Lucy the medical treatment. This is because, on the above accounts, Jean is less of a person than Lucy, and so has a weaker right to basic medical care. This outcome – Lucy has a stronger right to medical care, and so should be treated – seems implausible, given the relative seriousness of Jean's illness in comparison to Lucy's minor illness.

A further concern follows if we consider how Jean's rights will change as her condition progresses. Suppose that, as Jean's dementia advances, she will lose more of her psychological capacities. She will consequently be less of a person on both Gewirth's and McMahan's accounts. On the degrees of rights view, an upshot of this change is that Jean will have even fewer and weaker rights. As her dementia progresses, Jean will gradually *lose* human rights.

The above runs counter to the vulnerability discussions presented in 5.5. There, I explained how subjects who are vulnerable (either in terms of being systematically oppressed and discriminated against, or by lacking important capacities and abilities) ought to have more and stronger rights in order to protect against oppression, discrimination, and other forms of mistreatment. It seems clear that Jean will become *more* vulnerable as her dementia progresses. She will lose certain capabilities and abilities, and will be increasingly negatively discriminated against by being seen as incompetent and/or a burden.<sup>235</sup> Contra Gewirth and McMahan, we could thus suppose that Jean should actually have more and stronger rights as her dementia progresses, rather

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<sup>235</sup> Tarzia, Fetherstonhaugh, and Bauer (2012: 609-610) make a similar claim in their assertion that subjects with dementia experience negative discrimination as a result of systemic ageism in society.

than fewer and weaker rights. As it stands, the degrees of rights view thus seems to ignore legitimate concerns about the vulnerability of subjects with dementia.<sup>236</sup>

A second vulnerability concern occurs when we consider subjects with dementia who have a *high* degree of personhood. Both Gewirth and McMahan accept that a subject's degree of personhood is determined *only* by the degree to which they hold some relevant *psychological* capacity. A subject then has a degree of human rights on the basis of their degree of personhood, so defined. On this view, a subject with dementia has a high degree of personhood (and a high degree of rights) if they retain their psychological capacities at a standard level. This is the case with Peter. Recall that Peter has dementia with Lewy bodies, and so he has difficulties with his movement and perception, but his memory and certain other psychological capacities remain unchanged. It seems that both Gewirth and McMahan would accept that, as Peter has the same degree of personhood as a standard adult human (according to their personhood criteria), he also has exactly the same human rights as a standard adult human.

The above ignores the many non-psychological changes that Peter experiences as a result of his dementia. For example, because of his dementia, Peter will gradually lose his ability to control his body (but will retain his ability to make decisions). These non-psychological changes make Peter vulnerable in ways that the standard adult human is not. Unlike the standard adult human, Peter cannot perform many physical actions himself and/or without the assistance of a carer (e.g. he cannot drive, he may not be able to feed or dress himself, etc.). An upshot of this is that, contra the claims of the previous paragraph, Peter does not

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<sup>236</sup> For a related discussion of how the vulnerability of subjects with dementia ought to be considered from a legal perspective, see Mattsson and Giertz (2020).

have exactly the same human rights as a standard adult human. For example, let us assume that, like a standard adult human, Peter has a right to freedom of movement. Using the discussions of ‘privilege rights’ from 1.1, we can cash this out in terms of Peter being free to visit any city in the UK. Unlike the standard adult human, Peter cannot visit any city in the UK on a whim or without assistance. Due to his condition, Peter will need a carer to dress him, assist with his travel and general mobility, etc. (and we can assume that he has positive rights to this assistance). As the above demonstrates, Peter’s rights are different to (and in some cases, more extensive than) the rights of the standard adult human. Consequently, we cannot have a complete picture of Peter’s human rights without acknowledging the ways in which his dementia makes him vulnerable, and the ways in which this vulnerability affects his rights. Such vulnerability is not accommodated on the degrees of rights view.

Part of the above problem is that neither Gewirth nor McMahan are explicitly focusing on applying their human rights accounts to subjects with dementia. Consequently, their discussions of dementia are quick and fail to consider how different types of dementia generate different threats and rights issues. Below, I consider two accounts that *do* explicitly focus on the human rights of subjects with dementia, in order to see if they can do better.

### Dementia specific views

#### Memorial Personhood

Bruce Jennings (2009) argues that subjects with dementia stand in a morally significant relation to their pre-dementia selves. The pre-dementia self was uncontroversially a

person; they had all of the properties that we typically associate with being a person (e.g. rationality, agency, autonomy, etc.). Because the pre-dementia self *was* a person, Jennings (2009: 425) argues that subjects with dementia have *memorial* personhood. This means that others can remember the pre-dementia person and recall their pre-dementia choices, plans, and interests. For example, reconsider Jean, whose dementia causes her to experience confusion, psychosis, changes in behaviour and beliefs, etc. On Jennings' view, there is a clear divide between pre-dementia Jean (who was rational, had consistent interests and beliefs, and made considered choices) and post-dementia Jean (who lacks these capacities). For Jennings, only pre-dementia Jean is a person, and it is the responsibility of Jean's loved ones to respect her pre-dementia personhood, wishes, and interests.

There are three main problems with this 'memorial personhood' view. First, Jennings' definition of 'memorial personhood' assumes that all subjects with dementia *were* non-demented adults (and thus standard persons) at some point. This is challenged by the 'dementia strikes children too' campaign, which emphasises how children with certain rare diseases, like Batten disease, can experience brain damage that will result in dementia.<sup>237</sup> Children with dementia will *never* have been persons in Jennings' sense because they have never passed the relevant threshold for personhood (by being rational agents, etc.). In cases of childhood dementia, Jennings' argument fails because there is no pre-dementia self that the subject with dementia can stand in some relation to.

A second problem with Jennings' memorial personhood view is that it requires us to accept that it is *only* the pre-dementia self who *was* a person. Pre-dementia Jean was a

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<sup>237</sup> See Dementia Strikes Children Too (2018) 'An urgent need for change'.

person, but post-dementia Jean is not a person (in her own right). This ignores the many ways in which post-dementia Jean can be a person *now*. For example, post-dementia Jean can still have interests, beliefs, emotions, and social relations – they will just be *different* to the interests, beliefs, etc. that she had as pre-dementia Jean. I will consider this point in more depth at the end of 6.1.1, where I will explain how my account understands the personhood and human rights of subjects with dementia.

A third problem with Jennings' view is that it only applies to those subjects with dementia who have people that care about them. On Jennings' view, if *no-one* remembers pre-dementia Jean, and/or if no one recalls or cares about her pre-dementia choices, plans, and interests, then no-one has a responsibility to respect her pre-dementia personhood, wishes, and interests. In such a scenario, post-dementia Jean is not a person in her own right (see above) and, because no-one remembers or cares about her pre-dementia self, Jean also lacks memorial personhood. On Jennings' view, as post-dementia Jean is not currently a person (in any sense), no one has a moral responsibility to respect her choices or interests. This leaves Jean at risk of permissible mistreatment.<sup>238</sup>

In response to the above worry, we could assume that Jean has written an advance directive, recording her pre-dementia choices and interests. If such an advance directive exists, then this would circumvent the above worry that no-one remembers pre-dementia Jean or her pre-dementia choices and interests. No one *needs* to remember pre-dementia Jean as there is a written record of her pre-dementia choices and interests (her advance directive) which her carers can use to respect Jean's memorial personhood. Govind Persad (2019) argues for a view of this kind. In what follows, I will outline Persad's view, before

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<sup>238</sup> For further discussions of permissible mistreatment see 3.2-3.4, 4.4, and 6.2.2.



explaining why reference to advance directives ultimately does not help to make the memorial personhood view any more defensible.

Whereas Bruce Jennings (2009) only talks about memorial personhood itself, Govind Persad (2019) explains how memorial personhood links to human rights. Persad draws on the notion of historical embodiment to claim that, because the pre-dementia individual was a person with (at least) bodily rights, they retain these bodily rights when they become the post-dementia individual (249-250). Using our example, pre-dementia Jean thus has prior rights to post-dementia Jean's body. On Persad's view, a consequence of this is that, if pre-dementia Jean writes an advance directive (e.g. stating that medical treatment should be stopped if she develops dementia), then she has a human right to have this directive be respected, even if this will cause the death of post-dementia Jean (252-255). Persad argues that this outcome is justified because pre-dementia Jean's bodily rights are stronger than post-dementia Jean's. This is because (i) pre-dementia Jean has been embodied in that body for longer and so has a stronger claim to it (250), and (ii) post-dementia Jean is much less of a person than pre-dementia Jean and so has weaker (if any) claim rights (251, 254).

The above problematically misunderstands the ways in which advance directives are used in practice. As The Alzheimer's Society (2020b) explains, an advance directive cannot be used "...to refuse treatment if you still have the capacity to give or refuse consent."<sup>239</sup> In practice, if post-dementia Jean does consent to medical treatment, then her current consent trumps pre-dementia Jean's advance directive.<sup>240</sup> Persad's view thus relies on

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<sup>239</sup> See Alzheimer's Society (2020b) 'What an advance decision cannot do'.

<sup>240</sup> At this point some might object that post-dementia Jean does not have the capacity to give consent and so the advance directive should hold. Even if this is true, there will be some cases of dementia where the

both a dismissal of post-dementia Jean's capacities, abilities and wishes, and on a questionable understanding of advance directives. If we were to accept Persad's view, we would be putting subjects with dementia at risk of permissible mistreatment; we would be ignoring the human rights that subjects with dementia have *now* (e.g. a right to medical treatment).<sup>241</sup>

### Social Personhood

The second dementia-specific view, defended mainly by Kristen Zeiler (2013), argues for a social conception of personhood. Zeiler begins by accepting that each individual has certain characteristic traits and behaviours that make them who they are (135). Using our earlier example, suppose that Jean is kind, religious, artistic, inhibited, etc. Zeiler claims that the traits that each individual has will cause them to develop "...a certain style of being, i.e. a certain habituated manner of engaging with others and the world..." (135). For example, suppose that, because of the traits that she has, Jean is shy and does not like physical contact, but is an enthusiastic member of her church choir and regularly attends art classes. Zeiler argues that it is this characteristic, and socially-situated, style of being that determines our personhood.<sup>242</sup>

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subject does retain the capacity to give consent. For example, as discussed earlier, Peter's form of dementia does not necessarily affect his cognitive capacities, and so he would, presumably, retain his ability to consent to medical treatment. In at least some cases, the subject with dementia *can* consent to medical treatment. For a more in-depth discussion of 'consent', see 'my view' below.

<sup>241</sup> Another obvious problem is that Persad's account only considers subjects with dementia who have written advance directives. For those subjects with dementia who have *not* written advance directives, it is unclear, on Persad's account, if and how they have posthumous rights to their bodies.

<sup>242</sup> This is because Zeiler (2013) adopts what she calls a "mixed body-oriented conception of personhood" (132). It is unclear precisely what this entails, but a 'mixed conception' seems to see "a set of capabilities and relations as necessary for someone to qualify as a person" (footnote 4, 139). Zeiler seems to take 'body-oriented conceptions' to entail that the relevant capabilities are those "that reside on pre-reflective bodily levels of existence" (132). I interpret this as saying that personhood, on Zeiler's account, requires a combination of personhood traits and certain socially-oriented behaviours.

Zeiler then applies this social conception of personhood to subjects with dementia. She explains that, because subjects with dementia experience changes to their characteristic style of being, their status as persons is at risk. This is because subjects with dementia may not remember who they are, or may no longer be able to express themselves in characteristic ways (135). For example, Jean may not remember that she is religious or artistic, or, because of her dementia, she may not be able to recall her favourite hymns or attend art classes. Zeiler argues that, in cases of this kind – where a subject cannot express themselves in ways required to be a person – it falls on others to hold them in personhood (131). She explains this as follows: “...others can act in ways that *maintain my personhood* by interacting with me in ways that enable me to express myself” (139). For example, suppose that Jean has a carer, David. David will ‘hold Jean in personhood’ if he sings hymns with her or shows Jean copies of her favourite artwork. Here, Jean is a person because of her relationship with David, and as a result of the interactions that she has with him.

The main problem with Zeiler’s account is that it implies that subjects with dementia *must* be in a caring relationship (with those who ‘hold them in personhood’) in order to be a person. If, in our example, David does not care for Jean, or does not help her to express herself, then Jean is not a person. An implication of this is that ‘personhood’ is problematically transient, on Zeiler’s view. Jean can suddenly become a person when David cares for her and holds her in personhood. She can also suddenly cease to be a person when David stops holding her in personhood.<sup>243</sup>

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<sup>243</sup> Zeiler (2013: 140) acknowledges the above issue and makes the following response: “...someone, because he or she *can* be held in personhood interactions, indeed qualify as a person also when not in such interactions ... my argument is based on an analogy with an individual without dementia who sleeps. Just as it would be highly implausible to assume that we, when sleeping, no longer qualify as persons because we do not exercise capabilities that are deemed necessary for personhood, I suggest that [subjects with

The above ‘social personhood’ view also has problematic implications for human rights. Throughout this thesis, I have argued that human rights depend on personhood, in the sense that one must be a person in order to have human rights. As explained above, there are problems with the attribution of personhood on Zeiler’s account – personhood is transient and dependent on a subject being in a caring relationship. Given that personhood and human rights are connected, the above problems with the attribution of personhood would generate problems relating to how we ought to understand a subject’s human rights. Suppose that David does hold Jean in personhood. In this scenario, Jean would have human rights in virtue of being held in personhood. However, if David then ceases to hold Jean in personhood, she would no longer have human rights (because she is no longer a person). If the scenario changes – for example, if David or another carer hold Jean in personhood again – then she will have human rights again, and so forth. This is an unsustainable view of both personhood and human rights.<sup>244</sup>

### My view

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dementia]... need not exercise the intercorporeal capabilities that spring forth in joint activity in order to qualify as a person when no longer in this activity”.

There are two main problems with Zeiler’s response. First, it depends on the idea that “...because he or she can be held in personhood interactions, [they] qualify as a person also when not in such interactions” (ibid). The first clause of this statement still depends upon the subject with dementia being in a caring relationship whereby someone holds them in personhood. If this relationship is removed (as in my above objection) then Zeiler’s response does not work.

Second, Zeiler’s sleeping analogy is questionable. As explained above, Zeiler’s main argument is based on the importance of interpersonal relationships and joint activities for maintaining personhood. Sleeping is not a joint activity and does not involve interpersonal relationships. I consequently question the relevance and effectiveness of Zeiler’s analogy.

<sup>244</sup> Note that the key problem with Zeiler’s account is that she sees being ‘held in personhood’ as *necessary and sufficient* for the personhood of subjects with dementia. On my account, ‘being in a caring relationship’ is not necessary for personhood, and there are other properties that are also sufficient for personhood. The problems with Zeiler’s account do not arise for my account.

As the above discussion shows, we are currently at an impasse. No current account can satisfactorily explain the human rights of subjects with dementia. This is because the above accounts take an overly limited view of personhood and/or human rights. As a result, the current accounts present arguments that are either unintuitive, incomplete, or morally problematic.

What the current accounts *do* get right is their acceptance of two main claims. First, when a subject develops dementia, their personhood changes. Second, the human rights of subjects with dementia will change as a result of their changed personhood. These are both sensible, intuitive claims and are accepted, in some form, by all of the above accounts. However, none of the above accounts develop these intuitive claims into a plausible view that can accommodate most, if not all, subjects with dementia (regardless of their type of dementia or medical care status). Below, I will argue that my account (chapter 5) offers a framework that can neatly develop these two claims.

Claim one states that when a subject develops dementia, their personhood changes. To argue for this claim, we need to show that personhood is not static, and so it is possible for a subject to gain or lose personhood properties (or, at least, to gain or lose a degree of the personhood properties). For example, post-dementia Jean may *lose* some degree of rationality or autonomy because of her dementia. However, if she enters a care facility, she may *gain* certain social properties; she may develop new social relations (with carers and residents) and partake in more social activities than she did pre-dementia. We want an account that accommodates both gains and losses to Jean's post-dementia personhood.

My account can accommodate these changes. In 5.4 I explained that most, if not all, of the personhood properties come in degrees. The upshot of this is that, whatever personhood properties we take there to be (rationality, emotions, perceptions, etc.), subjects can have more or less of these properties. This allows us to make intuitive claims about Jean's post-dementia personhood. Instead of saying that Jean now lacks personhood post-dementia (as some of the above accounts claim), we can say that Jean's personhood is changed by dementia, in the sense that she has more or less of certain important properties (autonomy, creativity, etc.).

The second thing that we want to say about claim one is that different subjects with dementia will experience different changes to their personhood. My account can explain these differences. In 5.2 I argued that there are many different types of personhood property. Some of these properties are psychological (e.g. rationality), emotional (e.g. having feelings), social (e.g. being in a caring relationship), physical (e.g. embodiment), and phenomenal (e.g. felt experiences). This means that there are many different ways in which subjects can be persons, and many different types of personhood property that subjects can have more or less of (in the sense described in the previous paragraph). We can apply this to our dementia examples. Jean experiences changes to her psychological and emotional properties. She may become an atheist (a psychological change), or become uninhibited (an emotional change). Peter experiences changes to his physical and phenomenal properties. He may become unable to control his bodily movements (a physical change), or start hallucinating (a phenomenal change). Both Jean's and Peter's cases are examples of personhood changing, but the ways in which personhood changes depends upon the properties affected.

Claim two (see above) states that the human rights that subjects with dementia have will change as a result of their changed personhood. In defending this claim, we intuitively want to say two things. First, the human rights that subjects with dementia have are different to the human rights of standard adult humans.<sup>245</sup> We have already seen this in the evaluation of the general accounts, above. There, I explained how Peter's vulnerability as a subject with dementia causes him to have different liberty rights to the standard adult human. My account can explain this difference. In 5.5 I argued that different subjects have different human rights on the basis of their different personhood properties, and the different threats that apply to them. It is intuitive to suppose that subjects with dementia and standard adult humans *do* differ in terms of their personhood properties and the threats that apply to them (as seen in the aforementioned Peter example). On my account, this difference entails that they ought to have different human rights to one another.

The second thing that we want to say about claim two is that different subjects with dementia will have different human rights to one another. The upshot of this is that the human rights of Peter and Jean may change in different ways, and so he may have rights that she lacks, and vice versa. To examine this idea, we can look at specific human rights debates in dementia care. At the time of writing, a key debate is whether subjects with dementia have the capacity to consent to sexual relations, and thus whether subjects with dementia have a right to sexual self-expression.<sup>246</sup> In essence, this debate revolves around

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<sup>245</sup> Note that in most, but not all, cases of dementia, the subject with dementia will have changed from a standard adult human to a subject with dementia.

<sup>246</sup> This debate is well summarised in the work of Tarzia, Fetherstonhaugh, and Bauer (2012), and Victor and Guidry-Grimes (2019).

For the purposes of this discussion, the key question is whether subjects with dementia ought to be allowed to have consensual sexual relations in care settings. The answer to this question has implications for subjects with dementia's liberty rights (to choose to do x), autonomy rights (to make their own choices), privacy rights (to both a private life and private spaces), and social rights (to have relationships).

two claims: (i) there are different types and degrees of consent, and (ii) some cases of consent are uncontroversial; others require further discussion.

An uncontroversial case of consent would be when a subject can consistently and rationally express verbal consent for a sexual act. Using our examples, we can assume that Peter could give this sort of verbal consent as his psychological capacities (including his rationality) are unaffected by his form of dementia. On standard accounts, Peter thus uncontroversially retains his capacity to consent to sexual relations, and has a right to sexual self-expression.<sup>247</sup>

In contrast, it is likely that Jean could not offer the same sort of rational, verbal consent. This is because Jean's psychological capacities *are* affected by her dementia – she is confused, has changeable behaviour and beliefs, and can become uninhibited. In cases like this – where explicit verbal consent is problematic – Elizabeth Victor and Laura Guidry-Grimes (2019: 1656) argue that subjects' "... interests could be inferred through patterns of behaviour and dispositions". For example, carers could observe "handholding, displays of affection, and happiness together" (ibid). If Jean's behaviour and dispositions consistently indicate a desire for a specific sexual act/relation, then, on this view, she could be viewed as non-verbally consenting to this sexual act.

However, an issue with the above view is that it is unclear how much non-verbal consent (and in what forms) Jean would need to display before she could be taken to consent to sexual relations. There are also related concerns about how to properly interpret Jean's

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<sup>247</sup> Obviously, Peter does not have a further right to sex itself.



non-verbal behaviour and dispositions.<sup>248</sup> Because of these concerns, Jean's capacity to consent to sexual relations is controversial and, unlike Peter, her right to sexual self-expression is open to debate.

My account can explain this difference between Peter's and Jean's human rights. As explained above, a central tenet of my account is that different subjects have different human rights on the basis of their different personhood properties, and the different threats that apply to them. In the above examples, Peter has the full range of psychological capacities, and can uncontroversially consent to sexual relations. There will be direct threats to Peter's agency if he is prevented from engaging in a consensual sexual relation, and so he has a right to sexual self-expression to protect against this threat. In contrast, Jean either lacks important psychological capacities or has low levels of them. We thus need to determine her capacity for consent through non-verbal cues. As these non-verbal cues could be easily misinterpreted, we risk putting Jean at risk of sexual exploitation if we too readily assume that she is non-verbally consenting to a sexual act. In contrast to Peter, we must be more cautious about saying that Jean has the capacity to consent to sexual relations, or that she has a right to sexual self-expression. In 6.2.6 I will outline a framework that will allow us to more concretely determine the specific personhood properties, threats, and human rights that apply to different subjects with dementia.

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<sup>248</sup> These concerns are amplified in Jean's case because her behaviour is changeable and uninhibited. It may thus be difficult, if not impossible, to get a consistent overview of Jean's patterns of behaviour and dispositions.

As Victor and Guidry-Grimes (2019: 1662) emphasise, a lot more research needs to be conducted in order to properly determine how to assess the non-verbal capacity for consent in subjects with dementia. They argue that "Future research needs to continue this line of inquiry to clarify how supportive caregivers should be in furthering the sexual interests of residents, how to modify existing assessment instruments to better weigh nonverbal communication of preferences to allow for more thorough capacity assessments, and how to best support historically marginalised communities, such as LGBTQ\* residents, when developing policies to empower residents' sexual autonomy" (ibid).

To summarise, I have argued that my account provides a simple, plausible way of defending two intuitive claims about subjects with dementia. First, when a subject develops dementia, their personhood changes. Second, the human rights that subjects with dementia have change as a result of their changed personhood. My account is uniquely placed to explain these claims in a way that can acknowledge the differences between individual subjects with dementia, and between subjects with dementia and standard adult humans. Because my account can explain the above, whilst other accounts cannot, I argue that my account is preferable. In the next two subsections, I will explain how my account can also help us to understand the human rights of nonhuman animals and robots.

### **6.1.2 Nonhuman animals**

This subsection discusses the human rights of nonhuman animals. I begin by outlining the arguments of Paola Cavalieri (2002) and Sue Donaldson and Will Kymlicka (2011); both of which discuss which *human rights* nonhuman animals have (independently of any other moral and legal rights that they may possess).<sup>249</sup> I will argue that neither view is satisfactory. On Cavalieri's (2002) view, nonhuman animals have too few human rights, whilst on Donaldson and Kymlicka's (2011) view, some nonhuman animals have too

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<sup>249</sup> As discussed in 4.3, Cochrane (2013) and Regan (2004) also discuss the human rights of nonhuman animals. I will not discuss Cochrane and Regan any further in this section because a) they have already been extensively discussed elsewhere in the thesis, and b) unlike Cavalieri (2002) and Donaldson and Kymlicka (2011), Cochrane (2013) and Regan (2004) do not provide a comprehensive list of *which* human rights nonhuman animals have.

Although I am focusing on the human rights angle here, this should not be taken to suggest that other (non-human rights focused) rights arguments and debates within the animal rights literature are unimportant or uninteresting. They are omitted for reasons of space and relevancy. As a brief survey, however, some of the key questions being considered within the animal rights literature include:

- Can rights extend to nonhuman animals, or is the concept of 'rights' exclusively human? (Bortolotti (2006), Cohen (1997), and Sussman (2014)).
- Can animals have the requisite capacities to be a person and rights-holder? (Mameli and Bortolotti 2006)
- Does the scope of justice extend to nonhuman animals? (Pepper (2018)).
- Can animals benefit from lacking certain rights? (Lamey (2019)).

many human rights. I conclude by explaining how my account provides a better framework for understanding the human rights of nonhuman animals.

### Cavalieri's View

Paola Cavalieri's (2002: 125-144) central argument is that nonhuman animals *deserve* human rights.<sup>250</sup> In order to identify which subjects deserve human rights, she critically assesses substantive justifications for human rights. On substantive accounts, certain criteria are proposed as justifications for having human rights. In 5.3 I discussed substantive accounts in terms of agency, basic needs, and good life accounts. Cavalieri supposes that if a subject meets the relevant criteria for having human rights (discussed below), then they *deserve* human rights. She aims to demonstrate that nonhuman animals *can* meet a relevant criterion, and so *do* deserve human rights.

To this end, Cavalieri argues that human rights "... are not justified by reference to rationality, self-consciousness, or any other "higher" characteristics, but instead by reference to the mere *intentionality* of the individual" (126). She defines the intentional agent as conscious, purposive, and focused on achieving its goals (136). On her view, it is all and only intentional agents, so defined, who have human rights.<sup>251</sup> Specifically, Cavalieri argues that intentional agents have negative human rights to freedom, welfare,

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<sup>250</sup> Cavalieri (2002) defines human rights as "political and institutional in character" (126), and as containing only *negative* rights, i.e. rights *against* certain actions (e.g. torture) (126-129).

<sup>251</sup> Cavalieri (2002) takes her position to be consistent with the human rights account of Gewirth, whom she argues also adopts the above definition of an intentional agent (136-137). As I have argued in chapter 3, Gewirth's human rights account is exclusionary and does suppose that rights-holders must necessarily have higher capacities (specifically, those linked to human action (e.g. rationality)). It is consequently unclear to me how Cavalieri's account of intentionality is independent of the 'higher capacity' views that she dismisses. Cavalieri wants to divide 'mere intentionality' from the possession of higher capacities, but it is difficult to see how her intentional agent (conscious, purposive and focused on achieving its goals) does not necessarily require higher capacities (such as rationality) in order to be intentional.

and life (138). This is because she supposes that freedom, welfare, and life are necessary conditions of intentionality, and so intentional agents have justified rights to the protection of freedom, welfare, and life (ibid).<sup>252</sup>

Cavalieri argues that many nonhuman animals can also be intentional agents in the ways suggested – they can be conscious, purposive, and focused on achieving their goals (140).<sup>253</sup> For example, a tiger is intentional in this way when she purposefully pursues her prey. Cavalieri argues that, if we are to take intentionality as the hallmark of being a rights-holder for human rights, then consistency demands that we also accept that such intentional nonhuman animals have human rights (ibid). We are guilty of speciesism otherwise (69-86). On her account, intentional nonhuman animals have negative human rights to freedom, welfare, and life. For example, the tiger has a negative right to not be killed.

As summarised above, Cavalieri’s arguments are bold and interesting.<sup>254</sup> If we accept her view, then we have a new, expanded human rights theory that has important implications for the treatment and use of nonhuman animals. However, in what follows, I will argue that we should not accept Cavalieri’s arguments. This is because, alongside the specific

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<sup>252</sup> This is reflected in the following quote: “...beings that fulfil the requisite of intentionality are characterised by the capacity to enjoy freedom and welfare, as well as life which is a precondition for them” (Cavalieri 2002:139). It should be noted that Cavalieri’s arguments here are very quick (3 paragraphs long) and she does not give any in-depth explanation as to why intentional agents necessarily have negative rights to freedom, welfare, and life.

<sup>253</sup> Cavalieri (2002) does not specify which nonhuman animals could be intentional agents. She argues that “among the beings that an *expanded theory of human rights* should cover there undoubtedly are mammals and birds, and probably vertebrates in general. I do not deem it necessary to restate here the cumulative case for this claim, which is supported by common sense...” (140).

<sup>254</sup> Cavalieri’s arguments are bold from a *human rights* perspective. Those working in animal rights or animal ethics may argue that Cavalieri’s arguments are *not bold enough* and do not go far enough in the call for animal rights. I present an argument of this kind below.

issues highlighted in footnotes 251-253, there are two general problems that affect Cavalieri's account.

First, Cavalieri argues that animals (both human and nonhuman) only have *negative* human rights to freedom, welfare, and life.<sup>255</sup> In 5.6 I argued that the human rights that we get on my account include both positive and negative human rights.<sup>256</sup> If I am correct, Cavalieri denies all animals (human and nonhuman) rights that they ought to have (namely, positive rights). This is important because if, as Cavalieri argues, nonhuman animals only have negative rights, then we have no positive obligations to help them. This means, amongst other things, that nonhuman animals do not have a right to medical care when injured or sick (as this is a positive right to assistance). Similarly, if there are no positive obligations towards nonhuman animals, then states or official bodies do not have a duty of care to remove nonhuman animals from dangerous or distressing environments (e.g. neglect or animal abuse). This goes against widely accepted animal welfare policy (e.g. the work of the RSPCA), and seems to leave nonhuman animals at risk of permissible mistreatment.

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<sup>255</sup> Cavalieri (2002) argues that “[human rights] refer to narrow morality and are thus negative rights” (126). She understands ‘narrow morality’ in the sense of outlining constraints on how individuals may permissibly treat one another (126-128). She argues that human rights are particularly well suited to address concerns relating to narrow morality (128-129).

Cavalieri acknowledges that viewing human rights as negative rights could seem overly restrictive, but she remains committed to the claim that this is the correct view to take. This can be seen in the following paragraph: “It might be objected that such an interpretation, laying stress essentially on *noninterference*, points toward an unjustifiedly [sic] minimalist account of human rights. After all, the modern conception has gradually added a new side to the doctrine, in particular in the form of welfare rights or social and economic rights. Yet it is plausible to maintain that the core of the theory remains protective, and that between the two main sorts of rights—*negative* rights, or rights not to be treated in a certain way, and *positive* rights, or rights to be treated in a certain way —the ones that prevail are always negative rights, and, in particular, the so-called civil liberties, secured by the generalized prohibition against taking life, depriving of freedom, and violating bodily integrity. Apart from the widely accepted ethical priority of nonmaleficence over beneficence, it is clear that there are serious pragmatic reasons for this emphasis. Negative rights, being less affected by conditions of scarcity, are less likely to be subject to exceptions and thus offer the significant advantage of being more easily implementable” (128).

<sup>256</sup> To recap, in 5.6 I argued that the sort of human rights that we get on my account are Nickel's (2007:11) six categories of human rights. Nickel's categories include both positive and negative rights.

A second problem with Cavalieri's account is that she is committed to the claim that "...rights are equal for all their holders, because the value of the goods they protect is equal" (139). On this view, all rights-holders (so all intentional animals) should have qualitatively identical negative rights to life, freedom, and welfare. Cavalieri's 'equal rights' view is similar to the inclusive binary accounts discussed in chapter 4, and inherits the same problems. As I have already discussed the problems with these accounts elsewhere (4.4), I will not rehearse the arguments again here. Instead, I will simply state that, like the inclusive binary accounts, Cavalieri's account (i) underplays important differences between different animals' rights, and (ii) cannot adequately resolve rights conflicts.<sup>257</sup>

To summarise, Cavalieri's account is problematic because it gives nonhuman animals too few human rights, and also fails to acknowledge important differences between different animal species (in terms of both moral status and rights). Below, I will critically assess the arguments of Sue Donaldson and Will Kymlicka (2011) who conversely present a sustained defence of the claim that different nonhuman animals have different human rights. I will ultimately conclude that their arguments are also unsatisfactory.

### Donaldson and Kymlicka's view

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<sup>257</sup> For example, let us suppose that we have two intentional agents who are both rights-holders on Cavalieri's account. One is a human being and one is a domestic cat. Let us suppose that both have a negative right to life, but we are in a conflict situation where we have to violate either the human's or the cat's right to life. If, as Cavalieri argues, the rights of the human and the cat are *strictly* equal, then the just way to resolve this conflict would be to toss a coin or use some other fair decision procedure. As explained in 4.4.3, such 'fair decision procedures' give our marginal case (the cat) either too much or too little moral consideration.

In *Zoopolis*, Sue Donaldson and Will Kymlicka (2011) argue that “...our moral obligations to particular animals...vary with the nature of our relationship to them” (160-162). Here, ‘moral obligations’ correspond to ‘rights’, where rights contain both supposedly inviolable negative rights (e.g. a right against torture) and more expansive positive rights (e.g. to certain social goods, like political representation) (1-16). Donaldson and Kymlicka accept that the sort of rights that they are interested in are typically classed as ‘human rights’, and the goal of their book is to develop a new moral framework which allows us to extend human rights to nonhuman animals (2-3, 20-25, 101). Specifically, they argue that different nonhuman animals have different human rights depending on whether they are domesticated animals, wild animal sovereignty, or liminal animal denizens. Below, I will discuss each of these human-animal relationship types.

Although Donaldson and Kymlicka do not explicitly state which nonhuman animals are ‘domesticated’, we can assume that domesticated animals include any animal that has been bred to live with humans (e.g. pets, companion animals, farm animals, etc.). Donaldson and Kymlicka argue that domesticated animals have been forcibly brought into our society and denied other forms of (non-domesticated) existence. They claim that this is analogous to our past treatment of “...slaves, indentured labourers, or foreign migrants...initially brought into a community as a subordinated caste” (101). They explain that we now (rightly) see these human cases as citizens and members of our community, and accept that they have human rights that must be respected. By parity of reasoning, they conclude that domesticated animals should be seen as citizens and

members of our community, and that we should accept that they also have human rights that must be respected (74, 100, 101, 121).<sup>258</sup>

They argue that, as citizens, domesticated animals have rights to autonomy, and to have their choices respected (122-125). In practice, this entails that domesticated animals have human rights to, amongst other things, basic socialisation, mobility and the shared use of public space, protection, medical care, and political representation (122). It would take too much space to consider all of these rights, so let us focus on one example: a right to mobility and freedom of movement. According to Donaldson and Kymlicka, our current practices of physical restraints (cages, leads, etc.) and mobility restrictions (e.g. banning nonhuman animals from businesses) violate domesticated animals' human rights to freedom of movement (125). This is because, as long as these restrictions are in place, domesticated animals cannot have sufficient mobility, in even a minimal sense (129).<sup>259</sup>

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<sup>258</sup> It is unclear to me how this central analogy between domesticated animals and slaves is supposed to work. Donaldson and Kymlicka seem to suppose that the similarity between the two cases is that both slaves and domesticated animals have been forcibly subjugated into our (dominant) community. This is true, but is not enough to justify the claim that domesticated animals and 'freed' slaves should be treated the same (i.e. they should both be given citizenship and have their rights respected). It is clear why slaves, indentured labourers, and migrants should be seen as citizens in this way; but it is currently unclear why domesticated animals should be citizens.

The issue is further complicated in a later section where Donaldson and Kymlicka argue that nonhuman animals are citizens in the same way as psychologically impaired people are citizens (104). They use the idea of 'dependent agency' to argue that, like psychologically impaired people, nonhuman animals can be citizens because they engage with society (and the wider moral community) via their interactions with humans (owners, carers, trustees, etc.) (104-155). Whilst this idea does make sense, it is not related to the earlier slavery analogy.

Adopting a principle of charity, I take Donaldson and Kymlicka's central argument to be as follows: Domesticated animals are citizens because, via animal-human relationships, they can be part of society in important ways. As citizens, domesticated animals have certain rights. We mistreat domesticated animals if we treat them as non-citizens and violate their rights (and this is akin to the unjust treatment of slaves). For want of a clearer explanation, I will be assuming that this is the correct way of understanding Donaldson and Kymlicka's claim that domesticated animals are citizens.

<sup>259</sup> They justify the claim that domesticated animals should have at least minimal mobility and freedom of movement with the following quote: "To accept domesticated animals as members of our community means accepting that they belong here in the community, and have the prima facie right to share its public spaces" (Donaldson and Kymlicka 2011: 126).



As this example demonstrates, Donaldson and Kymlicka accept that domesticated animals (as citizens) have strong, extensive human rights.<sup>260</sup>

Donaldson and Kymlicka's second category of nonhuman animals are "wild animal sovereignty" (156-209). Wild animals are defined as those who "...avoid humans and human settlement, maintaining a separate and independent existence (insofar as they are able to) in their own shrinking habitats or territories" (156). An example is a jaguar in the Amazon rainforest. They argue that such wild animals should be viewed as sovereigns, where 'sovereignty' is understood in the same way that we understand 'sovereign states' (like indigenous Australian settlements) in human society. Like sovereign states, wild animals exist outside of 'mainstream' human society, but can nevertheless be affected by the actions of mainstream society, e.g. hunting, loss of habitat, the effects of climate change, etc. (156). They argue that we should respond to wild animal sovereigns in the same way that we respond to human sovereign states. Namely, we should respect the autonomy of wild animal sovereigns and, in doing so, acknowledge that they have rights to a) their territory and b) non-interference (172).

On this view, wild animal sovereigns have fewer rights than domesticated animal citizens (above). As a wild animal sovereign, our Amazon jaguar has only those rights that are

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<sup>260</sup> Donaldson and Kymlicka (2011) acknowledge that their argument may be difficult to apply to all domesticated animals. For example, they struggle to work out how a domesticated goldfish could have a right to free movement in any sensible sense. This can be seen in the following quote: "Consider goldfish... On the one hand, ...goldfish have lost some of their fitness for survival in the wild, so we can't simply turn them loose. On the other hand, providing them with tanks...that meet the test of sufficient mobility is a large undertaking. In such cases, the commitments of a citizenship approach may not be achievable" (130). There is thus a risk that their view may be overambitious (and I will return to this problem below).

As a side note, I also worry that their freedom of movement argument is self-defeating. Domesticated animals are given freedom of movement because they are domesticated (and thus citizens). Yet to be domesticated and a citizen requires curtailing the animal's freedom of movement in the first place. They must (forcibly) reside in a domestic environment in order to have freedom of movement.

consistent with respect of his sovereignty. For example, he cannot be forcibly relocated or killed for sport – both of these activities violate his autonomy. However, unlike a domesticated cat (who is a citizen), our jaguar does not have rights to social goods, like medical care, freedom of movement, or political representation.<sup>261</sup> This is because, as a wild animal sovereign, the jaguar stands in a more distant relation to us (humans) than the cat does (as a domesticated animal citizen). As explained above, Donaldson and Kymlicka accept that what human rights nonhuman animals have vary depending on our relationship to them. Consequently, if an animal does not want/need a relationship with humans, then they have fewer human rights.

The final group that Donaldson and Kymlicka consider are liminal animal denizens (210-251). Liminal animal denizens are neither domesticated animal citizens nor wild animal sovereigns. They live amongst humans (and so are not truly wild) but are not kept as companions, and so do not have the strong animal-human relationship enjoyed by domesticated animal citizens. An example of a liminal animal denizen is an urban fox (210).

Donaldson and Kymlicka argue that liminal animal denizens are outsiders who share our communal space (214). They argue that denizens have fewer rights than domesticated

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<sup>261</sup> Donaldson and Kymlicka (2011) are, however, careful to emphasise that whilst the rights of wild animal sovereigns are limited, they should not be restricted solely to ‘the right to be left alone’. They argue as follows: “Respect for sovereignty does not require isolation or autarchy, but rather is consistent with various forms of interaction and assistance, and even with forms of intervention” (178). This could be taken to imply that wild animals have certain positive rights (e.g. to assistance). However, Donaldson and Kymlicka argue that any human assistance or intervention given to wild animals must always be consistent with respect for their sovereignty and autonomy. They concede that it is very difficult to imagine what this sovereignty-respecting assistance would look like in the wild animal case (180 – 207). They argue that, on a practical level, we might enforce wild animal sovereignty via “...some form of proxy representation by human beings who are committed to the principle of animal sovereignty. At present, we have little idea what such a system of proxy representation would look like” (209). I agree with Donaldson and Kymlicka that this is an interesting suggestion, but their argument for the above is quick and underdeveloped.

animal citizens (who are inside the community), but more rights than wild animal sovereigns (who do not share our communal space) (ibid).<sup>262</sup> They claim that three types of rights apply to liminal animal denizens: (i) rights to secure residency, (ii) to fair terms of reciprocity, and (iii) against stigmatisation.<sup>263</sup>

As summarised above, *Zoopolis* aims to explain how different nonhuman animals can have different human rights. I agree with this focus, and will present a similar argument in the ‘my view’ section below. However, as I will now argue, we should not accept Donaldson and Kymlicka’s arguments as they stand. This is because, alongside the many specific issues highlighted in footnotes 258 and 260-262, there are two general problems with *Zoopolis*.

First, at least some nonhuman animals have too many rights on Donaldson and Kymlicka’s view. To see this, we can focus on domesticated animal citizens, who have the most extensive rights according to Donaldson and Kymlicka. I concede that

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<sup>262</sup> Here, Donaldson and Kymlicka (2011) acknowledge that “The resulting status is a complex one, and not without its moral ambiguities. It does not offer the seeming clarity of either citizenship for domesticated animals or sovereignty for animals in the wild” (250). I would agree with this assessment.

<sup>263</sup> (i) means that our urban fox should not be treated as a pest or relocated elsewhere (Donaldson and Kymlicka 2011: 242). However, Donaldson and Kymlicka also argue that “While efforts can legitimately be undertaken to discourage or prevent the initial entry and reproduction of opportunist or exotic liminal animals, over time they come to acquire the right to stay” (ibid). And again, they talk about discouraging liminal animals from urban settlements as follows: “We have argued that it is perfectly reasonable for humans to make cities a little less attractive to adaptive species (e.g., by reducing resources, and by using barriers, competitors, and predators), while making the wilds more attractive (by not colonizing them)” (250). I am not convinced that these measures of active discouragement and threat (see the use of predators), is consistent with a right to secure residency.

(ii) means that the rights and responsibilities of liminal animal denizens should be proportional to the extent to which they engage in human society (Donaldson and Kymlicka 2011: 240). The upshot of this is that our urban fox will have fewer rights than domesticated animal citizens (e.g. he will not have a right to political representation). He will also have comparatively weaker rights (e.g. the urban fox should not be hunted by humans, but should not be protected from natural predators. Conversely, we *would* typically protect a *domestic* animal from predators – for example, by putting barbed wire on a chicken coup).

(iii) follows from the fact that liminal denizens are often labelled as ‘pests’, and are consequently particularly vulnerable to discrimination, oppression, and mistreatment (Donaldson and Kymlicka 2011: 248). Donaldson and Kymlicka argue that we should engage in state-policies (such as education) to protect against this (248-249).

Donaldson and Kymlicka *may* be correct about what human rights domesticated animal citizens have. It is not outlandish to suppose that domesticated animal citizens have rights to basic socialisation, mobility, protection, medical care, and political representation. However, I argue that Donaldson and Kymlicka are wrong about the *scope* of these rights. For example, take the right to political representation. Donaldson and Kymlicka (2011) argue that this entails taking the interests of domesticated animal citizens into consideration in “...municipal land planning decisions, or on governance bodies of various professional services (police, emergency services, medicine, law, urban planning, social services, etc.)” (154). This argument *may* make sense when applied to cats, dogs, horses, etc. However, for at least some domesticated animals (e.g. goldfish and hamsters), Donaldson and Kymlicka’s view is overdemanding. For instance, it is unclear how to take the interests of a domestic goldfish into consideration when developing urban planning regulations.

There are two ways in which Donaldson and Kymlicka could respond to the above problem. First, they could argue that pet hamsters and goldfish are not domesticated animal citizens, and so do not have the extensive rights outlined above.<sup>264</sup> The difficulty with this option is that pet hamsters and goldfish are clearly neither wild animal sovereigns nor liminal animal denizens. It is consequently unclear what grouping they could belong to, if not domesticated animal citizens.

The second option available to Donaldson and Kymlicka would be to argue that there are subcategories within each grouping. So, for example, horses and cattle might be high-

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<sup>264</sup> This option is implied in the quote of footnote 260. There, Donaldson and Kymlicka (2011) argue that “...the commitments of a citizenship approach may not be achievable” (130) in the case of goldfish.

level domesticated animal citizens who *do* have all of the rights that Donaldson and Kymlicka claim domesticated animals have. And perhaps hamsters and goldfish are very low-level domesticated animal citizens and only have *some* of the above rights (so perhaps medical care and protection, but not political representation). Something along these lines would help to prevent Donaldson and Kymlicka's view from being overdemanding (and potentially unintuitive). As it currently stands, however, Donaldson and Kymlicka's view causes some nonhuman animals (like goldfish) to have too many extensive rights.

The above discussion highlights a second general problem with *Zoopolis*. In the above example, our goldfish has extensive human rights simply in virtue of belonging to a group (domesticated animal citizens) whose members *typically* have these rights (according to Donaldson and Kymlicka). The same is true of all other nonhuman animals. Each nonhuman animal has rights in virtue of belonging to a certain group (wild animal sovereigns, etc.), where group membership is determined by how closely the nonhuman animal stands in relation to human beings. What is missing from this discussion is any consideration of the individual capacities and properties of each nonhuman animal. For example, let us take a nonhuman animal from each of Donaldson and Kymlicka's categories: a cat (a domesticated animal citizen), a panther (a wild animal sovereign), and an urban fox (a liminal animal denizen). At the very least, we can accept that the cat, the panther, and the urban fox are all sentient and have the capacity to feel pain. As such, it seems plausible that the cat, the panther, and the urban fox should all have a positive right to medical assistance if they are in pain and this assistance can be provided. Yet, on Donaldson and Kymlicka's view, it is only the cat (as a domesticated animal citizen) who has a positive right to medical assistance. By ignoring capacities, and focusing only on

group membership, Donaldson and Kymlicka ignore the fact that nonhuman animals from different groupings ought to have some of the same human rights (e.g. to medical care) in virtue of having the same capacities and vulnerabilities.

To summarise, the above has argued that neither Cavalieri nor Donaldson and Kymlicka present an account that satisfactorily explains the human rights of nonhuman animals. On their accounts, nonhuman animals either have too many or too few human rights. Below, I will argue that my account provides a better framework for understanding the human rights of nonhuman animals.<sup>265</sup>

### My view

On my account, a subject is a person if and only if, and to the degree that, they have some property (or properties) that is (are) conducive to them being an agent, satisfying their morally relevant basic needs, and/or having a minimally good life (5.3).<sup>266</sup> To begin with, it is at least conceivable that some nonhuman animals are agents, have morally relevant basic needs, and/or have a minimally good life. To see this, let us return to the earlier discussions of agency, basic needs, and good life accounts (5.3).

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<sup>265</sup> I do not mean to imply that the only alternatives are either my account or the accounts of Cavalieri or Donaldson and Kymlicka. There are of course other accounts. For a brief discussion of these other accounts, and for a justification of my focus in this section, see footnote 249.

<sup>266</sup> As explained in 5.2 and 5.3, I accept that many different types of property can be personhood properties. I argued that some personhood properties will be psychological, emotional, social, physical, and phenomenal. Thus, there are many ways in which a nonhuman animal could be a person, on my account. It is worth noting that my account is more extensive than many other accounts of nonhuman animal personhood, such as Rowlands' 2012 *Can Animals Be Persons?* Rowlands argues that there are four conditions for personhood: consciousness, cognition, self-awareness, and other-awareness (1-26). He argues that many animals can meet all four of these conditions, and so be persons (chapters 3-11). Whilst we agree that nonhuman animals can be persons, Rowlands and I disagree about what is required to be a person.

On agency accounts, a subject is an agent if they can make autonomous choices and (ideally) go on to act on the basis of these choices (5.3). Nonhuman animals can be agents in this way if they can make reasoned decisions about specific end goals. For example, a wild gorilla is an agent when it makes rational choices about how to get food (e.g. by using rocks, sticks etc. as tools).<sup>267</sup>

In 5.3 I argued that a need is both a basic need and morally relevant if a failure to meet this need will harm a subject. On this view, at least food, shelter, and basic medical care are morally relevant basic needs. I take it as given that all nonhuman animals have at least some morally relevant basic needs. As living entities, if nonhuman animals are denied food, shelter, or basic medical care, then they will be harmed (by suffering malnourishment, exposure, preventable illness, etc.).

Finally, in 5.3 I outlined a minimal good life account. On this view, a good life is one in which subjects have the ability to pursue a decent existence. In footnote 184 and section 6.2.1, I accept that some of the goods required for a decent existence might extend across species (e.g. strong interpersonal relationships), whilst other goods might be species-specific. I take it that at least some nonhuman animals can pursue some of the goods of a minimally good life (however these goods are understood). For example, highly social nonhuman animals (e.g. primates and great apes, elephants, orcas, etc.) can have strong interpersonal relationships with one another, and with human trainers/carers.

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<sup>267</sup> A 2005 New Scientist article argued that such behaviour in wild gorillas is an example of “...abstract reasoning” to achieve goals (Pickrell 2005). The idea that nonhuman animals can be rational, in the sense of being able to reason, is also defended by Rowlands (2012: 85-107).

From this, we can argue that different nonhuman animals can have agency, basic needs, and/or the good life in different ways. This is true both between species and within the same species. For example, let us consider morally relevant basic needs. A horse, a dog, and a dolphin all have different morally relevant basic needs. Unlike the horse and the dog, the dolphin needs to live in water. Only the horse might need to be shod (for health reasons). And so on. Similarly, morally relevant basic needs will vary amongst the same species. For example, not all dogs have the same basic needs. Some dog breeds, like the Basset Hound, need daily cleaning to avoid skin infections. Others, such as the German Pointer, need extensive daily exercise (several hours a day). These needs must be met in order to avoid serious medical conditions that negatively affect the animals' chances of survival.

We can also argue that different nonhuman animals have different properties that are *conducive* to their agency, the satisfaction of their basic needs, or their good life. For example, let us contrast a wild lion with a domestic rabbit. Both have a morally relevant basic need for food, but each has different personhood properties that help them to satisfy this need. The lion has certain psychological properties, such as rationality, autonomy, intentionality, etc. which, alongside their natural instincts, make them a successful hunter. They can satisfy their own need for food. The rabbit, however, has certain social properties – they are in a caring relationship. These social properties will help the rabbit to satisfy its need for food as others (the rabbit's owners/carers) will provide food for the rabbit.<sup>268</sup>

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<sup>268</sup> This is not to ignore the fact that the rabbit could find its own food in the wild.



Because nonhuman animals can have different personhood properties, and can live in different contexts, different threats will apply to different nonhuman animals. For example, the lion, as a wild animal, is susceptible to unique threats, such as poaching, loss of habitat through deforestation, etc. In contrast, the rabbit, as a domesticated pet, is susceptible to threats created by human neglect, such as isolation, starvation, etc.<sup>269</sup> As discussed below, different nonhuman animals will have different human rights to protect against these different threats.<sup>270</sup>

When we think about what human rights a nonhuman animal has, we first think of our obligations to protect animals' agency, basic needs, and good life. As I have argued elsewhere (1.1 and 5.6), these obligations are both positive (to help) and negative (to leave alone).<sup>271</sup> Consider our lion. Recall that the lion has certain psychological properties that help it to satisfy its basic needs. The lion lives in the wild and is threatened by poaching, hunting, etc. In order to protect the lion, the state/official bodies have negative obligations to not poach or hunt the lion, or perform other actions that are detrimental to it satisfying its basic needs (e.g. deforestation, culling, etc.). The state/official bodies also have positive obligations to help the lion (e.g. by providing medical care if it has been injured

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<sup>269</sup> This has some similarities to Donaldson and Kymlicka's view (above).

<sup>270</sup> I previously argued that some nonhuman animals have too many human rights, on Donaldson and Kymlicka's account. I suggested that this problem occurs because all nonhuman animals from the same group have the same rights, on their account. This entails that all domestic animals (such as goldfish and hamsters, and horses and dogs) have the same human rights as one another. I explained that this can lead to overdemanding implications, such as hamsters having to be considered in urban planning regulations.

On my account, whilst the domestic hamster does have human rights, it does not have the sort of extensive rights that Donaldson and Kymlicka claim it has. On my account, none of the threats that apply to the hamster (illness, neglect, isolation, etc.) are resolved by considering the hamster's interests in urban planning regulations. Because my account allows us to consider the nuances of individual nonhuman animal's situations, it avoids the overdemanding implications of Donaldson and Kymlicka's account. My account aims to ensure that all rights-holders (including nonhuman animals) have neither too many nor too few human rights. This is the aforementioned 'Goldilocks Approach' (5.5).

<sup>271</sup> On my account, nonhuman animals have both positive and negative rights. My account thus avoids the first problem that I levelled against Cavalieri's account (above) – that nonhuman animals lacked certain important positive rights.

by poachers, etc.). On my account, the state/official bodies have these obligations because the lion is a person and rights-holder.<sup>272</sup>

Once we have a view of what obligations we have towards nonhuman animals, we can determine what human rights they have. In the above example, the lion has certain security rights (to life, against torture, etc.), liberty rights (e.g. freedom of movement), and basic social and cultural rights (e.g. to medical care). Other animals will have different rights depending on what obligations are owed to them in virtue of the personhood properties that they have, the context in which they live, and the threats that apply to them.<sup>273</sup>

To summarise, I have argued that my account provides a clarity that is missing from current attempts to extend human rights to nonhuman animals. My account can explain when a nonhuman animal is a person (and rights-holder) and can accept that there are many different ways in which nonhuman animals can be persons. My account can also accept the intuitive claim that different nonhuman animals have different human rights, and can address how context and vulnerability affect what human rights nonhuman animals have. Further, and as explained in footnotes 270, 271, and 273, my account can avoid the problems levelled at existing views (Cavalieri, and Donaldson and Kymlicka).

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<sup>272</sup> Note that my claim is that individual nonhuman animals have certain rights, depending on the personhood properties that they have and the threats that apply to them. This is different to the claim that species, in general, have rights. I have avoided going down this species route due to the difficulties with defining a species (see 2.1 ‘Problem 1: Kind essentialism and species membership’), and because I want to allow for different members of the same species to have different rights to one another.

<sup>273</sup> I previously argued that a problem with Donaldson and Kymlicka’s account is that it assigns rights on the basis of group membership (domestic animal citizen, wild animal sovereign, and liminal animal denizen), and underplays the importance of individual animal capacities (e.g. sentience, the capacity for pain, etc.). I argued that individual capacities have a bearing on what rights nonhuman animals have (e.g. all animals who can feel pain and suffering intuitively ought to have rights to medical assistance). My account avoids this problem as I consider both contextual factors (e.g. whether an animal is domesticated or wild) *and* individual capacities (sentience, etc.).

In 6.2.6 I will also explain how we can resolve rights conflicts between nonhuman animals and other rights-holders on my account. In the next subsection (6.1.3) I will consider how my account is similarly useful when discussing the human rights of another nonhuman case – robots.

### 6.1.3 Robots

This subsection considers whether robots have human rights.<sup>274</sup> I begin by outlining current discussions of robot rights. These discussions typically argue that robots could have moral rights *if* the robots are sufficiently human-like or, at the very least, nonhuman animal-like. I will argue that this similarity requirement is the wrong way to look at robot rights. Instead, I propose a simpler question: is the robot a person (to some degree)? I explain how my account provides a useful framework for assessing whether robots are persons with human rights.

#### Current views

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<sup>274</sup> Two clarifications may be helpful here. First, I am taking ‘robots’ to be any advanced technology that has some intelligence (it can make decisions and perform actions) and potentially some autonomy (via machine learning or deep learning which allow computerised systems to ‘learn’ and perform non-programmed actions). There are a number of entities that could be ‘robots’ on this definition, e.g. automata, humanoid robots, artificial intelligence (A.I.), etc.

Second, I am only considering whether robots could have human rights. I will not be considering the more prevalent, high-profile discussion of whether robots could violate *our* human rights (e.g. by taking our jobs, killing us, etc.). This is a frequent topic of discussion in popular media, and has also generated a number of high-profile policy-based suggestions on how to regulate robots/A.I. in order to protect human rights. See, for example, the guidelines created by Atomium – European Institute for Science, Media and Democracy (EISMD) (2018), and the High-Level Expert Group on Artificial Intelligence (AI HLEG) (2019). Whilst these discussions are interesting, they will not be considered further here. I will also not discuss:

>Views which claim that, in the case of robots, we need to reframe the debate in non-rights terms (see Coeckelbergh (2010), and Gunkel (2018)).

> The case of Sophia, the robot that was granted Saudi Arabian citizenship (and rights) in 2017. I will not discuss Sophia because my interest is not whether a single robot can be granted citizenship and legal rights, but whether robots in general have human rights. However, for a good discussion of Sophia, and the reaction that followed her citizenship, see Danaher (2019: ‘The Sophia Controversy and the Argument in Brief’).

John-Stewart Gordon (2020: 211-212), David Levy (2009: 211-214), Lantz Fleming Miller (2015: 370), and John Tasioulas (2019: 69) all accept that there are certain high-level (human) psychological capacities that are necessary for having a moral status and for having human rights.<sup>275</sup> For Gordon these capacities are moral-reasoning and decision-making; for Levy it is phenomenal consciousness; for Miller it is sentience, consciousness, and intelligence, and for Tasioulas it is rational autonomy. They argue that *if* a robot has these capacities to the same level as a standard adult human, then they too ought to have a moral status and rights. However, they all conclude that robots *do not* currently have these capacities, and so do not currently have rights.<sup>276</sup>

A key problem with the above is that it unjustly discriminates against robots, in two senses.<sup>277</sup> First, there is a very real risk that, whatever high-level psychological capacities robots could have, there will be ways to dismiss these capacities as insufficiently human-like. For example, suppose that we have a robot (Robbie) who has phenomenal consciousness. One could argue that Robbie's robot-consciousness is entirely different to

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<sup>275</sup> This has similarities to the exclusionary binary views of chapter 3.

<sup>276</sup> Their respective views can be summarised in the following quotes, my emphasis throughout:

*"If machines attain a capability of moral reasoning and decision-making that is comparable to the moral agency of human beings, then they should be entitled to the status of full moral (and legal) agents, equipped with full moral standing and related rights"* (Gordon 2020: 211).

*"I argue that if a machine exhibits behaviour of a type normally regarded as a product of human consciousness (whatever consciousness might be), then we should accept that that machine has consciousness"* (Levy 2009: 211). *"My own argument in support of giving certain rights to robots is not that robots with consciousness should have rights because [sic] of their consciousness per se [sic], but that, because they have consciousness, such robots will be regarded by us in similar ways to those in which we regard other humans...for example by regarding those robots as having rights"* (Levy 2009: 214).

*"If automata were constructed with the capacity for human-level sentience, consciousness, and intelligence, everyone concerned with human rights should consider whether such entities warrant the same rights as those of biological humans"* (Miller 2015: 370).

*"If RAIs [robots and artificial intelligence] came close to replicating our general capacity for rational autonomy, there would be a case for according them a comparable moral status to human beings, with corresponding rights as well as responsibilities"* (Tasioulas 2019: 69).

In each case, the researcher in question presents robot capabilities as theoretical (*if* robots have x) rather than actual (robots have x). I thus think it is fair to interpret the above researchers as accepting that robots currently do not have properties that are sufficiently human-like.

<sup>277</sup> Similar objections are discussed by Danaher (2019).

that of a human-being (call her Hilda). Robbie's consciousness may function in different ways to Hilda's; it may be caused in different ways (by computer chips rather than neural matter); and maintained in different ways (via electricity). It could also have a different scope (Robbie could be more consciously aware than Hilda, or less). Further, Robbie and Hilda may experience their consciousness differently. In Nagel's (1974) sense, what it is like to be a robot may be entirely different to what it is like to be a human being. Some might also want to argue that, whilst Hilda's consciousness is real, Robbie's is manufactured and deceptive; he has been designed to appear conscious. Because of these differences, one could argue that Robbie's consciousness is not enough like Hilda's to grant him a moral status and rights.<sup>278</sup>

Note that the above discriminates against Robbie because it ensures that he cannot pass the criteria for having a moral status and rights. Robbie and Hilda both have the same morally relevant capacity: consciousness. However, Robbie has robot-like consciousness (which is not human-like), whilst Hilda, as a human, inherently has human-like consciousness. On the above view, this entails that Hilda will always have a moral status and rights, whilst Robbie will not (for at least as long as his robot-consciousness is insufficiently human-like). In sum, the problem is that it is not enough for Robbie to have consciousness (a threshold for having moral status and rights, on the above views). He must also meet the additional threshold of being sufficiently human-like. This discriminates against robots (and other nonhuman entities) by implying that it is only human capacities and properties that are morally relevant.

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<sup>278</sup> The issue of if and how we can determine whether a robot is conscious has been well-discussed in Andreotta 2020.

Let us, however, imagine that Robbie *could* meet both thresholds by having psychological capacities that are sufficiently human-like. Let us also imagine that we have another robot (Rick) who is slightly less advanced than Robbie. Whilst Robbie has properties that are *just* sufficiently human-like, Rick has properties that are *just* slightly too robot-like. On the above view, Robbie has a moral status and human rights, whilst Rick does not. It seems unjust to suppose that such a small difference in Robbie's and Rick's respective humanlike-ness, should have such a large impact on their moral status and rights. Even if the above view could work, it would thus promote unjust discrimination *between* robots.

The main problems with the above views are thus (i) they use a high threshold for personhood (properties at the level of a standard adult human) that is already difficult to meet, and (ii) they are unhelpfully vague about what it means for a property to be 'sufficiently human-like'. In response to these problems, John Danaher (2019) has argued that robots could have moral status and rights if they are sufficiently similar to marginal humans (defined in terms of the cognitively impaired), and/or to nonhuman animals ('Defending Premise (2): What's the performative threshold?').<sup>279</sup> He argues that a robot will be sufficiently similar if it is 'roughly performatively equivalent' to a marginal human or a nonhuman animal. "This means that if a robot consistently behaves like another entity to whom we afford moral status, then it should be granted the same moral status" ('The Sophia Controversy and the Argument in Brief').<sup>280</sup> On this view, we take

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<sup>279</sup> In other words, and using the terminology of this thesis, Danaher seems to accept that robots' moral status and rights ought to be evaluated in the same way that we evaluate the moral status and rights of other marginal cases (like those with psychological impairments and nonhuman animals). This avoids the first problem (above) of setting the bar for personhood/moral status too high (i.e. the level of a standard adult human).

<sup>280</sup> This notion of 'performative equivalency' helps to clarify what is required for a robot have properties that are sufficiently like those of other moral subjects. This clarification helps Danaher to avoid the (above) second problem that was levelled at other accounts (i.e. the problem of being unhelpfully vague about what it means for a property to be 'sufficiently human-like').

some criteria for moral status (e.g. emotions, feeling pain, etc.) and argue that if a robot can behave in the same way as entities that meet this criterion, then they should also be granted moral status. On Danaher's view, the upshot of this is that if a robot has the same moral status as a marginal human or a nonhuman animal, then that robot also has the same rights as the marginal human or the nonhuman animal (ibid).

There are a few general problems with Danaher's view.<sup>281</sup> For the purposes of this section, I will focus only on Danaher's claim that if a robot is sufficiently similar to a human with psychological impairments or a nonhuman animal, then the robot has the same human rights as these other cases. This claim can be questioned using the arguments of 6.1.1 (subjects with dementia) and 6.1.2 (nonhuman animals). I argued that different subjects with dementia can be persons in different ways, and so can different nonhuman animals. I also argued that the human rights that subjects with dementia and nonhuman animals have differ depending on what personhood properties they have and what threats apply to them. The upshot of this is that there is no one set of human rights held by all subjects with dementia or all nonhuman animals. Consequently, I argue that we should not accept

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<sup>281</sup> Three notable problems are:

- 1) As Danaher (2019) acknowledges, there are moral worries about suggesting an analogy between human beings with psychological impairments and nonhuman animals and robots. The above could be taken to imply that those with psychological impairments are less than human (i.e. are equivalent to nonhuman animals or robots) ('Defending Premise (2): What's the performative threshold?').
- 2) Danaher (2019) admits that there is controversy about what moral status and what rights humans with psychological impairments and nonhuman animals have ('Defending Premise (2): What's the performative threshold?'). However, he does not give a concrete answer as to what moral status and rights *he* takes them to have. Consequently, it is unclear what equivalent moral status and rights robots would have as a result of being sufficiently similar to humans with psychological impairments or nonhuman animals.
- 3) Danaher's (2019) concept of 'rough performative equivalency' needs more development. It is currently unclear whether all capacities (autonomy, intentionality, etc.) can be understood in terms of performative equivalence. It is also unclear when a robot meets the performative equivalency condition. Danaher states that performative equivalency is shown when a robot consistently shows similar behaviour to a human with psychological impairments or nonhuman animals ('The Sophia Controversy and the Argument in Brief'). More detail is needed on when a behaviour has been displayed with sufficient consistency (is it 10 times? 100 times? etc.).

Danaher's claim that robots could have *the same human rights* as the cognitively impaired or nonhuman animals. There is too much variance amongst the rights of the cognitively impaired and nonhuman animals for Danaher's similarity claim to be useful.

### My view

Above I have questioned the current view that robots must be sufficiently similar to some living entity (human beings or nonhuman animals) in order to have human rights. I have argued that this view is discriminatory against robots. It is also unhelpful and impractical as a starting point for determining what rights (if any) robots have. I will end this section by explaining how my account can provide a better framework for assessing the human rights of robots. I will briefly discuss how three elements of my view – the personhood properties, threats, and human rights – can be applied to robots.

The first benefit of my account is that my test for personhood (5.3) allows us to see if a robot is a person (and rights-holder). To recap, my test states that  $x$  is a personhood property if and only if, and to the degree that, it is conducive to the subject being an agent, or satisfying their morally relevant basic needs, and/or having a minimally good life. It seems feasible that robots have (or at least could have) properties that can pass this test at least once. For example, suppose that we have a robot that, via machine learning, can make autonomous rational decisions. This robot-rationality is conducive to the robot being an agent because it allows the robot to make choices and action these choices.<sup>282</sup>

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<sup>282</sup> We could use other properties. For example, robot consciousness has been examined by Chella, Cangelosi, Metta and Bringsjord (2019), and O'Regan (2012). An edited collection by Fellous and Arbib (2005) has outlined the possibility of robot emotions, and Castro-Gonzales, Malfaz, and Salichs (2013) claim to have developed an autonomous robot who can display fear. Further, Van Rysewyk (2013) has outlined how we might understand robot pain. I have chosen to focus on rationality because I take it to be one of the least contested properties that robots have (or could have).



Note that my account does not use a similarity requirement. Unlike the current views (above), I do not make the conditional claim that a robot is a person if they hold a property *that is sufficiently similar to a property held by some living entity*. As specified in 5.2, I accept that there can be currently unspecified (and/or undiscovered) personhood properties. Consequently, if robots have some special robot-specific property that is conducive to agency, the satisfaction of basic needs, or the good life, then this will still be a personhood property on my account.<sup>283</sup>

A second benefit of my account is that it allows us to consider the threats that apply to robots. There are three main things that we can say here. First, there will be some threats that apply to biological lifeforms that do not apply to robots. For example, human and nonhuman animals are vulnerable to chemical warfare, illness, and death in ways that robotic lifeforms are not. There will consequently be some threats that it simply does not make sense to apply to robots.

Second, there will be some threats that apply to both robotic and biological lifeforms. For instance, reconsider our rational robot. There are a number of ways in which the state can threaten our robot's rationality or agency. The state might decide that autonomous, rational robots are themselves a threat and consequently order their destruction. Or they may limit the amount of autonomy that robots have, e.g. by classifying them as property that is owned and controlled by others. Or they may enforce regulations that prevent engineers from manufacturing fully autonomous robots (e.g. by specifying that robots can

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<sup>283</sup> One might want to argue that this idea of robot-specific properties *could* be plausible in terms of robot-specific agency, but is more controversial when applied to robot-specific basic needs and good life. In 6.2.6 I will outline a method for resolving rights conflicts which might be able to help with this. There I will suggest that we could create a database of interdisciplinary research to help identify the properties and capacities that robots (and other marginal cases) have, and how these connect to agency, basic needs, and the good life.

only have certain body types that restrict free movement). Here, there are threats of destruction, enslavement, and bodily regulations. These threats also apply to biological lifeforms, for example, via genocide, human trafficking, etc. Whilst the threats may be realised differently in the cases of robotic and biological lifeforms, they are nevertheless serious threats in both cases and should be treated accordingly.

Finally, there are threats that (typically) only apply to robots. For example, the robot's mechanical nature makes it vulnerable to certain technological threats that do not apply to biological lifeforms. The robot, but not the biological lifeform, can be hacked, can be negatively affected by a computer virus, and can shut down due to a lack of charge or a power depletion. In these cases, the robot would not be able to function, and so would experience threats to their agency, to the satisfaction of their basic needs, and to their good life.<sup>284</sup> If our robot is a person (in the sense of having relevant personhood properties), then we must address these robot-specific threats (alongside the more general robot threats discussed above).

A third benefit of my account is that it allows us to sensibly discuss what human rights robots have. My account (5.5) argues that what rights robots have will depend on what personhood properties they have, and what threats apply to them. For instance, in order to protect against the above threats, our rational robot has rights to life (non-destruction),

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<sup>284</sup> One might object that humans could also experience these threats. This is because the electrical devices that humans use to have agency, to satisfy their basic needs, and to have a good life could be susceptible to hacking, viruses, etc. This is simply not the same as the robot case though. Humans can still function without these malfunctioning devices. If the robot malfunctions- due to hacking etc. – then it cannot function as a robot.

The only case in which there would be a relevant similarity would be if a human had an implanted electrical device that malfunctioned in the ways described above. In this case, the human could reasonably be termed a cyborg (a combination of human and mechanical/technological parts). As discussed in footnote 88, cyborgs are not clearly in either my 'atypical humans' or 'posthumans' groups, and so should be considered separately to both standard adult humans and robots.

to liberty (to not be enslaved), and to certain basic freedoms (to movement, etc.). Other robots will have different human rights depending on what personhood properties they have and what threats apply to them. Here, context will be important and we can suppose that robots with different roles (military robots, sex robots, domestic robots, etc.) will have different human rights (because their capacities and the threats that apply to them will be different). I will discuss a method for improving our understanding of the personhood properties, threats, and human rights that apply to robots (and other marginal cases) in 6.2.6.

### Summary

The last three subsections have argued that my account provides a useful framework for understanding the human rights of subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3). I have explained how different subjects with dementia, nonhuman animals, and robots can be persons in different ways, and I have acknowledged the effects that these differences will have on their human rights. My account has more nuance than the standard views presented in this chapter (6.1.1-6.1.3), and so can help us move forward with the debate on marginal cases' rights. In the next section (6.2) I will defend my view against a number of potential problems and objections. I will conclude that, as my account can avoid important problems, and has the useful applications described above (6.1), my account should be favoured over existing personhood views (Chapters 2-5.1).

## **6.2 Objections and replies**

The previous section explained how my account has useful applications to the marginal cases. I argued that, if we accept my account, subjects with dementia (6.1.1), nonhuman

animals (6.1.2), and robots (6.1.3) are all persons with human rights. As these three cases are currently contested in the existing literature (see above), my account suggests a way to move forwards with these debates, and it also makes sensible claims about how we ought to treat the marginal cases. I have thus explained how my account has *positive* implications. However, my opponent may worry that my account also has *negative* implications. This is because my account is notably revisionary, both in terms of its understanding of personhood and human rights (5.2-5.7), and in terms of how it claims we ought to treat the marginal cases (6.1). When an account is so revisionary, my opponent may have serious concerns that it will be unable to properly respond to problems that already vex less-revisionary accounts of human rights.<sup>285</sup>

This section will focus on six problems. Namely, my account could be accused of leading to arbitrary discrimination (6.2.1), and allowing for the permissible mistreatment of the marginal cases (6.2.2). It could also be viewed as both overinclusive (6.2.3) and underinclusive (6.2.4). Finally, there may be concerns that my account cannot respond to the problem cases of embryos and fetuses (6.2.5), or deal with rights conflicts (6.2.6).<sup>286</sup>

In what follows, I will suppose that there are two main ways to address a problem: we can dissolve it or we can solve it. A problem (x) will be *dissolved* if there is some scenario in which x is no longer a problem. For example, if I break my leg, then I will have a

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<sup>285</sup> I am supposing that a human rights account is ‘less revisionary’ if it is consistent with the mainstream literature on human rights. For example, whilst the exclusionary (chapter 3) and inclusive (chapter 4) binary accounts take different views on the marginal cases, both still accept that there is a standard threshold for personhood (and once you pass it you are a person), and that all rights-holders for human rights have equal, qualitatively identical rights. Because my account allows for subjects to be persons in different ways, and to have different rights to one another, my account is revisionary in ways that the existing exclusionary and inclusive accounts are not.

<sup>286</sup> Throughout chapters 3 and 4 I argued that (at least some of) these six problems affect all exclusive and inclusive binary accounts.

problem with walking. This problem will be dissolved when my leg is healed. I will argue that the problems of arbitrary discrimination (6.2.1) and permissible mistreatment (6.2.2) can be dissolved in this way. Conversely, a problem (y) will be *solved* if the problem still exists *but* there is a sensible way to deal with the problem. For example, whilst my leg is still broken, I can solve my problem with walking by having a cast or other walking aid. I will argue that the final four problems (6.2.3-6.2.6) can be *solved* in this way.

### 6.2.1 Arbitrary discrimination

This subsection will address concerns that my account leads to arbitrary discrimination.<sup>287</sup>

I begin by defining ‘arbitrary discrimination’ and explaining why it is problematic. I then consider three cases of potential arbitrary discrimination: (i) between persons and non-persons, (ii) between humans and non-humans, and (iii) between different persons. I will argue that my account does not lead to arbitrary discrimination in any of these cases. I end by considering why my opponent may still worry that my account makes arbitrary discrimination *more likely to happen*. I will argue that this worry is unfounded.

Familiar examples of arbitrary discrimination include (i) sexism, (ii) racism, (iii) ageism, and (iv) speciesism.<sup>288</sup> In all these cases, a group (e.g. women) experience some collective

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<sup>287</sup> Arbitrary discrimination can be direct or indirect. Direct discrimination occurs when a theory or policy explicitly and intentionally discriminates against a certain group on the basis of their group membership. For example, my account would show direct discrimination if I said that men do not have human rights, *because they are men*. Neither my account nor any other human rights account (to my knowledge) shows direct discrimination in this way. Indirect discrimination occurs when an otherwise neutral theory or policy has an unintended consequence of arbitrarily discriminating against certain groups. In 3.4.1 I explained how the ‘making exceptions response’ favoured by Gewirth (1978b) and Griffin (2008) shows this indirect form of arbitrary discrimination. It is indirect arbitrary discrimination that I will be discussing in this section. For a good summary of the differences between direct and indirect discrimination, see Mendoza (2018).

<sup>288</sup> The classic views on (i) sexism come from feminist philosophy, and discuss the ways in which women are victims of sexism. For canonical works on this, see Jaggar (1974, 1998, 2019a), and Young (1990). There has also been some discussion of how academic philosophy, as a discipline, is inherently sexist, and how this prevents diverse viewpoints and constrains academic freedom. For good discussions of this, see Jaggar (2007, 2019b), and Kidd (2017). Finally, Benatar (2012) has argued that sexism against men also exists and should be taken seriously.

harm or disadvantage *as a result of their group membership*. For example, in a racist society, a black man may be unable to rent property simply because he is black. Such discrimination is *arbitrary* because it is caused by unjustifiable bias and prejudice. There are no morally justifiable reasons for discriminating against someone because they are black, or a woman, etc.

Arbitrary discrimination is wrong for two main reasons. First, as Erin Beeghly (2017) argues, arbitrary discrimination is wrong because it is disrespectful. This is because, when we arbitrarily discriminate against someone, we fail to treat them with moral respect. We fail to show moral respect when we treat a group as objects or burdens, rather than as persons or our moral equals. For example, in sexist societies, women are systematically reduced to sexualised objects or bodies. A second reason why arbitrary discrimination is wrong has been suggested by Oscar Horta (2010b). Horta argues that when we arbitrarily discriminate against some group, we deprive them of some good or benefit that they ought to have. For instance, in our previous racist society example, the black man *ought* to be able to rent property as he has justifiable claim rights to do so. However, he is prevented from doing so on racist grounds. Using the above, we can argue that my account will be problematic if it is disrespectful and denies some group some benefit that they ought to have. In our terms, this will happen if I fail to treat some subject/group as a person and/or if I deny them rights that they, in fact, ought to have. There are three main ways in which

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Most of the academic literature on (ii) racism focuses on explaining how racism stems from prejudice and other epistemically invalid beliefs. For examples, see Basu (2019), Lengbeyer (2004), Levy (2017), and Silva (2019).

Much of the academic literature on (iii) ageism comes from bioethics and concerns whether or not it is morally permissible to take a subject's age into consideration when assessing who to give scarce medical resources to. For an argument in favour of ageism, see Shaw (1994). For arguments against ageist policy decisions, see Bognar (2015) and Harris (1994).

(iv) Speciesism refers to arbitrary discrimination in favour of a certain species (typically, but not exclusively, the human species). For good discussions of speciesism, see Horta (2010), Milligan (2011), and Singer (1975).

such arbitrary discrimination could be supposed to follow from my account. I discuss these three cases below.

#### Arbitrary discrimination between persons and non-persons

My opponent could argue that my account leads to arbitrary discrimination between persons and non-persons. To see how they could argue for this position, let us consider the claims that I have made about living nonhuman entities. I have argued that some nonhuman animals are persons with human rights (6.1.2). However, I suggested that the same cannot be said about less developed lifeforms, like bacterium (4.4.1). My account will lead to arbitrary discrimination if there can be no moral justification for excluding the bacterium, on my view. In other words, there will be a problem with my account if I am showing prejudice, and the bacterium actually ought to be a person with human rights. If this is so, then I am currently disrespecting the bacterium and denying it some benefit (rights) that it ought to have.

In response, I argue that there are morally justifiable reasons for viewing some nonhuman animals, but not bacterium, as persons. Some nonhuman animals can pass my test for personhood (5.3); bacterium cannot. I argued in defence of nonhuman animal personhood in 6.1.2. I explained how some nonhuman animals have morally relevant properties that help them to be agents, or to satisfy their basic needs, or to have a good life. In contrast, we can suppose that the bacterium is not an agent, does not have morally relevant basic needs, and cannot have a minimally good life. For a discussion of why this is the case, see 6.2.3.<sup>289</sup>

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<sup>289</sup> In 6.2.3 I make similar claims about bananas. I argue that whatever agency, basic needs, or good life the banana might have, they are not the relevant sort of agency, basic needs, or good life to pass my test for

Note that the above is not arbitrary discrimination. The bacterium does not lack human rights *because it is a bacterium*. It lacks human rights because it does not pass my test for personhood (5.3), and so is not the right sort of entity to be a rights-holder, on my account.<sup>290</sup>

#### Arbitrary discrimination between humans and non-humans

My opponent could also argue that my account leads to arbitrary discrimination between humans and nonhumans. To argue for this position, my opponent would need to show that my account disadvantages nonhumans simply because they are nonhuman. There are two main ways in which this could happen. First, my account would disadvantage nonhumans if I were to suppose that only human persons have human rights. I have already rejected this claim in 2.1 with my rejection of humanism (only human beings can be persons with human rights). As I reject humanism, I do not overtly discriminate against nonhumans. On my account, nonhuman entities *can* be persons with human rights, on the same conditions as humans are persons with human rights.

If my account *does* arbitrarily discriminate against nonhumans, it must, therefore, be at the level of my personhood criteria. My opponent would need to show that my test for personhood somehow discriminates against nonhumans. They could do this by focusing on the three fundamentally valuable goods that I use in my test for personhood – agency,

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personhood. These later arguments also apply to bacterium and, to avoid repetition, I will not outline these later arguments in depth here.

<sup>290</sup> The above discussion emphasises that, on my account, personhood (and rights) are not assigned (or denied) on the basis of group membership. In this respect, my distinction between persons and non-persons is different to the sort of problematic arbitrary discrimination shown in sexism, racism, etc. In these cases, the distinction *is* based on group membership. For example, in a sexist society, *all* women are viewed as inferior.



the satisfaction of morally relevant basic needs, and a minimally good life (5.3). My opponent could argue that these goods are human-centric and do not apply to non-humans. In other words, my opponent could argue that, whilst I do not deny that nonhumans *could* be persons, I have biased my personhood criteria in a way that makes it hard, if not impossible, for nonhumans to actually *be* persons, on my account.

In response, it is not enough to emphasise that I take nonhuman animals to have (at least some of) the above goods – agency, morally relevant basic needs, and a minimally good life (6.1.2). The mere fact that a nonhuman animal can have a good does not mean that that good is not human-centric. With this in mind, I want to focus on outlining two ways in which the fundamentally valuable goods *could* be human-centric, but where this does *not* lead to arbitrary discrimination against nonhumans.

First, I could argue that, even if my account is human-centric in the above way (by beginning from human-centric goods), it is not necessarily human-centric in a bad way. All ethical theories begin from human-centric ideas and concepts. This is because ethicists are (currently) only human, and so the ethical theories that follow must come from, and reflect, a human perspective. My account would only be human-centric in a bad way if I failed to give any ethical consideration to nonhuman entities, and/or if I failed to try and imagine their perspective. As 6.1 demonstrates, I do not fail to consider nonhuman entities.

Second, I could accept that the agency, morally relevant basic needs, and minimal good life of nonhumans are different to the agency, morally relevant basic needs, and minimal good life of humans. On this view, there is a human-centric use of the relevant terms

(human agency, etc.) and a nonhuman-centric use of the terms (nonhuman agency, etc.). Both types of agency, basic needs, and good life are important and relevant on my account; we just use the terms differently depending on which type of entity we are referring to. This view is consistent with the arguments of 6.1.2 and 6.1.3.

#### Arbitrary discrimination between persons

Finally, my opponent could argue that my account leads to arbitrary discrimination between different persons. This kind of discrimination could be shown in rights conflict cases. For example, suppose we have a conflict between the rights of a standard adult human (Dan) and the rights of a subject with dementia (Em). For the sake of argument, imagine that the conflict is between Em's right to life and Dan's right to leisure. My account will lead to arbitrary discrimination if we *always* prioritise Dan's rights over Em's. For example, by prioritising Dan's (less important) right to leisure over Em's (very important) right to life. In the above scenario we are arbitrarily discriminating against Em because we are disrespecting her. We disrespect her because we are *automatically* prioritising Dan's rights. As such, we are failing to treat Em with moral respect as we are failing to give her rights equal consideration. To answer this objection, we need to consider how to address rights conflicts. I will provide this discussion in 6.2.6. There, I will explain how my account can deal with rights conflicts in a fair, balanced way that does not arbitrarily discriminate against any group. I will not repeat those arguments again here. Instead, I will simply emphasise that, on my account, we would not automatically discriminate against Em, in the above example.

Above, I have presented three cases in which my account may be thought to lead to arbitrary discrimination. In response, I have argued that my account does not lead to arbitrary discrimination in any of these cases. However, my opponent may have a remaining worry. My account itself may make arbitrary discrimination *more likely*. This worry may follow from my rejection of 'strict equality'. Simply put, on most standard views, all rights-holders have equal rights.<sup>291</sup> This means that all rights-holders have the same rights to the same strength. My account explicitly rejects this. I argue that different subjects have *different* human rights, depending on what personhood properties they have, and what threats apply to them (C1; section 5.5). Because my account does reject 'strict equality', one may therefore worry that it permits *inequality*.

In the context of animal rights debates, Richard J. Arneson (1999: 105) terms this 'The Singer Problem'. In essence "...the problem is to specify moral principles that yield intuitively satisfactory implications for the treatment of human individuals and other individual animals given that cognitive capacities differ across species and individuals" (ibid). In other words, given that individuals have different properties, capacities, and rights, how do we ensure that they are all treated equally? If we cannot do this, and if inequality in capacities and rights necessarily leads to *inequality in treatment*, then my account would seem to make arbitrary discrimination more likely. This is because arbitrary discrimination (in terms of favouritism, disadvantage, etc.) seems to follow if we permit the unequal treatment of rights-holders.

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<sup>291</sup> The importance of equality and equal rights has been extensively defended by, amongst others, Buchanan (2010), Feinberg (1973: 85), Pogge (1995: 107), Rawls (1999), and Scanlon (2003: 26-42, 202-218). Equality also played a central role in the inclusive views of chapter 4.

In response, I concede that my account *does* allow for inequality - different persons have different human rights, on my account. An upshot of this is that different rights-holders *are* to be treated *differently* to one another, depending on what rights they have. However, this inequality is only problematic *if* it disadvantages certain rights-holders and denies them rights that they ought to have. This is not the case on my account. I argue that different subjects *need* different rights in order to have the rights protections that are relevant for them (5.5). I have discussed this at length in relation to the rights of subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3). I will not repeat these arguments again here. Instead, I will simply reiterate that my account offered a more nuanced view of these marginal cases' rights than is offered in the standard literature.

Because I argue for a more context-specific view of rights, I consider the standard 'equal rights' view to be problematic.<sup>292</sup> A focus on 'equal rights' causes us to either underplay or ignore the important differences between rights-holders. This is particularly problematic when we consider the marginal cases. As I have argued throughout, marginal cases are different to typical rights-holders (standard adult humans). In some cases, this is because the marginal case is a different species, and so has different capabilities, needs, and interests (see, for example, nonhuman animals and robots). In other cases, the marginal case is different because it is more vulnerable, and so more threats apply to it. In this case, the marginal case may need more or stronger rights than the standard adult human (see, for example, children). Consequently, I suspect that what we actually want from a human rights account is not equality, *but difference with fairness*. We want all rights-holders to be treated fairly and well. I maintain that this can only happen if we

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<sup>292</sup> In this sense, my arguments have similarities to those of McMahan (2008) and Pojman (1992), who also challenge egalitarian views.

acknowledge the rights that each individual rights-holder *actually* has, rather than taking a broad, prejudiced view of what rights we think they *ought* to have.<sup>293</sup>

### 6.2.2 Permissible mistreatment

In chapter 3, I argued that the permissible mistreatment of marginal cases is a key problem of the exclusionary binary accounts. In this subsection, I will argue that this problem does not affect my account; this is one reason to favour my account over the exclusionary binary accounts. I begin by explaining why it is problematic to *permit* the mistreatment of the marginal cases. I then argue that my account does not permit the mistreatment of marginal cases, as the marginal cases have human rights that protect them against the most serious threats. I end by considering a remaining worry. My opponent could argue that the mistreatment of the marginal cases *is* permitted on my account, *despite the marginal cases having human rights*, because their rights are fewer or weaker than those of other rights-holders. I will argue that this worry is misguided.

There are many ways in which people *do* mistreat the marginal cases. For example, some people forcibly starve children, torture nonhuman animals, and ignore the wishes and choices of subjects with dementia. It seems reasonable to suppose that all such cases of mistreatment are *wrong*. For instance, the existing literature on child abuse (Hacking 1991; Levin 2019) and elder abuse (Bužgová and Ivanová 2009) emphasises the wrongness of mistreating the marginal cases. Here, the mistreatment of marginal cases is described as evil, monstrous, wicked, and vile (Hacking 1991: 253), a failure of moral duty (Levin 2019), and as systematic neglect and a violation of rights (Bužgová and Ivanová 2009: 112; 115-120). We can identify two wrong-making features here. First,

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<sup>293</sup> In most standard cases, this prejudiced view will be that standard adult humans have all human rights, whilst marginal cases have no human rights (see chapter 3).

mistreatment is wrong because it *harms* the marginal case (e.g. by neglecting them). Second, we have a moral duty of care towards the marginal cases. Mistreatment is wrong because it is a violation of this duty of care. If we agree that the mistreatment of marginal cases *is* wrong (for these reasons), then any human rights account that *permits* the mistreatment of marginal cases is morally problematic.

My account *does not* permit the mistreatment of the marginal cases. To see this, let us reconsider one of our examples: someone forcibly starving a child. On my account, such an act constitutes mistreatment because it prevents the child from fulfilling its basic needs. Recall that ‘the satisfaction of basic needs’ is one of my fundamentally valuable goods. The ability to satisfy basic needs is an important part of a minimally decent life. We can reasonably suppose that one of the child’s basic needs is to food as if he does not have food, he will eventually die of starvation. There are many ways in which the child’s need for food could be threatened, and so many ways in which the child could be mistreated. For example, the state could increase the price of food in the hope of making some profit. In this scenario, only the richest citizens can afford to eat, and so poor children will starve. On my account, the above case of mistreatment is *impermissible* because it violates the child’s human rights. Briefly put, I accept that as the child has a basic need for food, he also has a *morally justifiable* human right to food. As human rights are high priority norms (1.2), they can only be violated in very strong circumstances. The above case (increasing the price of food to make a profit) is not a sufficiently strong reason to justify violating the child’s right to food. As such, the act of mistreatment – forcibly starving the child – is simply wrong on my account, and cannot be justified from a human rights angle.

At this point, my opponent may respond with a new worry. Above, I claimed that the child's human right to food could only be violated in extreme circumstances. In normal, non-extreme cases this will, indeed, mean that mistreating the child – by forcibly starving it – is impermissible. However, my opponent may wonder what will happen to the child's rights in conflict cases. For example, suppose that a child's right to food conflicts with a standard adult human's right to food. It is consistent with my account that the standard adult human will have both a higher degree of personhood and more and stronger human rights than the child. There may, therefore, be a worry that, in conflict cases, we would prioritise the rights of the standard adult human. As such, it may turn out that, in conflict cases, it would *no longer* be impermissible to violate the child's right to food and forcibly starve it.

To respond to this worry, I need to explain how we should deal with rights conflicts on my account. This discussion will take place in 6.2.6, and I will not rehearse the arguments in full here. Instead, I will offer a brief overview. As 6.2.6 will argue, marginal cases do not necessarily lose rights conflicts. In some cases, marginal cases' rights will be prioritised *in spite* of the fact that they have a lower degree of personhood and fewer and weaker rights than a standard adult human. In other cases, marginal cases' rights will be prioritised *because* they have a lower degree of personhood and so are more vulnerable and need more protections. In many cases then, it will remain impermissible on my account to mistreat the child by forcibly starving it.

### 6.2.3 Overinclusion

This subsection will address concerns that my account is overinclusive.<sup>294</sup> A human rights account will be overinclusive if too many entities are persons with human rights, on the account in question. To address this overinclusion worry, I consider two cases in which my account could be supposed to be overinclusive. In case 1, my opponent could argue that, on my account, entities like Amazon's Alexa and thermostats are persons with human rights because they have personhood\* properties.<sup>295</sup> In case 2, my opponent could argue that, on my account, bananas, watches, and houses are persons with human rights because they have basic needs (one of my fundamentally valuable goods). It would obviously be overinclusive to include any of the above entities as persons with human rights. In response, I will argue that none of the above entities *are* persons with human rights, on my account. This is because my test for personhood (5.3) is not passed in the above cases.

#### Case 1

In 5.2 I explained that there are many personhood\* properties, the having of which could *potentially* make a subject a person. Let us consider two examples. First, sentience (property 16) is a personhood\* property, according to the list in 5.2. We could suppose that a thermostat can be sentient to some minimal degree because it can be aware of, and respond to, its surroundings.<sup>296</sup> Second, perception (property 11) is also a personhood\*

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<sup>294</sup> In 4.4.1 I explained how the low binary threshold used by inclusive binary accounts could cause these accounts to become overinclusive. Both inclusive binary accounts (4.2-4.3) and my personhood account (chapter 5) ultimately accept that an entity can be a person if they have a low degree of a personhood property. The worry is that whatever property we choose, various 'absurd' entities seem able to possess that property to a low degree, and to consequently be persons with human rights.

<sup>295</sup> In 5.2 I explained that a personhood\* property is a property that has not yet passed my test for personhood. A personhood property is one that has passed the test for personhood (5.3).

<sup>296</sup> For a discussion of minimal accounts of sentience see footnotes 139-140.



property, according to the list in 5.2. Amazon's Alexa seems to have perception in a minimal sense.<sup>297</sup> Alexa can perceive auditory data in her environment; she can hear what is going on around her and respond to voice commands. As such, both the thermostat and Alexa seem to possess personhood\* properties, but it would clearly be overinclusive to include either the thermostat or Alexa as persons (to any degree).

My test for personhood (5.3) can explain why neither the thermostat nor Alexa have personhood properties, and why neither are persons. To class as a personhood property on my test, the property must help the subject to be an agent, to satisfy their morally relevant basic needs, or to have a minimally good life.<sup>298</sup> Neither the thermostat nor Alexa are agents in the relevant way. It is arguable that neither have morally relevant basic needs. And it is intuitive to suppose that neither the thermostat nor Alexa can have a minimally good life. Because the personhood\* properties that the thermostat and Alexa have do not *help* them to have the fundamentally valuable goods, they do not pass my test. It is for this reason that the thermostat and Alexa are not persons.

The above discussion emphasises the importance of context- sensitivity. The objection – that Alexa and the thermostat are persons – is based on a misunderstanding. Namely, my opponent supposes that, if a property is a personhood property in one context (by passing my test), then it is a personhood property in all contexts. In other words, my opponent assumes that because sentience and perception are personhood properties when standard adult humans have them, they must be personhood properties when *any* entity has them.

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<sup>297</sup> Amazon's Alexa is a cloud-based virtual assistant that responds to voice commands.

<sup>298</sup> For a full discussion of how I am understanding agency, morally relevant basic needs, and a minimally good life, see 5.3. To summarise, a subject will be an agent in the relevant way if they can make autonomous choices and (ideally) go on to act on the basis of these choices. A subject has needs that are both basic and morally relevant if a failure to meet these needs harms the subject. A subject has a minimally good life if they have the ability to pursue a decent existence.

This is a mistake. ‘Being a personhood property’ is context-sensitive, on my account. We have to apply the test for personhood for each instantiation of a given property in each individual context. On some occasions, the property *will* pass my test for personhood by being conducive to agency, the satisfaction of basic needs, and the good life. For example, this may happen when the property is held by human beings or nonhuman animals. In these cases, it is true that the human or the nonhuman animal is a person because they are sentient. However, in other contexts, the property in question will fail to pass my test for personhood because it is not conducive to agency, the satisfaction of basic needs, or the good life. This is what happens in the thermostat and Alexa examples above. By appealing to context-sensitivity, I can therefore avoid the first overinclusion worry.

## Case 2

My test for personhood (5.3) emphasises the importance of three fundamentally valuable goods – agency, the satisfaction of morally relevant basic needs, and a minimally good life. It seems that many living things and inanimate objects can have at least basic needs, in some minimal sense. For example, a (quartz) watch *needs* a battery. A house *needs* a roof. A banana *needs* sunlight to grow. My opponent could argue that if ‘having basic needs’ is important for personhood, on my account, then the watch, the house, and the banana ought to be persons with human rights. For instance, to develop this objection, my opponent could emphasise that there are important similarities between the banana’s need for sunlight and Mary’s (a human adult’s) need for food. Both needs function in the same way – they allow both the banana and Mary to grow and develop. If their needs *are* comparable in this way, then my opponent could object that I cannot reasonably exclude the banana from being a person with human rights whilst including Mary.

In response, I want to emphasise that case 2 only stands if myself and my opponent are using ‘basic needs’ in the same way. I suspect that we are not. In 5.3 I explicitly stated that it is only *morally relevant* basic needs that are relevant to my account. Drawing on the work of Harry Frankfurt (1984: 6) I outlined a view according to which a need is both basic and morally relevant *if* a failure to meet the need harms the subject. In what follows, I will draw on this distinction to explain how Mary’s need for food is both basic *and* morally relevant, whilst the banana’s need for sunlight is only basic.

Mary’s need for food is morally relevant, in the sense outlined above. If Mary’s need for food is not met, then she will die of starvation. Her death will harm her in a number of ways.<sup>299</sup> It will prevent her from being an agent and realising her plans. The pre-death starvation will cause her to greatly suffer, and so on. I posit that the banana’s needs are not morally relevant in the same way. If the banana’s need for sunlight is not met, then this does not seem to harm the banana.<sup>300</sup> The banana cannot suffer. Nor does the banana lose anything (or experience any disadvantage) if it does not grow. If this is so, then there is a viable reason for viewing Mary, but not the banana, as a person with human rights. Only Mary has morally relevant basic needs.

The above discussion emphasises how important it is for my account to have clear definitions of the *morally relevant* types of agency, basic needs, and the good life. I provided these definitions in 5.3. By appealing to these earlier definitions, I can avoid the second overinclusion worry (case 2). This is because I can accept that the quartz watch, the house, and the banana have basic needs; what they lack are *morally relevant* basic

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<sup>299</sup> For detailed discussions on the metaphysics of death, and on what makes death harmful, see Blatti (2012), Gruen (2014), and Purves (2016).

<sup>300</sup> I discuss morally relevant harm in more depth in 6.2.4.

needs. Because they do not have the right type of basic needs, watches, houses, and bananas are *not* persons with human rights, on my account. As such, I can avoid the most obvious charges of potential overinclusion.<sup>301</sup>

#### **6.2.4 Underinclusion**

This subsection will address concerns that my account is underinclusive. My account will be underinclusive if it fails to accommodate entities that ought to be persons with human rights. On my account, this will happen if I fail to include entities that pass my test for personhood (5.3).<sup>302</sup> Below, I will consider how my opponent could argue that I unfairly exclude plants and ecosystems in this way.<sup>303</sup> In response, I will outline why plants and ecosystems are not the right sorts of entities to be persons with human rights, on my account.

My test for personhood (5.3) emphasises the importance of three fundamentally valuable goods – agency, the satisfaction of morally relevant basic needs, and the minimally good life. To show that my account is underinclusive (in the sense described above), my opponent could start by arguing that plants and ecosystems *can* have these valuable goods, and so ought to be included on my account. I will consider each fundamentally valuable good in turn.

#### Agency

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<sup>301</sup> This response would also apply to the bacterium case from 6.2.1.

<sup>302</sup> To recap, my test for personhood (5.3) argues that x is a personhood property if and only if, and to the degree that, it is conducive to (i) the subject being an agent, or (ii) the subject satisfying their basic needs, or (iii) the subject having a good life.

<sup>303</sup> For a lucid and critical discussion of the claim that plants and ecosystems ought to have rights, see Pepper 2018.

Morten Tønnessen (2015: 127) argues that plants and ecosystems have biosemiotic agency.<sup>304</sup> According to Tønnessen, biosemiotic agency involves “... goal-directedness, self-governed activity, processing of semiosis (i.e. sign use) and choice of action” (138).<sup>305</sup> Tønnessen does not explain what he means by ‘goal-directedness’, but we can assume that a plant or ecosystem meets this condition if they have goals that they act towards. For example, a venus flytrap has the ‘goal’ of attracting and trapping insects. Tønnessen also does not define ‘self-governed activity’, but we can assume that it refers to the plant controlling and regulating its own actions. After all, no external actor controls a plant to *make it* engage in photosynthesis, etc. Tønnessen’s third condition – ‘semiosis’ – means that plants and ecosystems can use signs *without being aware of what they are doing* (133). For example, a plant may use bright petals to signal its readiness for pollination, without intentionally meaning to use its petals in this way.

Finally, Tønnessen argues that, if we adopt a broad notion of agency, then we can accept that plants and ecosystems can choose how to act. Here, he draws on the work of Jakob von Uexküll to argue that a plant has a “living cell layer...that enables it to make its choice of stimuli” (137). For example, if a plant has sunlight-receptive cells, then it may ‘choose’ to turn towards the sun. As plants and ecosystems *do* meet the conditions for Tønnessen’s biosemiotic agency, it seems like plants and ecosystems can be some kind of agents.

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<sup>304</sup> Tønnessen does not define what he means by ‘biosemiotic’. However, the journal *Biosemiotics* defines it as follows in their journal description: “Biosemiotic research is concerned with the study of signs and meanings in living organisms and systems. Its main challenge is to naturalize biological meaning and information by building on the belief that signs are fundamental, constitutive components of the living world” (Biosemiotics n.d.).

<sup>305</sup> Tønnessen (2015) acknowledges that this definition is open to debate (127: footnote 3).

In response, I will argue that whilst plants and ecosystems may be biosemiotic agents, this is not a *morally relevant* form of agency, on my account. In 5.3 I claimed that a subject has morally relevant agency if they can make autonomous choices and ideally go on to act on the basis of these choices. At even the most minimal level, this type of agency requires some form of *motivation* on the part of the subject. The subject must be motivated to make one choice over another, and (ideally) be further motivated to act on the basis of their choice. Michael Smith (1987) has outlined a very minimal account of what such motivation involves. On Smith's Humean theory, "motivation has its *source* in the presence of a relevant desire and means-end belief" (36). For example, I will be motivated to get water if I desire water and believe that I can get water from a tap. The upshot of this is that in order to be a morally relevant agent, on my account, a subject must have the relevant motivating desires and means-end beliefs.

I posit that biosemiotic agents do not have morally relevant motivating desires and means-end beliefs. To see this, let us reconsider the example of a plant 'choosing' to turn towards the sun. In order to have morally relevant agency, our plant would need to be *motivated* to turn towards the sun. Yet it seems intuitive that our plant *does not* have the relevant motivating desires and means-end beliefs. The plant does not literally *desire* to turn towards the sun. Nor does the plant really *believe* that if it moves its stalk in a certain way then it will get more sunlight. To me, the plant's turning towards the sun can best be explained as an instinctive automatic reaction that does not require any allusion to plant desires or plant beliefs. Because I am sceptical that plants and ecosystems have motivating desires and beliefs, I will be accepting that plants and ecosystems *do not* have the sort of *morally relevant* agency that I am interested in.

## Basic Needs

In 5.3 I made two claims about basic needs. First, basic needs are things that a subject *must* have in order to continue functioning as the sort of being that they are. For example, human and nonhuman animals have basic needs for food, shelter, medical care, etc. Second, a need is morally relevant if a failure to meet the need will harm the subject. I discussed this further in the overinclusion section (6.2.3). To say that plants and ecosystems have basic needs, in the sense relevant to my account, my opponent would need to say that plants and ecosystems *do* have basic needs *and* that they are *harmed* if these needs are not met.

It is obvious that plants and ecosystems have basic needs. There are things that they *must* have in order to continue functioning as plants and ecosystems. For example, they must have water, fertile soil, sunlight, a stable temperature, etc.<sup>306</sup> However, as I will argue below, it is less obvious that plants and ecosystems are *harmed* if these needs are not met.

Most definitions of ‘harm’ accept that a subject is harmed if and only if some state or event causes the subject to lose something important – welfare, the satisfaction of an interest, etc.<sup>307</sup> If we accept this definition, then we can make two important points about

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<sup>306</sup> For a discussion of the needs of plants and ecosystems, see Fulfer (2013: 28), and Wienhues (2017: 381).

<sup>307</sup> See, for example, the following quotes: “One person harms another...by invading, and thereby thwarting or setting back, his interest. The test, in turn (as we shall see), of whether such an invasion has in fact set back an interest is whether that interest is in a worse condition than it would otherwise have been in had the invasion not occurred at all” (Feinberg 1987: 35). “Someone suffers a level-1 harm with respect to a certain basic good if and only if he *loses* some quantity of that good” (Hanser 2008: 441). “I propose an analysis of harm in terms of causation: harm is when a subject is caused to be worse off” (Northcott 2015: 147). “A is harmed if and only if: A is the subject of a historical worsening or A is the subject of a harmful prevention of benefit” (Rabenberg 2015: 22). “Individuals are harmed when their welfare is seriously diminished” (Regan 2004: 94).

harm. First, in order to be harmed, a subject (typically) must have welfare, interests, etc. in the first place. After all, you cannot lose what you do not have.

To me, an upshot of this first point is that the subject must also have some degree of conscious awareness. Consciousness seems like a prerequisite for having interests, and for having welfare (in the sense of things going better or worse for an experiencing subject).<sup>308</sup> There is ongoing debate about whether plants and ecosystems have conscious awareness. For example, Peter Harries-Jones (2017: 277), and Stuart Thompson (2019) both argue that plants have some form of basic consciousness. Whereas, Lincoln Taiz et al (2019: 677) have drawn on extensive research in plant science and neurobiology to argue that “...plants, with their relative organisational simplicity and lack of neurons and brains, have consciousness to be effectively nil.” I am sympathetic to the arguments of Taiz et al, as I too suspect that plants and ecosystems lack the internal constitution to have notable consciousness.<sup>309</sup> As I take plants and ecosystems to only have very minimal consciousness (if any), I also posit that plants and ecosystems have very minimal interests and welfare (if any).

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<sup>308</sup> For example, I take it that completely non-conscious objects (like chairs and tables) do not have interests and cannot have a welfare (things cannot go better or worse for a chair). Those who are unconscious or with minimal consciousness (such as those in comas or vegetative states) could be supposed to have minimal interests and some welfare, in the sense of things going better or worse for them. (I take it that those who are unconscious or minimally conscious can have more interests and welfare as their awareness/responsiveness increases). Finally, I take it that those who are uncontroversially conscious (like human and nonhuman animals) have interests and welfare.

One may wonder where robots (6.1.3) fit into this discussion. I take it that at least some robots could have some degree of consciousness (in the sense of having functional mental states and some level of awareness). For example, autonomous robots who ‘think’ for themselves, using machine learning, could be conscious in this way.

<sup>309</sup> Though I am willing to concede that plant consciousness may be entirely different to animal consciousness, and so does not require organisational complexity, neurons, a brain-like structure, etc. The onus of proof would, however, be on my opponent to show *how* plants can be conscious (without having the internal constitution that typically enables consciousness).



The second point that our definition of ‘harm’ raises is that a subject must be affected by the loss of welfare, the failure to satisfy an interest, etc. This point is discussed at length in Duncan Purves’ 2019 ‘Harming as making worse off’.<sup>310</sup> In essence, the loss of welfare or the failure to satisfy an interest, etc. must be detrimental to or for the subject.<sup>311</sup> I posit that plants and ecosystems cannot themselves be negatively affected by the loss of welfare, the failure to satisfy an interest, etc. If, as suggested above, plants and ecosystems only have very minimal interests and welfare (so minimal that they are essentially non-existent), then it is unclear that their loss could be detrimental to the plant or ecosystem. Plants and ecosystems would go from having effectively no interests/welfare, etc. to having no interests/welfare etc. If this is a loss (which I doubt), it does not seem to be the sort of morally relevant loss that constitutes harm.<sup>312</sup>

The above has suggested that plants and ecosystems do not meet the sufficient conditions for being harmed. I thus take plants to be like the bananas in our overinclusion section (6.2.3). Like the bananas, plants and ecosystems do have basic needs, but these basic needs are not morally relevant, on my account.

### The Good Life

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<sup>310</sup> It is also accepted in all of the quotes presented in footnote 307.

<sup>311</sup> One may wonder what will follow in the case of un-experienced harms (which are harms that are not felt or known by the subject). Keerus, Gjerris, and Röcklinsberg (2017) have conducted an analysis of unexperienced harm in relation to Regan’s Principle of Harm. They ultimately conclude that “...whether anybody can be harmed, in the descriptive meaning of this word, without their slightest negative experiences, remains open at best. Consequently, that animals can be wronged when ‘harmed’ without such experiences, does not get support despite Regan’s attempts” (17). I am convinced by their arguments, and so remain sceptical that there can be unexperienced harms.

<sup>312</sup> Here, I am assuming that, in order for the loss to be morally relevant, it must cause the subject to be worse off in some way (see the quotes in footnote 307). I do not think that plants and ecosystems are worse off when they go from having effectively no interests/welfare to having no interests/welfare.

In 5.3 I explained that a subject can have a minimally good life if they have the ability to pursue a decent existence. A good life, so defined, may include the ability to pursue relationships, meaningful work, hobbies and interests, etc. To show that plants and ecosystems can have a minimally good life, my opponent would need to show that plants and ecosystems can pursue these goods (see 5.3 and footnote 185). Katy Fulfer (2013) has developed a good life account for plants.<sup>313</sup> Fulfer's main argument is that a plant's life can go objectively well if it is treated with dignity (28). Here, I take it as a given that 'being treated with dignity' is a component of a minimally good life. Fulfer argues that dignity is a relational concept and that "...our dependence on elements within ecosystems bestows a kind of dignity on them" (31). She argues that we treat a plant with dignity if we recognise its importance to us and ensure that it has "...access to high soil quality, access to water, and so forth" (32).

Importantly, on Fulfer's view, dignity is bestowed to plants; it is not a property that they intrinsically have. In what follows, I will argue that this concept of 'dignity' is insufficient to generate a good life account for plants. To see why, let us consider Elizabeth Harman's (2007) argument. Harman argues that loving or worshipping something is not enough to give that thing a moral status. For Harman, an upshot of this argument is that an object that is loved or worshipped cannot itself be benefitted or wronged *simply because it is loved or worshipped by someone else* (61-81). There must be additional reasons. This is a convincing argument, and can be extended to Fulfer's dignity case. The fact that I endow dignity on a plant does not entail that the plant has a good (or a good life) as a result of this dignity. In order for a plant to have a good life, on my account, the plant would need

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<sup>313</sup> Wienhues (2017) also presents a wide good life account that can accommodate plants. I am focusing on Fulfer because her account specifically looks at the good life of plants.

to have the ability to *pursue* the objects of a minimally good life *itself*, rather than simply having goods bestowed on it by others (see 5.3 and footnote 185). Unless such an argument can be made, I take it that plants and ecosystems *cannot* have a minimally good life, on my account.

To summarise, I have argued that, whilst plants and ecosystems may have some form of agency, basic needs, and good life, they do not have *morally relevant* forms of agency, basic needs, and good life (5.3).<sup>314</sup> Plants and ecosystems would need to have the *morally relevant* forms of these valuable goods in order to pass my test for personhood (5.3). Recall that my test for personhood argues that x is a personhood property if and only if, and to the degree that, it is conducive to (i) the subject being an agent, or (ii) the subject satisfying their basic needs, or (iii) the subject having a good life. If plants and ecosystems cannot have the relevant type of agency, basic needs, or good life (as argued above), then they also cannot have properties that can *help them* to realise these valuable goods (5.3).<sup>315</sup> I thus posit that plants and ecosystems do not have personhood properties, do not pass my test for personhood, and are not persons with human rights. In order to object to this position, my opponent would need to provide more evidence that plants and ecosystems *do* have the *morally relevant* forms of agency, basic needs, and good life. Until this evidence can be provided, it is not underinclusive to deny that plants and ecosystems are persons with human rights, on my account.<sup>316</sup>

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<sup>314</sup> This is not to deny that plants and ecosystems might be morally relevant in other ways.

<sup>315</sup> In saying this, I do not mean to deny that plants could have important properties (like ‘plant thought’ or ‘plant communication’, as discussed in Thompson (2019)). I simply state that, even if plants do have certain properties, these are not personhood properties, on my account. This is because, for reasons outlined in the main text, whatever properties the plant may have cannot help the plant to be an agent, satisfy its basic needs, or have a good life in the sense relevant to my account. As such, I maintain that plant properties cannot pass my test for personhood.

<sup>316</sup> Above, I have argued that consciousness seems to be a prerequisite for having morally relevant agency, basic needs, and the good life (and I will return to this idea again in 6.2.5). One may worry that, in accepting this, I am also accepting the sort of strong entailment relations between the personhood properties and the

### 6.2.5 Problem cases: Embryos and Foetuses

This subsection will consider how my account can respond to the problem cases of embryos and foetuses. Embryos and foetuses are problem cases for two reasons. First, it is unclear if and when embryos and foetuses are (or become) persons. Second, there is ongoing debate about whether embryos and foetuses have rights, and particularly a right to life.<sup>317</sup> If embryonic and foetal rights do exist, then this has important implications for bioethics and medical policy. For example, if foetuses and embryos *are* persons with human rights, then this would seem to entail that we ought to have strong anti-abortion laws, that in-vitro fertilisation (IVF) is wrong (in cases where embryos are discarded), and that embryonic stem cell research is impermissible.

Because the above area of debate is so contentious, it is important that I can provide some answer as to whether embryos and foetuses are persons with human rights, on my account.

I will defend two main claims. First, on my account, embryos and early-stage foetuses do not pass my test for personhood (5.3) and are not persons with human rights. Second, on my account, late-stage foetuses *could* pass my test for personhood and be persons with

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fundamentally valuable goods that I previously claimed to reject (5.3). Whilst I can see how this could be a natural worry, I posit that it is unfounded. Whilst consciousness is undoubtedly important (see above), the presence of consciousness does not *entail* that the property-holder will have the fundamentally valuable goods. As detailed above, entities can be conscious (in some minimal way) and yet *not* be agents, have basic needs met, or have a good life. Because the presence of consciousness (a personhood property) does not *guarantee* the fundamentally valuable goods, we do not have the sort of strong entailment relation that I previously dismissed.

Instead, as detailed above, the relevant sort of consciousness is connected to motivating desires and beliefs, welfare, interests, etc. In 5.2 I already accepted that consciousness can be connected to, and be a prerequisite for, other personhood properties (desires, beliefs, etc.). Consciousness, so defined, will be conducive to the subject being an agent, satisfying their basic needs, or having a good life, in the sense that it helps the property-holder to have morally relevant forms of these goods. This is consistent with the test for personhood developed in 5.3.

<sup>317</sup> The research discussing the personhood and rights of embryos and foetuses is extensive. For a varied but representative sample of views see: Andersson (2014), Arrell (2019), Bernstein and Manata (2019), Blackshaw (2019), Boonin (2019), Christensen (2019), Colgrove (2019), DeGrazia (2006), Harman (1999; 2007), Hendricks (2019), Lovering (2013), Marquis (1989; 2006), Steinbock (2006), Strong (2006), Thomson (1971), Warren (1973), and Williams (2015).

human rights (to at least some degree). I will consider what follows if we accept that late-stage foetuses have some human rights.

### Case 1: Embryos and early-stage foetuses

In his ‘future like ours’ view (hereafter ‘FLO view’) Don Marquis (1989) argues that embryos and early-stage foetuses are persons with human rights.<sup>318</sup> Marquis begins by stating that there are certain things that make our (human) lives valuable – we can have experiences, relationships, interests, desires, etc. It follows from this that, if these things really *are* valuable and morally significant, then it would be wrong to deprive someone of a future of value by killing them (189-192). Consequently, anything that can have a ‘future of value’ ought not to be killed. Marquis argues that embryos and foetuses have a future of value in this way (192). This is because “... they are earlier stages of the very same individual who later will (or would) have valuable experiences” (Marquis 2006: 24). In other words, because embryos and foetuses will have a morally valuable ‘*future like ours*’, they have a moral status and a right to life *now*.

Marquis’ FLO view thus rests on the claim that the mere *potential* for personhood is morally significant enough to give embryos and foetuses a moral status and rights. I reject this claim.<sup>319</sup> In 5.3 I argued that a subject is a person with human rights *if* they pass my test for personhood. To pass my test, subjects must have some relevant properties that

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<sup>318</sup> Others who defend this position include Andersson (2014: 660-663) and Colgrove (2019). Hendricks (2019) has also presented a more extreme anti-abortion argument that claims that abortion is immoral, even if the foetus is not a person. I will not consider Hendricks’ argument further here, as my concern is whether foetuses *are* persons and *do* have rights *in virtue of their personhood*.

<sup>319</sup> Marquis’ FLO view, and other potentiality arguments, have also been rejected by Christensen (2019), DeGrazia (2006: 55-56), Jaworska and Tannenbaum (2019: 70), Steinbock (2006: 30-32), and Warren (1973: 59-61). For a further discussion of my rejection of potentiality arguments see 3.4.1.

help them to be agents, or to satisfy their basic needs, or to have a good life. The fact that a subject has the *potential* to hold relevant personhood properties *in the future* would not be enough to pass my test. This is because potential (future) properties are simply not conducive to the subject being an agent, or satisfying their basic needs, or having a good life now.<sup>320</sup> *Future* properties cannot help a subject to have goods *in the present*.

In order to be a person with human rights, on my account, the embryo and early-stage foetus would need to already have properties that help them to be agents, or to satisfy their basic needs, or to have a good life. The academic literature largely agrees that embryos and early-stage foetuses *cannot* have any such properties, at their current stage of development.<sup>321</sup> This is because they do not yet have the internal constitution or brain development to be rational, or have emotions, or feel pain, etc. For example, Bonnie Steinbock (2006: 29) emphasises that “...early embryos, indeed early-gestation foetuses, have no consciousness, no awareness, no experiences of any kind, even the most rudimentary”. This is because they lack “...even the precursor of a nervous system” (ibid). If this is true (and I see no reason why it is not), then embryos and early-stage foetuses cannot have even a low degree of the relevant psychological, emotional, social, physical or phenomenal properties required for personhood (5.2, 5.3).

The above also suggests that embryos and early-stage foetuses cannot be agents, have morally relevant basic needs, or have a good life (in the senses defined in 5.3). In 6.2.4 I argued that, in order to have even minimal levels of morally relevant agency, a subject

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<sup>320</sup> Note that this is the converse of the argument made in 6.1.1. There, I rejected the idea that subjects with dementia have memorial personhood, i.e. that they are morally significant because they *were* persons in the past. If x’s *past* personhood is not enough to make them a person with human rights now, it seems like we must say the same about y’s *future* personhood.

<sup>321</sup> See, for example, DeGrazia (2006: 52-54), Harman (1999: 310), Steinbock (2006: 29), and Warren (1973: 56-58).

needs motivational desires and means-end beliefs. An embryo or early-stage foetus cannot have these motivational desires and beliefs if they completely lack consciousness (as argued above). As such, embryos and early-stage foetuses are not morally relevant agents.

In 5.3 I argued that a need is both basic and morally relevant if a failure to meet the need will harm the subject. In 6.2.4 I outlined a view of harm according to which a subject can only be harmed if they are made worse off by losing something important (welfare, the satisfaction of an interest, etc.). I explained how, because plants and ecosystems have only minimal consciousness, they cannot be harmed in this way. I suggest that embryos and early-stage foetuses are similar to plants and ecosystems in this respect. Because embryos and early-stage foetuses lack consciousness, I take it that they also lack interests and welfare (in the sense of things going better or worse for them). As they lack interests/welfare to begin with, embryos and early-stage foetuses cannot be made worse off by the loss of these things. I consequently take it that embryos and early-stage foetuses cannot be harmed (in the sense outlined above) by failing to meet a basic need.<sup>322</sup>

Finally, in 5.3 I argued that a subject can have a minimally good life if they have the ability to pursue a decent existence (i.e. one containing positive relationships, hobbies and interests, etc.) (see also footnote 185). It seems clear that embryos and early-stage foetuses cannot pursue a decent existence. There are two reasons for this. First, the embryo and early-stage foetus cannot literally pursue anything. As mentioned above,

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<sup>322</sup> My opponent could object that the foetus is harmed, and does lose something of value, if its needs are not met. Namely, it loses its life and this life is valuable. This argument, however, would either depend on the claim that (1) all human life is inherently valuable, or (2) the foetus' life has value in virtue of what the foetus will become (a human person). Claim 1 relies on humanism, which was rejected in 2.1. Claim 2 relies on potentiality arguments, which were rejected in 3.4.1.

embryos and early-stage foetuses lack the agency to do this. Second, it is implicit in good life accounts that things can matter to the subject – it is good for the subject to be in a positive relationship etc. As Bonnie Steinbock (2006: 26) emphasises, “...it is not wrong to kill embryos because it doesn’t matter to an embryo whether it is killed or goes on living.” If Steinbock is correct, and life and death do not matter to an embryo, then it seems intuitive to suppose that other (less vital) things also do not matter to the embryo.<sup>323</sup>

For the above reasons, I maintain that embryos and early-stage foetuses do not pass my test for personhood (5.3) as they cannot have properties that could help them to be agents, or satisfy their morally relevant basic needs, or have a minimally good life, in the relevant sense. I thus accept that embryos and early-stage foetuses are not persons and do not have human rights. As an upshot of this, I claim that embryonic stem cell research, IVF, and early-stage abortion are not wrong on (at least my) human rights grounds.<sup>324</sup> Embryos and early-stage foetuses do not have human rights that could be violated.

### Case 2: Late-stage foetuses

Unlike early-stage foetuses (above), it is largely agreed that late-stage foetuses can have at least some minimal psychological, emotional, social, physical, or phenomenal properties.<sup>325</sup> For example, it has been argued that human foetuses have some level of conscious awareness at 20 weeks (Andersson 2014: 660), at six months (DeGrazia 2006:

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<sup>323</sup> Whilst Steinbock focuses on embryos, I think her arguments could also be extended to early-stage foetuses. As Steinbock takes early-gestation foetuses to be similar to embryos – in terms of lacking consciousness, interests, etc. – she would presumably also accept that it also does not matter to early-stage foetuses whether they live or die (see, for example, Steinbock 2006: 29).

<sup>324</sup> Though I accept that there may be other moral and/or legal reasons to oppose embryonic stem cell research, IVF, or early-stage abortion.

<sup>325</sup> See, for example, Andersson (2014: 660-663), and Warren (1973: 58, though Warren argues that any properties that the late-stage foetus has are very minimal).



54), and at seven or eight months (Warren 1973: 660).<sup>326</sup> Whilst there are thus different views on precisely *when* a human foetus has some form of consciousness, all of the above views agree that it is at some *relatively late stage in foetal development*. I take this example to suggest that whatever important properties a foetus may have (like consciousness), they will only begin to have these properties at a relatively late stage of development.<sup>327</sup>

It is also feasible to suppose that late-stage foetuses could have morally relevant basic needs.<sup>328</sup> In 5.3 I argued that a need is both basic and morally relevant if a failure to meet the need will harm the subject. Let us suppose that all foetuses have a basic need for nutrients from the mother. It seems intuitive to suggest that this need can be morally relevant, in the case of a late-stage foetus, because the late-stage foetus can be harmed if this need is not met. This is because, unlike the early-stage foetus, the late-stage foetus has some degree of conscious awareness (see above) which would allow it to have some degree of experiential welfare (things could feasibly go better or worse for the late-stage foetus). As the late-stage foetus could thus be made worse off by the failure to fulfil its need for nutrients, the late stage foetus can be harmed. In virtue of this capacity for harm,

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<sup>326</sup> There are notable outliers to this view. Brody (1988: 249) argues as follows: “we have sketched (although certainly not proved the truth of) an approach to the essence of humanity according to which the fetus would be a living human being from about six weeks, the time at which we begin to note fetal brain activity.” This suggests that a foetus has conscious awareness at around six weeks’ gestation, and so much earlier than the above views suggest. This is an extreme, non-mainstream perspective, and I will not consider it any further here.

<sup>327</sup> It is important to note that I take late-stage foetuses to have a *low* degree of conscious awareness. They will have less conscious awareness than human infants, children, and adults. This is because late-stage foetuses are still developing a functioning brain and nervous system. Above I argued that, in contrast, early-stage foetuses have no conscious awareness. If I am wrong about this, and early-stage foetuses *do* have some minimal degree of conscious awareness, then the arguments that follow will also apply to them.

<sup>328</sup> My account accepts three fundamentally valuable goods – agency, basic needs, and the good life (5.3). I am focusing on basic needs here as it seems less contentious to say that late-stage foetuses could have morally relevant basic needs than it does to say that they could also be agents or have a good life. I leave it as an open question whether late-stage foetuses can be agents or have a good life.

the late-stage foetus can feasibly be supposed to have at least some morally relevant basic needs.<sup>329</sup>

Drawing on the above, I am willing to concede that it is possible that late-stage fetuses *could* have some low level-properties that help them to realise some fundamentally valuable good.<sup>330</sup> This is a possibility because our understanding of foetal properties and capacities is constantly changing, and it may turn out that late-stage fetuses are more developed than we previously suspected. As such, for the remainder of this subsection, I will talk *as if* late-stage fetuses can pass my test for personhood (5.3). I will consequently discuss what would follow if late-stage fetuses were persons with human rights, on my account. Specifically, I will assume that if late-stage fetuses have *any* human rights, they would at least have a right to life. If they *do* have a right to life, then this has important implications for the abortion debate. Below, I will consider two responses that could be made to the worry that, if late-stage fetuses have a right to life, then abortion must be impermissible.

First, we could take the strong view adopted by the likes of Judith Jarvis Thomson (1971) and Mary Anne Warren (1973). On this view, fetuses have a right to life, but the scope of this right is not strong enough to prevent abortion. To defend this view, Thomson (1971: 48-55) presents a series of thought experiments to try and determine the correct scope of the right to life.<sup>331</sup> She concludes that the right to life does not extend to “...either

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<sup>329</sup> For a discussion of harm, see 6.2.4.

<sup>330</sup> For example, let us suppose that, at a very basic level, it is good to avoid pain/discomfort. A late-stage foetus could realise this good if they avoid pain/discomfort. It is conceivable that late-stage fetuses could have properties that help them to do this. For example, they may have basic consciousness which would allow them to be aware of discomfort and react accordingly. For instance, if there is pressure on the part of the mother’s stomach, the late-stage foetus may register this discomfort and change position.

<sup>331</sup> Thomson’s (1971) most well-known examples are the case of the violinist (48) and the case of Henry Fonda (55). In the violinist example, a famous violinist has a rare kidney disease and you alone have the

a right to be given the use of or a right to be allowed continued use of another person's body – even if one needs it for life itself' (56). The upshot of this is that, in cases of abortion, the woman's rights to her own body always trumps the right to life of the foetus. This is because the foetus does not have a valid claim right against the woman for the (continued) use of her body.

The above position adopts a *prima facie* view of rights.<sup>332</sup> *Prima facie* views will be discussed at length in 6.2.6. In essence, *prima facie* views accept that rights are high priority (but not absolute) norms and, in conflict cases, it can be morally permissible to violate a right. In order for a rights violation to be morally permissible, we had best have strong, compelling reasons to violate the right. In the above examples, it is morally permissible to violate the foetus' right (in abortion cases) because the scope of the foetus' right to life does not extend to the continued use of the mother's body. This is a sensible view as it ensures that the scope of the right to life is not overly demanding. I am able to accept the above solution because I accept that human rights are high priority norms, rather than absolute rights (1.2). I consequently accept that there can be circumstances in which a right can justifiably be violated, as in the above abortion case.

In the next section (6.2.6) I will suggest another way of resolving rights conflicts based on priority setting. I will not discuss this view here, but it is worth noting that this view

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correct blood type to help him. You are kidnapped and plugged into the violinist. When you wake you are told that you must stay connected to him for 9 months or he will die. Thomson concludes that the violinist has no valid claim right against you, and you do nothing wrong if you unplug yourself and let him die (48-53).

In the Henry Fonda case, you have a life-threatening disease that, for some reason, can only be cured if Henry Fonda touches your forehead (55). Thomson again argues that you have no valid claim right against Henry Fonda, and he does not wrong you if he does not touch you and so let's you die (ibid).

<sup>332</sup> For a good, lucid discussion of *prima facie* rights see Rice (2003: 540-543). *Prima facie* rights are also discussed throughout 6.2.6.

can also accept that there can be conflicts between the mother and the foetus. There will be ways of resolving these conflicts, and these resolutions will typically also allow for the moral permissibility of late-stage abortion. Consequently, I maintain that, even if we allow for late-stage foetuses to be persons with human rights, this is not a problem for my account as it *does not* have the potentially morally problematic implication that abortion is impermissible.

### **6.2.6 Rights-rights conflicts**

This section will address the concern that my account cannot adequately deal with rights-rights conflicts (hereafter simply ‘rights conflicts’). I begin by explaining what rights conflicts are. I then outline a standard way of responding to these conflicts: weighting or priority setting. Human rights accounts that use priority setting accept that human rights can be weighted, and so one human right (e.g. to life) can outweigh another (e.g. to liberty) in conflict cases. I explain how priority setting views typically use a single variable to weight rights. For example, on James Griffin’s (2008: 68-70) view, if right A protects personhood (read normative agency) to a greater extent than right B, then right A should be favoured in a conflict case. Because my account is complex and uses many different variables (agency, the satisfaction of basic needs, the good life) to ground human rights, my opponent may worry that it is unclear how to weight rights (and so deal with rights conflicts) on my account. In response, I argue that, in spite of the complexity of my account, it is possible to develop a clear, workable response to rights conflicts. To do this, I provide both a theory and a method for dealing with rights conflicts.

Suppose that we have two rights-holders: Alex and Robin. As Frances Kamm (2001: 239-255) explains, there are three main ways in which their rights can conflict.<sup>333</sup> First, a negative right can conflict with another negative right.<sup>334</sup> For example, suppose that a duty to not invade Alex's privacy conflicts with a duty to not restrict Robin's freedom of speech. Second, there can be conflicts between a positive right and a negative right.<sup>335</sup> For example, imagine that a duty to provide Alex with healthcare (a positive right) conflicts with a duty to not kill Robin (a negative right). Finally, there can be conflicts between two positive rights. For example, a duty to provide Alex with education could conflict with a duty to also provide Robin with education.

Kamm (*ibid*) argues that, within the above categories, we can make two further distinctions. First, there can be conflicts between the same rights. For example, Alex's right to life can conflict with Robin's right to life. Second, there can be conflicts between different rights. For example, Alex's right to freedom of speech can conflict with Robin's right to life. For instance, if Alex uses her freedom of speech to incite violence or make death threats towards Robin. As a subcategory of the above second distinction, I would also include conflicts between rights that are different but connected. For example, Alex's right to life versus Robin's right to medical care. These rights are connected because one can need medical care in order to stay alive. Consequently, in at least some versions of

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<sup>333</sup> Kamm's taxonomy of rights conflicts is presented from an interest theory perspective. I am assuming that her taxonomy can be used and understood, even if one does not accept an interest theory of rights (as I do not, see footnote 43, chapter 1). Preda (2015: 681) has also argued that Kamm's taxonomy can be applied outside of interest theories.

<sup>334</sup> The idea that negative rights can conflict is rejected by Montague (2001: 259), and Preda (2015: 681-683). I do not agree that negative rights cannot conflict, and so I will be accepting Kamm's taxonomy.

<sup>335</sup> Preda (2015: 683-685) argues that there cannot be conflicts between positive and negative rights. Again, I do not agree that these rights cannot conflict, and so I will be accepting Kamm's taxonomy.

this conflict, the outcome will be the same – the person whose rights are violated will die.<sup>336</sup>

On most human rights accounts, these conflicts take place between two (or more) standard adult humans, as it is typically only standard adult humans who are viewed as rights-holders for human rights (chapter 3). My account (chapter 5) adds an additional dimension to rights conflicts by introducing new and interesting conflicts at the level of the rights-holder. As explained throughout the thesis, I accept that a variety of subjects can be persons with human rights. On my account, the class of rights-holders includes standard adult humans, marginal humans, and nonhuman marginal cases. Each of these different rights-holders can be in a rights conflict with any other rights-holder. This generates the following potential rights conflicts, on my account:

Standard adult human versus another standard adult human.

Standard adult human versus a human marginal case (e.g. a child).

Standard adult human versus a biological nonhuman marginal case (e.g. a nonhuman animal).

Standard adult human versus a non-biological nonhuman marginal case (e.g. a robot).

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<sup>336</sup> This may be an important consideration if we take account of compensation requirements for rights violations. Preda (2015: 686-689), Rice (2003: 550-555), and Wellman (1995: 284-295) all argue that we can determine what to do in a conflict case by looking at what reparations (if any) we would have to make to individuals whose rights had been violated. For example, if someone's property is destroyed (thus violating their right to own property), we might suppose that they have a valid claim to be compensated for the loss of property. They all accept that, in conflict cases, we typically ought to violate whichever right would require the *least* amount of compensation. As some outcomes (such as loss of life) cannot be compensated, Preda (2015: 687) explicitly states that we ought to always do whatever would avoid the loss of life. However, in the scenario above (life versus medical care), two different conflicting rights would both lead to loss of life and so, on compensation accounts, it would be unclear what to do in this conflict case.

Human marginal case (e.g. a child) versus another human marginal case (e.g. another child).

Human marginal case (e.g. a child) versus a biological nonhuman marginal case (e.g. a nonhuman animal).

Human marginal case (e.g. a child) versus a non-biological nonhuman marginal case (e.g. a robot).

Biological nonhuman marginal case (e.g. a nonhuman animal) versus another biological nonhuman marginal case (e.g. another nonhuman animal).

Non-biological nonhuman marginal case (e.g. a robot) versus another non-biological nonhuman marginal case (e.g. another robot).

The upshot of the above is that, whilst any human rights account will have to address rights conflicts, my account will have to address *many more* types of conflict than standard views. As a result, I will need to do more work to resolve rights conflicts, and there will also be many more ways in which my resolution (described below) could fail. With this in mind, it is important to emphasise that I will not attempt to address each of the above conflicts individually. That would take an entire thesis. Instead, I will provide a ‘general recipe’ that can be used to think about each kind of conflict case. In order to provide this ‘general recipe’, it is helpful to look at existing responses to rights conflicts.

#### Existing responses to rights conflicts

The most extreme response to rights conflicts would be to deny that there are genuine rights conflicts. This view follows if we accept that rights are absolute. If rights are absolute, then they belong at the overall level of explanation. As Jonathan Dancy (2004: 18) explains, if a moral concept (like a right) exists at the overall level of explanation, then this means that "... it expresses a command, maybe, it has a compelling quality, it has 'obligatory force' in some sense or other, it feels like an order and directs us to do this rather than that". Another way of expressing this sentiment is that rights correspond to absolute duties in W.D. Ross's (2002: 28-30) sense. If rights are understood in this way, then if someone (Lucy) has a right, this provides others with final, non-negotiable reasons to act. We must either give Lucy something (if she has a positive right) or refrain from doing something to Lucy (if she has a negative right). Importantly, on this view, it is *never* permissible to violate Lucy's rights. And the same consideration applies to *all other rights-holders*. A consequence of this view is that there cannot be rights conflicts. Suppose that there *appears* to be a conflict between Lucy's right to life and James' right to healthcare. On the above view, this causes a moral dilemma. If it is *never* permissible to violate either Lucy's or James' rights, then any course of action would be wrong. The only way out of the dilemma would be to argue that either Lucy's or James' right was not a right in the first place. This removes the conflict as we only have absolute duties towards genuine rights-holders.<sup>337</sup>

The above is an extreme view, and most of us would accept the opposite idea – that there are genuine rights conflicts. On this view, we accept (i) both Lucy and James have valid

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<sup>337</sup> As Eddy (2006: 342) explains, defenders of this view would need to "construct a 'compossible' set of rights, where conflicts of rights are ruled out by definition." Examples of attempts to create a compossible set of rights include Christmas (2019), and Steiner (1977).



rights claims, (ii) their rights conflict, in the sense that both cannot be realised at the same time, and (iii) there is some way to resolve this conflict. Typically, we would say that we can resolve the conflict if there is some morally permissible reason for favouring one right over the other. We can do this if we accept that rights are not absolute, and can be of different weightings. If rights are not absolute, then they belong at the contributory level of explanation. As Jonathan Dancy (2004: 18) explains, if a moral concept (like a right) exists at the contributory level of explanation, then it gives us strong reasons to act, but these reasons are not undefeatable. Another way of saying this is that rights are *prima facie* duties in W.D. Ross's (2002: 19-28) sense.<sup>338</sup> On this view, rights are high priority (but not absolute) norms. Other things being equal, we ought to respect (and safeguard) people's rights. However, in extreme circumstances (like conflict cases), it can be morally permissible to violate someone's rights. In order for this rights violation to be morally permissible, there had best be very strong, compelling reasons to violate their right. For example, in the above scenario, we might suppose that it is permissible to violate James' right to healthcare as he will only be unwell if his right is violated, whereas Lucy will die if her right to life is violated. As I have previously stated that human rights are high priority (but not absolute) norms (1.2), I will be adopting the above position. Consequently, I will be accepting that there are genuine rights conflicts, and that different rights have different weightings. I will also accept that, to resolve rights conflicts, we

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<sup>338</sup> Ross (2002: 20) defines *prima facie* duties as follows: "...a *prima facie* duty, which is more or less incumbent on me according to the circumstances of the case. When I am in a situation, as perhaps I always am, in which one or more of these *prima facie* duties is incumbent on me, what I have to do is to study the situation as fully as I can until I form the considered opinion (it is never more) that in the circumstances one of them is more incumbent than any other." *Prima facie* duties are thus conditional and can conflict.

need to determine which right is stronger and so ought to be prioritised. This will be the focus of the rest of this section.<sup>339</sup>

### Priority Setting<sup>340</sup>

James Griffin (2008: 68-70) argues that we can determine which right ought to be prioritised in a conflict case by considering the justification or ground for these rights. As explained in chapter 3, Griffin takes human rights to be grounded in personhood (normative agency). To recap, Griffin argues that, in order to be a normative agent, one needs autonomy, minimum provisions, and liberty, and so these are the things that human rights are meant to protect.<sup>341</sup> On his view, it is thus the protection of personhood (in the form of normative agency) that is so morally valuable that it grounds human rights. In relation to rights conflicts, Griffin argues that right A can be prioritised if it protects personhood (normative agency) to a *greater extent* than right B. He explains this using the following example: “Saving the lives of twenty or thirty innocent bystanders is more protective of personhood than detaining a handful of innocent suspects for six months is destructive of it” (Griffin 2008: 69). In other words, the right to life is weightier in this

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<sup>339</sup> I am aware that there are other prominent solutions to rights conflicts. For example, one may expect to see a discussion of Waldron’s (1989) ‘Rights in conflict’, which is widely-cited in the literature. Or more discussion of Kamm’s (2001) account. Or some discussion of specificationism, whereby “rights-principles refer to conditions that are sufficient for individuals to possess rights in particular cases” (Montague 2001: 273). Specificationism is perhaps most well-defended by Wellman (1995). Whilst I acknowledge that these discussions of rights conflicts are important, I have not discussed them here because they typically either presuppose an interest theory or will theory of rights. As my personhood account (chapter 5) does not presuppose either an interest or will theory, I have intentionally not discussed accounts which do presuppose these theories. For a summary of will and interest theories, and an explanation of why I will not discuss them in this thesis, see footnote 43, chapter 1.

<sup>340</sup> For a good, general discussion of ‘setting priority rules’ see Eddy (2006: 342-356). Philips (2014) also discusses ‘setting priority principles’, though they ultimately reject priority approaches.

<sup>341</sup> Griffin’s account, and the conditions for normative agency, are explained in depth in 3.1. In essence, ‘autonomy’ refers to the subject’s ability to “...choose one’s own path through life” (Griffin 2008: 33). ‘Minimum provisions’ refers to the resources and capabilities that the subject needs in order to act on their choice. And the ‘liberty’ condition requires that the subject be free to pursue their choice; others must not interfere (ibid).

case than the right to not be detained. This is because the right to life protects personhood to a greater extent, given that if Anna loses her life, she cannot be a person (normative agent) in any way. Conversely, if Gary is detained for six months, he can still be a person (normative agent) in important ways. He will have *less* autonomy, minimum provisions, and liberty than normal, but he can still have (minimum) amounts of all of these things, and so still meet the conditions for normative agency (personhood).

Like Griffin, I too want to use personhood to develop a priority setting view.<sup>342</sup> There are, however, important differences between Griffin's approach and mine. On Griffin's account, there is one single ground for personhood (normative agency), and so only one variable that we need to consider when developing a priority setting view – to what extent would normative agency be affected by the violation of a right? Griffin's view is thus admirably simple, streamlined, and easy to apply.<sup>343</sup> My priority setting view will necessarily be more complex than Griffin's as, because my account of personhood is multi-faceted (see chapter 5), there are many factors that we need to account for when weighting rights. Below, I outline four key factors.

First, there are a variety of different rights-holders on my account. When we are weighting rights, we must ensure that each type of rights-holder has a fair chance of winning a rights conflict. Something will have gone wrong if a standard adult human *always* wins a rights conflict against a marginal case (see 6.2.1 and 6.2.2). Similarly, there will also be issues

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<sup>342</sup> For a discussion of why I think this is the correct approach to take, see the 'my theory for resolving rights conflicts' section, below.

<sup>343</sup> Whilst I agree (in principle) with Griffin's solution to rights conflicts (prioritising whichever right protects personhood to the greatest extent), I reject Griffin's account of personhood. I have extensively discussed the problems with Griffin's threshold for personhood (normative agency) in 3.4.

if my priority setting view generates counterintuitive outcomes, for example, that we ought to prioritise a chicken's right to life over a human child's right to life.

Second, on my account, personhood is multi-faceted. In 5.3 I argued that *x* is a person if they have certain important properties that help them to be agents, or to satisfy their basic needs, or to have a good life. I thus claim that a right protects personhood if it protects the subject's ability to be an agent, *or* to satisfy their basic needs, *or* to have a good life. Right A will be weightier than right B (and ought to be prioritised) if it protects these things to a greater extent. My view thus has three moving parts (agency, basic needs, and the good life) to Griffin's one (normative agency).

Third, my account acknowledges the importance of vulnerability (5.5). I accept that some rights-holders are particularly vulnerable, and so warrant extra or stronger protections than non-vulnerable rights-holders. For example, we might suppose that a child is vulnerable in this way, whilst a standard adult human is not. It is important that we take account of vulnerability when weighting rights. This does not necessarily mean that vulnerable subjects will *always* win in rights conflicts. It simply means that we will need particularly strong reasons to violate the rights of vulnerable subjects.

Finally, in 5.5 I accepted that rights-holders can have *some* human rights and lack others, depending on which personhood properties they have, and what standard threats apply to them. This generates a potential practical worry for my priority setting view. Suppose that we have a conflict between a standard adult human (who has all human rights) and a nonhuman animal (who has some human rights). For the standard adult human, a right protects *some* agency, basic needs, or aspect of the good life. If the right is violated, the

standard adult human will typically only lose a small amount of agency, basic needs, or the good life. In contrast, it seems like rights make a big difference to the nonhuman animal. Their few rights protect most (if not all) of their agency, basic needs, or good life. If their right is violated, the nonhuman animal will typically lose a lot of agency, basic needs, or good life. An upshot of this is that the rights of the nonhuman animal seem to protect their personhood *to a greater extent* than the rights of the standard adult human. On my priority setting view (the protection of personhood), this seems to entail that the rights of the nonhuman animal should always be prioritised in a conflict case. This could be seen as impractical and overdemanding. My priority setting view will need to avoid this practical worry by explaining why we do not *always* prioritise the rights of nonhuman animals (and/or other marginal cases).

Above, I have listed four features that make my account more complex and multi-faceted than other personhood accounts (chapters 2-4). This complexity makes it difficult to develop a priority setting view as, on my account, we cannot do a simple weighting evaluation to determine which right ought to be prioritised in a conflict case. Below, I will outline both a theory and a method for resolving rights conflicts. Whilst my response is less simple than other priority setting views (like Griffin's), it is not so complex as to be unworkable.

#### My theory for resolving rights conflicts

My priority setting view accepts that the correct response to rights conflicts is to prioritise whichever right protects personhood to the greatest extent. This focus on protecting personhood follows from the arguments presented throughout this thesis, which began by

accepting that personhood is a particularly important moral concept (2.2). As explained above, I am also accepting that rights correspond to *prima facie* duties and so, in order for a rights violation to be morally permissible, there had best be very strong, compelling reasons to violate the right. I take it that the protection of personhood can provide this strong, compelling reason. As personhood is so morally important, we ought to prioritise whichever right protects personhood to the greatest extent in a conflict case.

On my account, personhood is multi-faceted, and so there are many variables that we need to consider when determining which right protects personhood to the greatest extent. To reiterate, in 5.3 I argued that x is a person if they have certain important properties that help them to be agents, to satisfy their basic needs, and/or to have a good life. A right furthermore protects personhood if it creates moral protections around the subject's abilities to be an agent, to satisfy their basic needs, and/or to have a good life. Right A will thus be weightier than right B (and ought to be prioritised) if it morally protects these things to a greater extent. Right A is weightier and protects these things to a greater extent when the violation of right A would present a greater threat to some subject's ability to be an agent, to satisfy their basic needs, and/or to have a good life than the violation of right B does to anyone's similar abilities.

As outlined above, I accept that there will always be a fact of the matter as to which right protects personhood to the greatest extent, and so ought to be prioritised, in a conflict case. However, I concede that some conflict cases will be easier to resolve than others. To see this, let us consider four example cases. In cases 1 and 2 it will be easy to see why one right is weightier than the other (in the sense outlined above). In cases 3 and 4 it will

be more difficult to determine which right protects personhood to the greatest extent. I will explain how my priority setting view works in all four cases.

### Easy Cases

Conflict Case 1. Suppose that we have two rights-holders, Ed and Gina.<sup>344</sup> Their rights are in conflict, in the sense that both rights cannot be realised at the same time. Gina's right protects her ability to be an agent, to satisfy her basic needs, and to have a good life, and it protects these abilities to a great extent. Ed's right also protects these three abilities, but only does so to a low extent. On my account, it is clear that Gina's right ought to be prioritised. This is because Gina's right protects personhood to a greater extent than Ed's right does.<sup>345</sup>

Conflict Case 2. Ed and Gina both have rights that protect their ability to have a good life, and their rights both protect this ability to the same extent. However, their respective rights protect their abilities to be agents and to satisfy their basic needs to different extents. Gina's right protects these two abilities to a great extent; Ed's right protects these two abilities to a low extent. On my account, it is again clear that Gina's right ought to be prioritised. This is because, on balance, Gina's right protects personhood to a greater extent than Ed's right does.

The above examples are easy cases because, other things being equal, it is easy to see how Gina's right protects personhood to a greater extent than Ed's right does. In the above

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<sup>344</sup> For the purposes of this discussion, I am making no claim as to what sort of entities Ed and Gina are. They could be human, nonhuman animals, robots, etc.

<sup>345</sup> This example (and the others discussed in this theory section) may seem abstract. In the method section, below, I will explain these cases further using named rights.

cases, Gina's right *always* protects at least one ability (agency, the satisfaction of basic needs, or the good life) *more* than Ed's right does, and further, Gina's right *never* protects any other abilities (agency, the satisfaction of basic needs, or the good life) *less* than Ed's right does.

Another way of understanding this is in terms of Pareto improvements.<sup>346</sup> In the social sciences, a Pareto improvement refers to a state of affairs in which some change will make at least one person better off, and will not make anyone else worse off. For example, suppose that we have three people: Melissa, Robert, and Jacob. Some policy change will make Melissa richer, without making either Robert or Jacob worse off. This policy is a Pareto improvement.

Our response to the easy cases has a similar structure to Pareto improvements, but instead of looking at three people, we are looking at three abilities (agency, the satisfaction of basic needs, and the good life), and the way the relevant rights protect them. In the easy cases, we choose whatever action (i.e. prioritising right A or right B) would protect at least one of these abilities more, and not protect the remaining abilities any less than the other competing action. This is what happens with Gina's rights in the above examples. We can thus use a modified understanding of Pareto improvements to offer a general principle for resolving easy conflict cases, on my account.

### Difficult Cases

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<sup>346</sup> Pareto improvements are part of a wider theory of Pareto-optimality or Pareto-efficiency. For a concise discussion of this wider theory, see Ingham (n.d.).



Conflict Case 3. Gina's right protects her ability to be an agent, to satisfy her basic needs, and to have a good life, and it protects these abilities to a great extent. Ed's right protects his ability to be an agent, to satisfy his basic needs, and to have a good life, and it also protects these abilities to a great extent. In this case, it is not obvious who ought to win the rights conflict, as both rights protect personhood to the same extent.

Conflict Case 4. Gina's right protects her ability to satisfy her basic needs, and it protects this to a great extent. Ed's right protects his ability to have a good life, and it protects this to a great extent. As both Ed's and Gina's rights protect their personhood to a great extent (but for different reasons), it is again not obvious whose right ought to be prioritised.

The above examples are difficult cases because there is no simple principle that we can use to resolve them. In the easy cases, I argued that we should prioritise whichever right protects at least one ability (agency, the satisfaction of basic needs, and/or the good life) more than the competing right, and which does not protect the other abilities less than the competing right. We cannot apply this principle to the difficult cases. This is because, in the difficult cases, *neither* right protects at least one ability more than the competing right, whilst also not protecting the other abilities less than the competing right.

As mentioned previously, I assume that there *is* a fact of the matter as to which right ought to be prioritised in conflict cases. In the above difficult cases, it is admittedly hard to determine what this fact of the matter will be. At the end of the day, I suggest that, in difficult cases, we must rely on our intuitive moral judgements. I will explain how we can do this using wide reflective equilibrium.<sup>347</sup> In its simplest form, wide reflective

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<sup>347</sup> There is also narrow reflective equilibrium, which is where we seek coherence between moral judgements and the underlying principles for this judgement. I am focusing on wide reflective equilibrium

equilibrium is a method of reasoning or justification whereby we attempt to achieve coherence between our moral judgements, the moral principles that underlie these judgements, and relevant background theories. There are typically three stages involved in using wide reflective equilibrium. I briefly discuss each stage below.

First, we take our intuitive moral judgements about concrete ethical problems. For example, suppose that case 3 (above) is a conflict between Gina's right to life and Ed's right to liberty. Both rights are typically viewed as important rights that require very strong reasons to violate, and so our ethical problem is how to deal with this difficult conflict. Let us also suppose that our intuitive moral judgement about this case is that Gina's right to life ought to be prioritised. This is because, on balance, here the protection of life typically seems to be more important than the protection of liberty.<sup>348</sup>

The second stage of wide reflective equilibrium is the formulation of moral principles. For our purposes, these moral principles are the mechanics of my human rights theory. On my account, there are general principles about: i) what agency, basic needs, and the good life are (5.3), ii) what properties different entities have that are conducive to them having agency, satisfying their basic needs, and having a good life (5.2, 5.3), and iii) what

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as it is wide reflective equilibrium that is standardly used in ethics. For discussions of (wide) reflective equilibrium, see Arras (2009), Baderin (2017), Daniels (2018), Nichols (2012), Rawls (1999), and Scanlon (2014: 70-104).

<sup>348</sup> We could make similar claims about case 4. In case 4, Gina's right protects her ability to satisfy her basic needs, whilst Ed's right protects his ability to have a good life. Other things being equal, we may intuitively judge that Gina's right ought to be prioritised. This is because, on balance, Gina would seem to lose more if her basic needs are not met, than Ed would lose by being unable to have some feature of the good life.

Here, it is important to reiterate that we do not get a general principle for resolving rights conflicts in the difficult cases. The upshot of this is that there may be some cases where the right that protects the ability to have a good life is, in fact, more important. We can make the same point about the other difficult conflicts under discussion. In the difficult cases, which right is prioritised will be determined by wide reflective equilibrium (which can allow any right to win a conflict) rather than general principles (which would imply that some right (e.g. those that protect basic needs) ought to *always* be prioritised).

types of threats there are (5.5). I also discuss iv) how much these threats prevent a subject from being an agent, satisfying their basic needs, and having a good life (5.5, 6.2.6), and v) how, and to what extent, human rights protect against these threats (5.5, 5.6, 6.2.6). Given these principles, my view will generate solutions to difficult conflict cases (discussed further below).

Finally, we assess the fit between our moral judgements, moral principles, and relevant background theories. On my account, we do this by assessing whether there is a conflict between our intuitive moral judgements and the mechanics of my theory. When we have a good fit, we get an answer to difficult conflict cases. For example, reconsider the intuitive judgement that Gina's right to life ought to be prioritised over Ed's right to liberty. This intuitive judgement is compatible with my theory. Recall that in conflict cases my theory proposes that we prioritise whichever right protects personhood to the greatest extent, and we assess this by looking at how much each right protects three abilities (agency, the satisfaction of basic needs, and the good life). It seems clear that Gina's right greatly protects these three abilities as, if Gina's right to life is violated, she cannot be an agent, satisfy her basic needs, or have a good life. Conversely, Ed can still be an agent, satisfy his basic needs, and have a good life (to some extent) if his right to liberty is violated. Consequently, although both Ed's and Gina's rights protect their personhood to a great extent, Gina's right actually protects personhood to an unbeatably great extent.<sup>349</sup>

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<sup>349</sup> I have used the rights to life and to liberty as an example here. One may object that this is an unfair pairing as the right to life will obviously always win in this example. I accept this criticism, but maintain that life versus liberty is a helpful example as it can easily demonstrate the point that I am trying to make – that we may intuitively view one right as more important than another. We could make the same point with other rights pairings. For example, suppose that Gina's right is to privacy, whilst Ed's right is to liberty. Again, both rights protect personhood to a great extent. In this new case, we might suppose that it is Ed's right that is intuitively more important. And so on with other rights.

In other cases, there may be a bad fit between our intuitive moral judgements and the mechanics of my theory. For example, let us again consider conflict case 3 (above), but this time imagine that it is a conflict between Gina's right to life and Ed's right to life. Suppose also that Gina is a cat and Ed is a human child. For most of us, our intuitive moral judgement would be that Ed's right to life ought to be prioritised. There will be a bad fit if my theory concludes the opposite – that Gina's right to life ought to be prioritised. In such cases, reflective equilibrium would require that we either reformulate our moral principles (by revising my theories of the personhood properties and human rights that Ed and Gina respectively have), or revise our moral judgements (by conceding that there can be cases where Gina's right to life ought to be prioritised). This seems like a sensible approach to take in the difficult conflict cases, and I will discuss this further in the methods section below.

#### My method for resolving rights conflicts

Above, I argued that we ought to resolve rights conflicts by prioritising whichever right protects personhood to the greatest extent. I explained how, in theory, it is possible to do this. Below, I will consider how we can apply this theory to real-life conflicts. To do this, I will outline my method for resolving rights conflicts.

As discussed below, my method for resolving rights conflicts proceeds in three stages: (i) the creation of personas, (ii) the weighting of rights, and (iii) the creation of a database of conflict resolutions. In essence, my method works by determining the correct responses to hypothetical conflict cases, and then using these hypothetical cases to inform how we ought to deal with actual conflict cases. In this respect, my method could be understood

as a hypothetical way of doing case law. One aspect of case law is precedent setting, whereby a decision made in one case sets a precedent for how similar cases should be dealt with. I view my method as almost parallel to precedent setting in case law, except I will be using hypothetical cases (personas) rather than real cases to set a precedent. I consider it a benefit of my approach that it has these parallels with case law, as this similarity entails that my method for resolving rights conflicts is realistic and practical, despite its hypothetical nature.

### Stage 1: The creation of personas

As I have explained throughout this section, rights conflicts are complex on my account. I accept that many different entities can be persons (and rights-holders), and that each person is different in terms of the personhood properties, vulnerabilities, and rights that they have. In order to properly address rights conflicts on my account, we thus need some way of quickly accessing and assessing this important contextual information. To do this, I propose that we create a database of personas.

‘Personas’ are a conceptual device that are used in fields as diverse as software development and education.<sup>350</sup> In essence, a persona is a fictional yet realistic description of an end user (e.g. a consumer or student) which lists the key properties of the imagined persona. The properties that are emphasised can vary depending on the context in which the persona is used. For example, a persona used in marketing might emphasise an imagined person’s purchasing history, credit score, hobbies and interests, etc.

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<sup>350</sup> For discussions of the use of personas in software development see Cooper (2004), Grudin and Pruitt (2002), and Nielsen (2013; n.d.). For the use of personas in education see Cameron Jones, Floyd, and Twidale (2008), The Open University (2019), and Yström, Peterson, von Sydow, and Malmqvist (2010).

Personas are typically used to identify, pre-empt, and respond to problems that could occur with an end product. For example, in education, a persona might be used to ensure that modules (the end product) are suitably inclusive. To do this, a lecturer might develop a series of personas for students with different educational needs, socioeconomic backgrounds, and skillsets in order to check whether the proposed module will meet these learners' needs. Importantly, personas can be continuously modified and updated. For example, once a lecturer knows which students are taking their course, they can modify their existing personas to reflect the backgrounds and capabilities of their actual students.

In order to be useful, personas typically feature a name, a picture, a brief profile, and a summary of key characteristics and vulnerabilities. A helpful analogy here is a *Top Trumps* card. In the game *Top Trumps*, each card presents a concise character profile and a list of vital statistics, which players use to determine which card 'trumps' the others. Personas are akin to these cards in the sense that, once a persona has been created, we can use it to gain a snapshot of a person's important properties, vulnerabilities, etc. As I will argue below, I also take it that, in a similar vein to *Top Trumps*, we can use personas to determine which person (or, more specifically, which person's right) 'trumps' another in a conflict case.

In terms of my priority setting view, I propose that we create a database of personas for all of our different types of person (standard adult humans, nonhuman animals, robots, etc.). There should be multiple personas for each type of person (e.g. subjects with dementia), in order to reflect the differences (in capabilities and background) that affect different persons from the same person-type (e.g. different subjects with dementia). For instance, drawing on the arguments of 6.1.1, the use of personas would allow us to quickly

see how Jean, who has frontotemporal dementia, is very different to Peter, who has dementia with Lewy bodies.

In order to get a complete, useful picture of each person, our personas should contain the following information: name, age, type of person, brief profile, personhood (in terms of agency, basic needs, and the good life; and in terms of underlying personhood properties (psychological, social, emotional, physical, and phenomenal)), vulnerabilities, and rights. The actual personas that we create would be precise and detailed. For the purposes of demonstration, I have created some very simplified versions below:

**Persona 1: Jean.** Jean is 87 and has frontotemporal dementia. She has no relatives and has been in a care home for the last decade. Her dementia causes confusion, psychosis, obsessions, changes in behaviour and beliefs, and a lack of inhibition. Whilst Jean's dementia affects her psychological and emotional capacities, it does not affect her social, physical, or phenomenal capacities. She has many close friends at the care home, and her movement and senses are unaffected by her dementia. Jean's carers claim that her confusion and unstable beliefs prevent her from being able to understand and make autonomous choices. Whilst Jean may have a diminished capacity for agency, she can (typically) satisfy her basic needs and have a good life. Jean retains most of her human rights, except for those that require her to make rational choices (e.g. to marry, to vote, etc.). Because Jean is not viewed as capable to make her own decisions (by her carers), she is particularly vulnerable to having her needs and interests ignored.

**Persona 2: Don.** Don is 35 and is a standard adult human. He is unmarried and works in sales. He has a standard range of psychological, emotional, social, physical, and

phenomenal properties. He is an agent, he can satisfy his basic needs, and he can have a good life. He has the full range of human rights. He is not vulnerable, in any context.

**Persona 3: Winnie.** Winnie is a 4-year-old elephant. She lives in a wildlife reserve in Africa. Winnie is intelligent, and has at least low-level psychological and emotional capacities. She is part of a herd and popular with the reserve rangers, and has strong social capacities. She has physical and phenomenal properties that allow her to feel things (like pain, etc.). Winnie has some degree of agency, can satisfy some of her basic needs, and can have some form of good life. She has at least basic rights (to life, against torture, etc.). She is vulnerable to poaching, hunting, etc.

**Persona 4: Lara.** Lara is an autonomous social robot with a humanoid appearance. Via a combination of artificial intelligence and machine learning, Lara has autonomy and can make her own decisions. She has high-level reasoning and decision-making abilities and can be supposed to have a ‘mind’ of her own. She has also developed some emotions (primarily robot-fear and robot-happiness), and has been upgraded with special sensors that allow her to feel things (like pain, heat, etc.). Given the above, Lara has (at least robot-like) agency, morally relevant basic needs, and a minimally good life, to some degree.<sup>351</sup> She has at least basic rights (against destruction, against torture, etc.). She is particularly vulnerable to (i) electrical malfunctions, and (ii) having her needs and interests ignored by humans (who dismiss her as an irrelevant object).

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<sup>351</sup> I previously argued that ‘agency’, ‘morally relevant basic needs’ and ‘minimally good life’ are not problematically human-centric terms (6.2.1). I accept that there could be robot agency, robot basic needs, etc.



There are three main benefits of using personas. First, they allow us to make conflict cases less abstract. Personas enable us to give each rights-holder a name, background, abilities, etc., and this allows us to have a sense of emotional investment in each rights-holder, rather than simply seeing them as a variable in a conflict case.<sup>352</sup> Similarly, by outlining the properties that each individual rights-holder has, and the contextual factors that apply to them, we can treat each rights-holder as a concrete individual, rather than a stereotype. This will help to prevent us from making sweeping generalisations, for example, that no nonhuman animals are intelligent, or that all subjects with dementia have memory problems.

A second benefit of personas is that they are not static; they are always a work-in-progress.<sup>353</sup> Take Winnie (persona 3). We do not need to know all of the properties that African elephants have in order to create a persona for Winnie. We begin with the properties that she uncontroversially has (like the capacity to feel pain). We then develop Winnie's persona, and make it more nuanced, as we learn more about her and her capacities. The persona develops as our understanding develops. Note that in order to fully understand Winnie (and our other personas), we will need to draw on information from different disciplines. For example, to assess what capacities and abilities Winnie could have, we will need the expertise of philosophers, psychologists, biologists, behavioural scientists, animal rights activists, etc. To create accurate and workable

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<sup>352</sup> Contrast this with Griffin's aforementioned claim: "Saving the lives of twenty or thirty innocent bystanders is more protective of personhood than detaining a handful of innocent suspects for six months is destructive of it" (Griffin 2008: 69). Here, the rights-holders are nameless numbered variables (20-30 innocent bystanders; a handful of innocent suspects).

<sup>353</sup> The modifiable nature of personas will be particularly useful for robots (6.1.3) as we are currently only just beginning to investigate their capabilities, moral status, and rights.

personas, I thus suggest that the creation of our database of personas ought to be an interdisciplinary effort.

As with the use of personas in other fields (business, education, etc.), our personas can also be modified when we are in actual (rather than imagined) conflict cases. Personas are designed to be a tool/framework that we can use to improve our understanding of complex issues (in our case, rights conflicts). The personas are fictional (but realistic) place-markers that we are using to determine who *would* win in an *imagined* conflict case. In an actual conflict case, we use the personas as a guide (along with the database of conflict resolutions (stage 3, below)). For example, suppose that we have an *actual* conflict case involving a subject with frontotemporal dementia. On my method, we use ‘Persona 1: Jean’ as a touchstone and see how Jean has fared in various conflict cases (stage 3, below). If our actual subject with frontotemporal dementia has properties/rights that Jean lacks (or vice versa), we modify our response accordingly. Because we have already done the work with Jean, our response to the *actual* conflict case can be (relatively) quick and precise. I return to this point in the discussion of stage 3, below.

A final benefit of using personas is that a database of personas is easily sharable. It would be easy to create a centralised database that could be accessed and modified by researchers, lawyers, policy makers, etc. If used properly, a centralised database would always be up-to-date, and could be used across different disciplines, contexts, and countries. In stage 2 (below) I will argue that we should use this centralised database to test our intuitions about rights conflict cases. If we are all beginning with information

from the same centralised database, then it is more likely that we will be able to achieve the sort of consensus that we need to properly weight rights (stage 2, below).<sup>354</sup>

### Stage 2: Weighting rights

Once we have developed a database of personas, and so have all of the relevant contextual information in place, we can begin to imagine conflicts and determine how we ought to deal with these conflicts. As discussed in the theory section (above), I take it that the correct response to rights conflicts is to prioritise whichever right protects personhood to the greatest extent. I have already explained how to weight rights in this way in the theory section, and I will not repeat it again here. Instead, I will use two conflict cases from the theory section and apply them to our personas. This should be sufficient to give an example of how stage 2 of my method works.

Revised conflict case 1: An easy case. In the theory section, I explained conflict case 1 as follows. Suppose that we have two rights-holders, Ed and Gina. Their rights are in conflict, in the sense that both rights cannot be realised at the same time. Gina's right protects her ability to be an agent, to satisfy her basic needs, and to have a good life, and it protects these abilities to a great extent. Ed's right also protects these three abilities, but only does so to a low extent. On my account, it is clear that Gina's right ought to be prioritised. This is because Gina's right protects personhood to a greater extent than Ed's right does.

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<sup>354</sup> It is worth emphasising that the creation of a database of personas (as described above) could have wider benefits. A centralised database describing the capacities and rights of various entities (nonhuman animals, children, robots, etc.) could have wider applications to moral philosophy, practical/applied ethics, law, etc.

Let us reconsider this case using Persona 1: Don (our standard adult human), and either Persona 3: Winnie (our elephant) or Persona 4: Lara (our robot). Suppose that Don has a right to leisure and entertainment, and wants to use this right to torture either Winnie or Lara for fun.<sup>355</sup> Both Winnie and Lara can feel pain (to some extent) and both have a negative right to not be tortured. Our conflict is thus between Don's right to leisure, and Winnie's and Lara's rights to not be tortured. Drawing on my theory of rights conflicts, we can weigh their respective rights as follows. Don's right protects his ability to be an agent, to satisfy his basic needs, and to have a good life, to a minimal extent. Winnie's and Lara's rights protect their ability to be agents, to satisfy their basic needs, and to have a good life, to a great extent. According to my theory, Winnie's and Lara's rights ought to be prioritised because they protect personhood to the greatest extent.

Revised conflict case 3: A difficult case. In the theory section, I explained conflict case 3 as follows. Gina's right protects her ability to be an agent, to satisfy her basic needs, and to have a good life, and it protects these abilities to a great extent. Ed's right protects his ability to be an agent, to satisfy his basic needs, and to have a good life, and it also protects these abilities to a great extent. In this case, it is not obvious who ought to win the rights conflict, as both rights protect personhood to the same extent. I argued that, in this difficult case, we ought to use wide reflective equilibrium (explained above) to make a fitting intuitive moral judgement about the case.

Let us reconsider this case using Don (our standard adult human) and Winnie (our elephant). Suppose that we have a conflict between Don's right to life and Winnie's right

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<sup>355</sup> Let us suppose that Don thinks that Winnie and Lara are mere objects that can be used for his own entertainment.

to life. Both rights protect the subject's abilities to be agents, to satisfy their basic needs, and to have a good life, and both rights protect these three abilities to a great extent. As both rights seem to protect personhood to the same extent, it is not immediately obvious whose right ought to be prioritised.<sup>356</sup>

To resolve this conflict using wide reflective equilibrium, we would proceed in the three stages outlined in the theory section. First, we would take our intuitive moral judgements about the case. For example, we might intuitively suppose that Don's right ought to be prioritised. We may suppose this because we feel that Don will intuitively lose more upon his death than Winnie would lose upon her death, and so on. We then take our moral principles which, in our case, are the underlying mechanics of my theory (e.g. my principles on what morally relevant agency, basic needs, and good life are, etc.). Finally, we assess the fit between our intuitive moral judgements and the mechanics of my theory. We will have a good fit if my theory supports the supposition that Don's right ought to be prioritised. We will have a bad fit if my theory implies that we ought to prioritise Winnie's right. This could happen if my theory emphasises some feature that Winnie has that somehow strengthens her right claim. For example, suppose that, using the personas from stage 1, we learn that Winnie is particularly vulnerable (e.g. imagine that she is the last member of an endangered species of elephant). Given that we have previously suggested that vulnerability can strengthen a subject's rights claims (5.5), we may thus suppose that Winnie's right outweighs Don's, and ought to be prioritised, in this case. I take it as a positive feature of my priority setting view that it can account for changes in

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<sup>356</sup> This is true provided we do not fall back on humanism (2.1) and assume that Don's right ought to be prioritised simply because Don is human. On my non-humanist account, Don and Winnie are both persons, both have a human right to life, and both of their rights seem to protect their personhood to the same extent by protecting their abilities to be agents, to satisfy their basic needs, and to have a good life.

intuition in this way. Rights conflicts are controversial and typically high-stakes; it is important that we can continually check our responses to conflicts in order to ensure that they are fitting and contextually-sensitive.<sup>357</sup>

### Stage 3: A database of conflict resolutions

Stages 1 and 2 (above) have explained how to create a database of personas (stage 1), and weight rights in conflict cases (stage 2). Together, these stages tell us the relevant facts about the rights-holders (stage 1), and explain how these facts affect our intuitions about which rights-holders' right ought to be prioritised in a conflict case (stage 2). As the final stage of my method for resolving rights conflicts, I propose that we collate the information collected at stages 1 and 2 into a searchable database of conflict resolutions. It is useful to have such a database, given the sheer amount of conflicts that can occur on my account (see introduction of 6.2.6), and the many variables that need to be considered in order to resolve these conflicts (stages 1 and 2, above). It is unrealistic to suppose that, in cases of actual conflict, we would have either the time or the inclination to create personas (detailed profiles of the rights-holders), and test our intuitions about difficult conflict

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<sup>357</sup> One may respond that this approach may be helpful when considering a conflict between Don and Winnie, but what would happen if the conflict were between Don and Lara (our robot)? This conflict is potentially more difficult because, whilst we typically share intuitions about how to treat living entities (like Don and Winnie), there is less moral consensus about how to treat robotic lifeforms (like Lara). To address this, let us suppose that we do have a conflict between Don's right to life and Lara's right to life.

One response to this conflict would be to say that the above mischaracterises Lara's rights. If we take 'the right to life' literally then Lara, as a non-living being, cannot have this right. If we accept this supposition, then our conflict is very easy to resolve. Don's right to life ought to be prioritised because only Don actually has a right to life (and so there is, in fact, no conflict). Note that this moral judgement (Don's right ought to be prioritised) could change if our intuitions change. For example, as we learn more about Lara, we might suppose that she does, in fact, meet some sufficient condition for 'being alive'. If so, and if Lara is in some sense alive, then there is no longer a conceptual problem with saying that she has a right to life. Alternatively, we might suppose that Lara has some other rights that have a similar scope to a right to life (for example, she may have a negative right to not be destroyed). In either case (where Lara has a right to life or a right to not be destroyed), we ought to reassess our moral judgements in order to determine whether Don's right to life still ought to be prioritised.

cases using wide reflective equilibrium. I propose that we do this complex, time-consuming work early on, and then use my proposed database of conflict resolutions (stage 3) to help us develop well-thought-out answers to actual conflict cases.

My searchable database of conflict resolutions could be created as part of an *interdisciplinary* research project. I see this project proceeding in two research streams. Stream one involves creating the initial database of personas (stage 1, above). Stream two uses the database of personas, and wide reflective equilibrium (stage 2, above) to test intuitions about a variety of conflict cases. As many rights conflicts as possible should be considered at this stage. Once both of these research streams are established, a centralised online database would be created, which would house all of the work and findings of stages 1 and 2.

Via the centralised online database, search algorithms would allow users to input types of person and conflict scenarios, and get considered suggestions as to whose right ought to be prioritised, all things considered. This database would be helpful in actual conflict cases for three main reasons. First, the database would provide us with relevant information about a variety of conflict cases. Second, it would be a useful educational tool that can (i) increase our understanding of the personhood and rights of different types of entities, and (ii) help us to learn more about the intricacies of rights conflicts (including new types of rights conflict, such as those involving robots). Finally, it would help to ensure that we make consistent decisions in like cases (i.e. where there is a similarity between actual conflict cases and our hypothetical cases (our personas)).

For the above reasons, I posit that the centralised online database would *help* us to reach an initial decision as to whose right ought to be prioritised in a range of different conflict cases. Note that I am *not* claiming that we should use the online database to reach a *final* decision about how to resolve rights conflicts (e.g. by looking up a conflict and going with whatever resolution is suggested by the database). This would be too quick, and would not give us enough information about the *reasons* why some course of action (prioritising right A or right B) is right or wrong in a specific context. Instead, I am suggesting that we use the online database as an in-depth guide that can *help* us to ultimately resolve rights conflicts in ways that are considered, consistent, and fitting. Given all of the above, I thus claim that we have a viable and attractive theory and method for resolving *any* rights conflict on my account.

## **Conclusion**

This chapter has discussed the applications and implications of my account (chapter 5). I began by explaining how my account has useful applications to three exemplar marginal cases: subjects with dementia (6.1.1), nonhuman animals (6.1.2), and robots (6.1.3). On my account, each of these subjects has at least some personhood and some human rights. I explained how, if we accept my account, we can move forwards with the debates on marginal cases' personhood and rights, and focus on determining how we ought to treat the marginal cases. My account suggests that we ought to treat them much better than we currently do.

In 6.2 I then defended my account against potential objections. I argued that worries about arbitrary discrimination (6.2.1) and permissible mistreatment (6.2.2) do not apply to my account, and so can be removed as potential objections. I then suggested ways to solve



worries about overinclusion (6.2.3), underinclusion (6.2.4), problem cases (6.2.5), and rights conflicts (6.2.6). I end by claiming that my account has useful applications to the marginal cases, and can offer resolutions to serious problems that could be levelled against it. In this respect, my account is different to the standard views discussed in chapters 3 and 4 which, I have argued, do not have useful applications to a wide range of marginal cases, and cannot resolve key problems. For these reasons, I suggest that my account is preferable to these existing views and should be favoured over them.

## CONCLUSION

The aim of this thesis was to identify a viable solution to the problem of marginal cases. I sought a human rights account that could present a morally justifiable reason for either excluding marginal cases from having human rights *or* for including marginal cases and explaining what human rights they have. I have argued that none of the standard accounts discussed in this thesis present a defensible view of the marginal cases. They typically treat the marginal cases as an undifferentiated mass, and argue that they either have no human rights (chapter 3), or all of the same qualitatively identical basic rights (chapter 4). My new account (chapter 5) offers a more individuated approach, and allows for different marginal cases to have different human rights to one another, depending on the personhood properties and vulnerabilities that the marginal case has. I termed this the ‘Goldilocks Approach’ as it ensures that each marginal case has the human rights that are right for them.

The arguments defended in this thesis are important because they suggest that we need to revolutionise our thinking about personhood, human rights, and the marginal cases. In terms of personhood, we need to accept that there is no one way of being a person, and that personhood is not static and so can change across a lifetime. As explained in the section on subjects with dementia (6.1.1), my view of personhood has important applications for beginning-of-life and end-of-life care. This is because, if we abandon the conventional view that there is one static standard of personhood, we can acknowledge the intuitive idea that subjects can be persons in different ways. This allows us to say that infants and those with dementia are still (importantly) persons, even though their personhood is different to that of standard adult humans.

Second, my account argues that we should abandon the conventional and widely-accepted intuition that only human beings can be persons. As I demonstrated in 6.1, nonhuman animals and robots can pass my test for personhood, and so be persons with human rights. My account thus offers support for the extensive animal rights and fledgling robot rights movements. It is my contention that accounts that defend nonhuman personhood ought to be taken more seriously, and I hope to have offered a convincing argument for this throughout this thesis.

In terms of human rights, my account argues that we should stop viewing human rights as all-or-nothing. As I argued throughout chapters 5 and 6, a more sensible approach is to suggest that persons can have some human rights, and that what rights they have will be dependent upon what personhood properties they have, and what threats apply to them. This nuanced approach is particularly helpful for the marginal cases, as it allows us to accept the intuitive idea that marginal cases (like children and nonhuman animals) have fewer or different human rights to standard adult humans, and can also have different human rights to one another.

Finally, and perhaps most importantly, my account argues that we need to completely rethink how we view the marginal cases. At present, we tend to see most marginal cases as expendable and (morally) less important than a standard adult human (with the notable exception of children). This is particularly true of nonhuman marginal cases, like nonhuman animals and robots. I suspect that we have this view at least partly as a result of accepting the exclusionary binary view that marginal cases are not persons with human rights (chapter 3). On my account, this statement is no longer true. Marginal cases *are* persons with human rights. If we accept this, then we ought to radically revise how we

respond to the marginal cases. Simply put, we ought to treat them better. We must recognise what is owed to them in terms of human rights, and act accordingly.

My account thus has important and radical consequences – most (if not all) marginal cases are persons with human rights. This has huge moral and legal implications as it means that rights, obligations, and duties *currently* apply to marginal cases, and should be given real consideration. I began this thesis by arguing in favour of human rights as person rights. I end by arguing that such person rights *must* apply to all persons – human and nonhuman; marginal and nonmarginal.

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