

# Justice at the Margins

## *The Social Contract and the Challenge of Marginal Cases*

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### **1. Introduction: The Challenge of Marginal Cases**

Most of us believe that we may do things to animals that we may not do to fellow human beings. For example: owning them; having them spayed or neutered; or sometimes even eating them. In justifying our belief in the special moral status of human beings, we generally appeal to our unique rationality.<sup>1</sup> As a Kantian might put it, rationality deserves moral respect, and, as rational beings, humans may not be used as mere means to another's ends. There is surely something right about this, but the proposed justification faces a serious objection: the challenge of marginal cases. The basic problem is that we cannot appeal to rationality to draw a clear line between humans and other animals, for there are plenty of humans who are no more rational than animals: infants, the severely cognitively disabled, and so on.

This presents us with a dilemma. If we take seriously the idea that the absence of rationality is what justifies our treatment of nonhuman animals, then we must accept the implication that it is permissible to treat nonrational humans just as we treat nonhuman animals: keeping them as pets, or perhaps even serving them up for dinner with some fava beans and a nice chianti. Alternately, we must abandon the claim that humans have special moral status by virtue of their rationality. The first option strikes most people as repugnant, an affront to a basic and widely held

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<sup>1</sup> We are using 'rationality' here as a kind of general placeholder for the various cognitive capacities commonly appealed to by philosophers to distinguish humans from other animals: theoretical reasoning, practical agency, and so on.

commitment to the moral equality of human beings. The second option leaves the conventional view about the subordinate moral status of nonhuman animals without any clear justification. It also imposes a significant constraint on any justification that might be offered to support the view: namely, the justification will have to appeal to morally relevant characteristics or capacities that belong to all human beings and no animals.

This is the challenge of marginal cases.<sup>2</sup> Notice that it is aimed broadly at those philosophers who appeal to the rational nature of the self to distinguish the special moral status of humans. The argument exposes an inconsistency in this view, for it aims to undermine any basis for assigning special moral status to those humans who lack rationality. In our response to this challenge, we will argue that defenders of rational selfhood do, in fact, have the resources for successfully distinguishing the moral status of all humans—even marginal cases—from other animals. In what follows, we appeal to the social contract tradition—in a novel manner<sup>3</sup>—to develop this response.

The essay is organized as follows. In section two we review a prominent response to this challenge. The failure of this response helps motivate our turn to social contract theory, in section three. In section four we identify a neglected concept, *recognition*, that plays an essential role in the social contract. This sets up our account of the different moral status of humans and

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<sup>2</sup> For two early and influential expressions of the challenge, see Singer 1989 and Regan 1983. We focus on capacities in formulating the argument, but as Horta 2014 notes, appeals to privileged relationships are also relevant here. Because the term ‘marginal’ encourage this emphasis on capacities, to the exclusion of relationships, Horta prefers to call it the argument from ‘species overlap’. Although the point is well-taken, we will continue to use the more widely recognized name.

<sup>3</sup> Social contract theorists are usually thought to be especially vulnerable to the challenge of marginal cases. We believe, and hope to show, that this is a mistake.

non-humans and our response to the challenge of marginal cases, in section five. Then, in section six, we step back to consider the broader picture, as a way of clarifying the nature of our position. We conclude by anticipating and responding to objections in sections seven and eight.

The idea of a social contract will play a central role in this response. Before presenting our view, however, it will be useful to consider why a standard response to the argument from marginal cases fails.

## 2. The Failure of the Argument from Kinds

Many philosophers have attempted to meet the challenge of marginal cases by appealing to alleged facts about human nature. The idea is that it is in the nature of a human being to possess rationality. This is so even though not all human beings, at all times, will enjoy full realization of their rational human nature. Indeed, for some human beings—the congenitally severely cognitively disabled, for example—realizing this rationality may never be possible. Despite such contingencies, it is said to be in the nature of these individuals, *qua* human beings, to possess reason, and this is held to be both necessary and sufficient for having moral rights. Carl Cohen is one among several prominent exponents of this view:

The capacity for moral judgment that distinguishes humans from animals [Cohen's specific version of the appeal to rationality] is not a test to be administered to human beings one by one. Persons who, because of some disability, are unable to perform the full moral functions natural to human beings are not for that reason ejected from the moral community. The critical distinction is one of kind. Humans are of such a kind that rights pertain to them *as humans*; humans live lives that will be, or have been, or remain *essentially* moral.... On the other hand, animals are of such a kind that rights never per-

tain to them; what humans retain when disabled [their moral nature], rats never had.

(Cohen 2001: 37)

This is the *argument from kinds*. It is intended to explain why special moral status is granted to humans who lack rationality, but not to nonrational animals. The explanation is that nonrational human beings are nonetheless the kind of being which does (generally and characteristically) possess rationality. Individual humans acquire their special moral status simply by virtue of belonging to this kind.<sup>4</sup>

As others have pointed out, this argument's main weakness is that the appeal to kinds seems arbitrary. Why should it matter that a cognitively disabled human belongs to a characteristically rational species when we are determining what moral status he or she should have? Or, to put the worry in another way, why should we believe that status should be assigned at the level of kinds,

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<sup>4</sup> A version of the argument from kinds was recently put forward in an important U.S. court decision: *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (N.Y. Super. Ct. App. Div. Dec. 4, 2014), as cited by Eugene Volokh in the *Volokh Conspiracy* legal blog (Volokh 2014). The petitioner had asked the court to grant a zoo chimpanzee the rights of persons—in particular, the right to freedom from unlawful detention. In its judgment, the court declines to do so, arguing that chimpanzees lack the relevant cognitive capacity: in this case, their “incapability to bear any legal responsibilities and societal duties.” To its credit, the court then explicitly recognizes the looming challenge of marginal cases. Its response echoes that of Cohen:

To be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise. (*People ex rel. Nonhuman Rights Project, Inc. v. Lavery*: 5, fn. 3)

rather than individuals? Absent a story of the moral relevance of the distinction between kinds, our awarding of special moral status to all humans will be nothing more than an unfounded speciesism, no better than race or gender-based prejudice.<sup>5</sup>

Defenders of the argument from kinds have provided various responses to this concern. One of the most promising, in our view, is the appeal to *misfortune*.<sup>6</sup> Suppose a human being is born with such severe disabilities that it will never develop sufficient rationality. And suppose a healthy mouse is born that will also never develop sufficient rationality. We are inclined to regard the condition of the human being, but not that of the mouse, as a grave misfortune, despite the fact that their conditions are not significantly dissimilar. Why is this? The most plausible explanation, we would suggest, is that we believe that at some point in the human being's development things could have gone differently, and the fact that they did not go differently leaves her significantly worse-off. We cannot plausibly say of the mouse that had things gone differently it might not have been a mouse. Perhaps, then, we should understand the claim that it is a human being's nature to develop rationality as follows: there is, uniquely, nothing about the nature of a human being which prevents it from developing rationality. Becoming rational is consistent with human nature in a sense that it is not consistent with nonhuman nature. With respect to particular human beings, of course, they may have conditions which as a matter of contingent fact prevent them from developing rationality. Again, however, there is nothing about their nature as human beings which mandates or entails the contingent (and possibly severe) limitations to which they

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<sup>5</sup> This is the conclusion pressed by Norcross 2004, who claims, among other things, that the reasoning behind the argument from kinds would seem "perfectly preposterous" in most other contexts. See also Nobis 2004.

<sup>6</sup> Kaufman 1998 offers a thorough discussion and critique of the appeal to misfortune.

are subject. This is why it may seem appropriate to pity these human beings, or appropriate to regard their condition as a misfortune. We can then introduce a principle to the effect that individuals who fail due to misfortune to develop rationality should be granted the same moral rights as fully functioning humans.

It seems to us that there is something intuitively right about this appeal to misfortune. (We will return to a version of this point.) At the very least, introducing the idea of misfortune provides a deeper rationale for the argument from kinds and goes some way toward removing that argument's apparent arbitrariness. Nonetheless, we believe the appeal to misfortune is unable to carry the argumentative weight assigned to it. The problem is that it simply pushes the arbitrariness problem back a step. So, instead of being faced with a question about why belonging to the kind 'human being' should be sufficient for possessing full moral status, we are now faced instead with a question about why being a subject of misfortune (for example, a human being lacking the distinctively human capacities) should be sufficient for possessing full moral status. After all, the fact that a human being lacks rationality due to misfortune, whereas an animal lacks it by nature, does not make the human being susceptible to greater harm than the nonhuman animal. If performing painful experiments on the nonhuman animal would worsen its condition in life, performing those same experiments on the similarly endowed human being would produce the same effect. Nor does the mere fact that an individual is a subject of misfortune seem to entail that it is owed special moral consideration and respect. Being a victim of misfortune does not seem to make a claim on us in the same way that, for instance, being rational, autonomous, sentient or human makes a claim on us. But if a human being's misfortune makes neither an intrinsic difference to its moral status, nor produces morally relevant effects like an increased capacity for suffering, it is difficult to see why this difference should make a moral difference.

One may object here that we have overlooked a sense in which victims of misfortune *are* susceptible to greater harm, or at least an additional form of harm—namely, they are susceptible to being *exploited* by the more fortunate. Suppose, for instance, that we are asked why it should be permissible to vivisect nonhuman animals but not permissible to vivisect functionally equivalent human beings. Is it not plausible to maintain that, other things being equal, there is at least this difference between the human being and the nonhuman animal: in using the nonhuman animal we will not be exploiting, or attempting to benefit from, another's misfortune. So one might think that being the victim of misfortune *can* make a moral difference insofar as it leaves an individual vulnerable to a form of exploitation that morality correctly forbids. Call this the Exploitation Principle: it is wrong to use an individual in a way that morality would forbid had the individual not suffered a misfortune.

The Exploitation Principle might seem to give the defenders of the argument from kinds what they are looking for—namely, a principled explanation of why it is morally permissible to use nonhuman animals as resources but morally impermissible to use similarly endowed human beings as resources. But we are inclined to reject this attempt to fortify the argument from kinds. One problem is that the principle is subtly question-begging. To see this, suppose that one were to propose the following: “It is of course a great tragedy that certain human beings either lose or fail to ever possess rationality, but, in order to make the best of a bad situation, we should use these unfortunate human beings in order to test drugs that could one day save the lives of persons. It's true, of course, that these human beings suffered a grave misfortune, but there's nothing we can do about that now. Let's focus on deriving some good from this terrible situation.” If this proposal strikes us as abominable, it must be because we think that these unfortunate human beings have moral rights against being used as mere means to benefit others. To use them as

mere resources would be exploitative; it would fail to give them the respect that they are due. But it seems doubtful that it is their *misfortune* that confers moral rights on them, or makes them deserving of moral respect, for anyone making the proposal readily acknowledges the fact of their misfortune. Rather, it seems it is our prior commitment to the moral standing of marginal cases that underwrites our sense that it would be wrong to seek to benefit from their misfortune, and not their misfortune that underwrites their moral standing. We conclude, then, that a different sort of response to the challenge of marginal cases is required.

### **3. Turning to the Social Contract**

Contractualism is a moral theory according to which questions about the scope and content of moral rights (for example) are answered by considering the verdicts of hypothetical persons deliberating about the scope and content of moral rights under certain hypothetical conditions. Contractualists differ in their description of the deliberators, or ‘contractors,’ and in their descriptions of the circumstances of deliberation. These differences notwithstanding, all contractualists would agree that an individual has a certain moral right if and only if persons, suitably described, would, when suitably situated, choose to confer this right on the individual. In short, moral rights are generated by an idealized social contract. We will argue that contractualism—or, at least, the version of contractualism we articulate below—provides the resources for a more satisfactory response to the challenge of marginal cases than those currently on offer.

We draw upon two contractualist ideas. The first of these is the idea that the social contract, and the moral rights emerging from it, are the product of an agreement between individuals con-



tracting for *mutual advantage*.<sup>7</sup> The parties to the social contract see themselves as gaining from signing on to it, and this gives force and justification to the rights and state authority emerging from the contract. We see this appeal to mutual advantage most starkly in Hobbes, but it is a general feature of social contract theory.

Of course, Nussbaum has argued that it is precisely this feature of social contract theory which renders it unable to account for the moral rights of non-persons, who are unable to contract for mutual advantage (Nussbaum 2006: chapters 1 and 2). We maintain, however, that this is too limited a conception of contractualism and its prospects. It does not follow from the fact that parties to the social contract must be persons that the beneficiaries of the social contract, or the individuals to whom moral rights are extended, must be persons.<sup>8</sup> As we argue below, whether an individual falls within the scope of the social contract depends not on whether that individual is a person, but rather on whether that individual is related to persons in the right way. Since non-persons, we suggest, may be related to persons in the right way, non-persons may fall within the class of moral rights holders. (More on this below.)

Along with mutual advantage, we also draw on a second contractualist idea—namely, that as we deliberate on the social contract, we abstract from the details of our own lives. That is, we do not consider our particular place in society when deciding who will have rights and what those

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<sup>7</sup> Rawls, for example, often identifies mutual advantage as a basic feature of his account (Rawls 1971: 4, 84, 112, 126). There is a useful discussion of Rawls's reliance on mutual advantage in Nussbaum 2006: 56-61.

<sup>8</sup> This point is forcefully made by Rowlands 2009, who proposes a contractualist argument for extending moral rights to all sentient life. We do not think Rowlands' argument is successful, but we agree with his claim that the scope of contractualist morality is broader than is generally assumed.

rights will be. This quality of abstraction is already present in early versions of social contract theory. It gains its clearest expression, however, in Rawls's depiction of the Original Position in which we are to imagine contracting taking place. Behind a veil of ignorance, as Rawls calls it, we have an incentive to arrive at principles of justice that are advantageous for all—precisely because we do not know what our place in the society we are creating will turn out to be.

The two ideas are meant to complement one another. Contracting for mutual advantage provides authority and justification for political principles. Contracting in abstraction from the details of one's life situation ensures that the principles arrived at are fair. On the plausible assumption that fair agreements have more authority, or are more justified, than unfair agreements, Rawls's development of social contract theory is very much in line with that tradition's original justificatory aims.

#### **4. Recognition in the Social Contract**

It is noteworthy that Rawls himself stipulated that the social contract applies only to persons. Faced with the objection that he was thereby leaving many human beings outside the sphere of justice, Rawls seems to have appealed to a version of the argument from kinds, which we criticized above, and to our practical need to select principles of justice that we could realistically adhere to without an undue "strain of commitment" (Rawls 1971: 505-6, 512). But on this score we do not need to follow Rawls. We believe that self-interested persons, deliberating about the scope of moral rights from behind the veil of ignorance, would have compelling prudential reasons to affirm the moral rights of marginal cases. In other words, there is, contrary to conventional wisdom, a straightforward contractualist account of the moral rights of marginal cases.

At the heart of the account we wish to propose is the claim that the scope of the social contract will extend to everyone in whom the contractors can *recognize* themselves. The scope of

recognition is the scope of self-interest behind the veil of ignorance—under conditions wherein one does not know the particular shape that one’s life will take. This notion of ‘recognition’ is not meant to be abstruse or technical. Rather, we mean to draw attention to our familiar capacity for seeing ourselves as others, or seeing the life of another as a life that could in fact be (or have been) ours. We do not mean to insist that there is only one way in which this capacity to see myself as, or recognize myself in, another can be actualized. Anything that allows one to do so will suffice. Perhaps the most obvious method is simply to imagine living the life of another. For example, one can imagine being an Egyptian pharaoh, tweaking his pyramid designs and fretting about the flooding of the Nile. It really does not matter whether one gets the details right. The crucial point is that we can recognize ourselves in these other lives, so that, when contracting behind the veil, we find it conceivable to be such people—and thus find it to our advantage to extend justice to them.

However, the process we have in mind need not involve this imaginative projection of oneself into another life. It can also work simply by reflecting on the situations of others, and recognizing that, had things gone differently, that could have been me. So, for example, our Egyptian pharaoh could ponder the plight of a slave laborer and think: had I been born into a different family, I too could have been a slave. Here, what drives the process of seeing oneself as another is not an imaginative projection of oneself into another life, for the Pharaoh need not consider in any detail what it would actually be like to be a slave. Rather, what does the work is simply the thought that, had certain contingent, arbitrary facts about his life been different, he could have been in the same position as another person. There is available to him the following thought: “There but for the grace of Amun-Ra go I.” In contrast to the *imaginative recognition* discussed above, we can call this *counterfactual recognition*.

## 5. Recognition and the Scope of Justice

In our view, it is by appealing to this concept of recognition that we can explain the different moral status of animals and marginal cases. Animals are accorded less than full-moral status because we are unable to successfully recognize ourselves in them when we are contracting behind the veil. To see why this is so, consider the first form of recognition we mentioned: *imaginative projection*. Evidently, we cannot imagine ourselves as, say, cats in the way that we can imagine ourselves as Egyptian pharaohs or slaves.

We need to be clear about what we mean to claim here. Thomas Nagel wrote a famous paper arguing that we cannot know what it is like to be a being with different sensory capacities—such as a bat (Nagel 1974). But this is not the kind of imaginative limitation we have in mind. We are not interested in whether we can get every detail of cat or bat-experience right—just as we do not really care if we are correct on every detail of the Pharaoh’s life. The failure of imagination that concerns us is more fundamental. It stems from our being unable to set aside capacities that are essential to our sense of selfhood. These have much more to do with rationality than the sensory capacities (such as echolocation) that worry Nagel. Examples include: the linguistic character of our thought; our ability to achieve knowledge (and to experience the world in terms of things known); our ability to step back from our desires and choose what we ought to do; and so on. Now, if we are correct in assuming that cats and other non-human animals are not selves, in that they lack rational capacities such as those just listed, it follows that attempts to achieve recognition with them will inevitably fail. In attempting to imagine ourselves as cats, we succeed only in imagining a rational mind trapped inside a cat-shaped body.<sup>9</sup>

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<sup>9</sup> A similar failure of recognition is entertained by Ted Toadvine, who writes: “From the perspective of phenomenological philosophy, which tries to lay bare the structure of experience as such, we must ask

Here, we anticipate two objections. First, one might insist that cats or other animals do have some of these rational capacities. We will not argue the point. In our view, this is an empirical question, and we are open to the possibility that certain nonhuman animals may have them. In fact, should the empirical evidence show that certain non-human animals possess some degree of rational selfhood, then these animals, on our view, belong within the scope of justice. Nonetheless, there are surely some animals that lack these capacities, and our point applies to these animals. Second, one might note that it is equally impossible to imagine ourselves as marginal cases without holding on to our rational capacities. This is surely right, but, as we will see shortly, it turns out not to matter.

In noting this failure of recognition, we do not mean to imply that our imaginative boundaries are determined by biological or species boundaries. After all, it is relatively easy to imagine ourselves as intelligent Martians. We can still hold onto all the capacities essential to selfhood, even if asked to imagine a being with very different sensory capacities. There is ample literary evidence for this point. We can tell interesting stories about intelligent aliens. But we can tell stories about non-rational animals only by falsifying their experience: anthropomorphizing them,

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whether experience refers essentially to a subject whose experience this would be, and whether this subject is necessarily human. If so, any attempt to describe what it is like to be a non-human animal necessarily refers first to the experience of the human subject, from which this non-human experience would be derivative, and against which it is dialectically set apart.” (Toadvine 2007: 41) Toadvine does not draw the same implications from this point. For him it reflects a flaw in phenomenology, as traditionally practiced.

making them secretly human.<sup>10</sup> Our human rationality prevents us from successfully adopting the standpoint of their animal existence.<sup>11</sup>

Of course, it is also true that we cannot imagine being a marginal case—and for precisely the same reasons. But here is the key difference: as rational beings, we can appeal to the other, counterfactual form of recognition. For example, you can recognize that, had things gone slightly differently, you could have been a non-rational human: if you had crashed your car or if the chromosomes in your DNA had been just slightly off. But it is not the case that—had things gone slightly differently—you could have been a cat. Thus, you are able to recognize yourself in marginal cases, but not in other animals, a fact that will lead you, insofar as you are guided by prudential self-concern, to assign moral rights to the former but not the latter.

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<sup>10</sup> See, for example, Kafka's "Report to the Academy" or Orwell's *Animal Farm*. Kafka strikes us as being keenly aware that depictions of the inner lives of animals inevitably anthropomorphize their subjects, a tension he employs to great literary effect in his short stories. To be sure, there is also an extensive literature, mostly in the realm of science fiction, exploring the idea of unrecognizably alien forms of intelligence. (Notable examples of this are Lem's *Solaris* and *His Master's Voice* and the Strugatsky brothers' *Roadside Picnic*.) Davidson famously argued that the notion of an incommensurable conceptual scheme is incoherent. (See Davidson 1973. Also helpful on this topic is Conant 1991.) For our purposes, however, we need not take a stand on this issue. Our point is only that the scope of justice would extend to beings with a rationality recognizable by us, and there is no reason to think this could not include species other than our own.

<sup>11</sup> That our capacity for recognition extends beyond humans to other possible rational beings shows that our response to the problem of marginal cases avoids the charge of speciesism. We take this to be a further advantage of our approach.

## 6. The Big Picture: Justice and Recognition

As a way of clarifying the position, let us step back for a moment to consider the broader outlook, starting with the relationship between justice and morality. One way to think of morality is as a kind of obligation to extend my concerns beyond myself. (And, if you believe there is any kind of moral arc to our history, then you might see this reflected in our gradual extension of moral concern to an ever wider group: non-property holders, people of other ethnic backgrounds, women, and so on.) In terms of morality, bare sentience (or a capacity for suffering) seems like a perfectly reasonable criterion for further extending moral concern to animals. If one wishes to claim that there is a kind of recognition involved here, that is fine with us. We would only wish to clarify that this is not the same notion of recognition that we are appealing to in our account, as will become evident below.

Justice, at least as conceived in the broad contractualist tradition, is an extension of one's concerns based on prudential reasoning. That is, we establish rights that commit us to concern for others, not based merely on moral considerations, but because they make us collectively better off. Naturally, this basic idea can play out in a variety of ways, but many accounts of justice combine the following two features. First, they provide individual advantage to the persons consenting to the contract, where this provides justification for the resulting obligations. Second, there will be some sort of fairness or impartiality condition, where this provides legitimacy to the agreement—unlike in strict contractarian accounts.

So, for example, in Rawls' account we find the first feature in the rationality of the contractors, each negotiating in pursuit of their own good. And we see the second feature in the veil of ignorance, which removes knowledge of one's own position and thus ensures fairness. Likewise, in Hume's account of justice, we start with individuals who naturally pursue their own interests,

but justice arises through their ability to (imperfectly) adopt the impartial standpoint of a “judicious spectator,” in which the interests of everyone are taken into account.<sup>12</sup>

Our notion of recognition enters the picture here, in the interplay between these two features. Specifically, it is their combination that requires the capacity for recognition. In determining what is just, we must pursue our individual advantage, but do so for everyone. There is an unavoidable “stepping into the shoes of others” quality to the social contract, one that is not required of general moral reasoning. To determine what is just, we must consider what each person would think of a proposed right—and how it would affect their particular situation in society. Moreover, since the contract is hypothetical, we cannot simply ask them what they think. We must inhabit their perspective and determine this for ourselves.

This notion of recognition is frequently invoked in contemporary discussion of contractualism. Okin, for example, stresses that “[i]n the absence of knowledge about their own particular characteristics, those in the original position cannot think from the position of nobody (as Rawls’s desire for simplicity might suggest); they must think from the position of everybody, in the sense of each in turn” (Okin 1989: 244) Likewise, Kymlicka maintains that, “[i]n order to decide from behind a veil of ignorance which principles will promote my good, I must put my-

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<sup>12</sup> As Hume notes in the *Treatise*:

Here we are contented with saying, that reason requires such an impartial conduct, but that ’tis seldom we can bring ourselves to it, and that our passions do not readily follow the determination of our judgment. This language will be easily understood, if we consider what we formerly said concerning that reason, which is able to oppose our passion; and which we have found to be nothing but a general calm determination of the passions, founded on some distant view or reflection. (Hume 2000: 3.3.1, 372)

For Rawls’ discussion of Hume on this point, see Rawls 1971: 161-3.



self in the shoes of every person in society and see what promotes their good, since I may end up being any one of those people.” (Kymlicka 1990: 65)

Such appeals to recognition are common. Moreover, it is worth emphasizing that there is nothing fancy or technical about this concept. We encounter recognition even in very simple forms of reasoning about fairness. Consider, for example, the classic parent’s strategy of letting one child divide the cake in two, and then having the other child pick which piece they want.<sup>13</sup> Like a kind of original position, the situation encourages the first child to reason fairly. In order to do so, she must be capable of adopting the perspective of her sibling: “what will he do if I cut it this way? Or that way?” Here, exhibited in primordial form, is the notion of recognition we have in mind.

If recognition fails in certain cases—if we are unable to inhabit certain perspectives, then we cannot say whether the being in question would assent to the proposed right. Questions of justice are necessarily limited to those individuals with whom we can establish recognition in this sense. And because we cannot achieve recognition with non-human (non-rational) animals, justice cannot be extended to them.<sup>14</sup> Of course, morality can and should be extended to them—and this

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<sup>13</sup> This example is often employed to show the intuitive character of Rawls’ original position. Bernard Williams, for instance, invokes it in his review of *A Theory of Justice* (Williams 2014: 121).

<sup>14</sup> Mark Rowlands would perhaps deny this claim that we cannot achieve recognition with non-human animals. In his contractualist argument for animal rights, Rowlands argues that the scope of justice extends to whatever an occupant of the original position can worry about being on the other side of the veil, and that we can worry about being certain sorts of non-human animals because there is something that it is like to be them (Rowlands 2009: 160). One way to interpret Rowlands is that he means to claim that in thinking about what it’s like to be a non-human animal we are, in fact, achieving with respect to these animals what we have called imaginative recognition. And it may seem like Rowlands has a point here.

alone would be enough to condemn much of our current treatment of animals. But what this shows is that it is coherent to claim a difference in moral status: that there are contractually-based rights owed to marginal cases that are not owed to nonhuman animals.

## 7. An Objection: Contested Assumptions?

The response we have just presented to the challenge of marginal cases depends on two contested assumptions: that the social contract is a legitimate source of moral status; and, perhaps more controversially, that the self is essentially rational and cannot escape this perspective. Those who wish to deny the special status of humans over other animals could simply reject either assumption. We are certainly in no position to defend these assumptions here. It would take too much space, and, in any event, these are far from settled issues in philosophy. So, it is reasonable to ask: why are we entitled to appeal to these assumptions in our response?

This objection, however, fails to consider the target audience of the challenge of marginal cases. The argument is aimed at philosophers who believe that rationality is the source of our special moral status, and these are precisely the people who are most likely to endorse the inextricably rational character of the self. Indeed, we find such a view defended by a broad range of contemporary philosophers. Velleman, for example, writes:

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As he puts it, non-human animals can suffer, and, one is capable of thinking, “if I were one of them I wouldn’t want this to happen to me.” As we have already said, however, we wonder whether thoughts like these are, strictly speaking, coherent. When *I* try to think of *myself* as a non-human animal, I invariably fail. The result of the thought experiment is always the rational self, differently embodied. Of course, we don’t mean to deny the obvious point that we can recognize in an animal’s joy or suffering something akin to our own joy and suffering, but, again, this is not sufficient for recognition and hence cannot engage us on the level of *prudential self-concern*.

The appeal of this view, for me, is that it locates autonomy in a part of the personality from which you truly cannot dissociate yourself. This part of your personality constitutes your essential self, in the sense that it invariably presents a reflexive aspect to your thinking: it invariably appears to you as ‘me’ from any perspective, however self-critical or detached. [...] You can dissociate yourself from other springs of action within you, by reflecting on them from a critical or contemplative distance. But you cannot attain a similar distance from your understanding, because it is something that you must take along, so to speak, no matter how far you retreat in seeking a perspective on yourself.” (Velleman 2000: 30-31)

Likewise, rationality lies at the essential core of Korsgaard’s constitutive account of the self<sup>15</sup>, Davidson’s linguistic account of agency<sup>16</sup>, Taylor’s “strong evaluating” subjects<sup>17</sup>, Burge’s normatively-bound, self-understanding persons<sup>18</sup>, and so on.

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<sup>15</sup> “But the human mind *is* self-conscious in the sense that it is essentially reflective. [...] A lower animal’s attention is fixed on the world. Its perceptions are its beliefs and its desires are its will. It is engaged in conscious activities, but it is not conscious *of* them. That is, they are not the objects of its attention. But we human animals turn our attention on to our perceptions and desires themselves, on to our own mental activities, and we are conscious *of* them. That is why we can think *about* them. And this sets us a problem no other animal has. It is the problem of the normative.” (Korsgaard 1996: 92-3)

<sup>16</sup> “My thesis is not, then, that each thought depends for its existence on the existence of a sentence that expresses that thought. My thesis is rather that a creature cannot have a thought unless it has language. In order to be a thinking, rational creature, the creature must be able to express many thoughts, and above all, be able to interpret the speech and thoughts of others.” (Davidson 1982: 322-3)

<sup>17</sup> “It must be clear that an agent who could not evaluate desires at all would lack the minimum degree of reflectiveness which we associate with a human agent, and would also lack a crucial part of the back-

Again, we do not claim to be defending any of these particular accounts of selfhood here. Our point is simply this: if you accept the idea of a social contract negotiated by essentially rational persons, then a straightforward response to the challenge of marginal cases is available to you.<sup>19</sup>

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ground for what we describe as the exercise of will. I should also like to add, but with perhaps less certainty of universal agreement, that the capacity for strong evaluation in particular is essential to our notion of the human subject; that without it an agent would lack a kind of depth we consider essential to humanity, without which we would find human communication impossible (the capacity for which is another essential feature of human agency).” (Taylor 1985b: 28)

“But then we must speak of man as a self-interpreting being, because this kind of interpretation is not an optional extra, but is an essential part of our existence.” (Taylor 1985a: 65)

<sup>18</sup> “I think it hardly controversial that having a natural capacity for critical reason is constitutive to being a person and being, or having, a self. It is arguable that being subject to moral norms is also constitutive. I will focus on both kinds of norms as clues to the nature of a type of self-understanding that is constitutive to being a person and self.” (Burge 2011: 318)

<sup>19</sup> One may reasonably wonder just how far, on our view, the scope of recognition extends. For example, does it extend to fetuses, and, if so, do we take our position to be laying the groundwork for an argument against abortion? We hesitate to go so far. While an unborn fetus might well fall within the scope of recognition and justice on our account, the circumstances of an unwanted pregnancy raise unique concerns involving a conflict between what is owed to a fetus and a woman’s right to control her own body, as Thomson 1971 famously argued. Even setting such complications aside, however, we assume that contractors can recognize themselves in pregnant humans who, for reasons of their own, choose to abort, and more generally in a significant population who value living in a society where that choice is legally permitted, whether or not they ever make it or have any desire to make it. In other words, then, contractors would have countervailing interests to weigh and consider, and so we do not believe that there is any

## 8. An Objection: The Metaphysics of Recognizing Marginal Cases

The challenge of marginal cases calls for the identification of a morally relevant difference between marginal cases and nonhuman animals with roughly equivalent cognitive capacities. We have identified a difference: hypothetical contractors, deciding on the principles of morality from behind a veil of ignorance, recognize themselves in the marginal cases but not in nonhuman animals. In this section we consider an objection that challenges our claim that we can counterfactually recognize ourselves in marginal cases. This would be a serious problem for our view, as we have already acknowledged that we cannot recognize ourselves in marginal cases in the imaginative projection sense.

The objection is that given facts about the metaphysics of personal identity, it is impossible that I could have been, or that I could become, a nonrational human being. If the objection succeeds, then our hypothetical contractors—who are of course rational beings—do not need to decide on the principles of morality in light of the possibility that they may be nonrational human beings on the other side of the veil. So what are the alleged facts about the metaphysics of personal identity on which this objection rests?

What is crucial, proponents of this view claim, is that we are essentially persons. This means that it is impossible that we ever were—or ever will become—nonrational beings. So, for example, you were never a fetus, and you will never exist in a persistent vegetative state. That might sound incredible, but it is supposed to follow from what many regard as the best account of personal identity available—namely, the account that says personal identity over time is a matter of ongoing psychological continuity and connectedness. We cannot be psychologically connected

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*straightforward* argument against abortion that falls out of our position. We are indebted to an anonymous referee for raising this question.

or continuous with beings lacking psychological life, and so we cannot be identical to any such beings. We will call this view *essentialism*, and its proponents *essentialists*.<sup>20</sup>

Essentialism has been defended with great ingenuity, and we can hardly do justice to it here, much less establish the facts about the metaphysics of personal identity. But we may not need to. We think the objection fails even if we assume that the essentialists are right. As we see it, it is sufficient for achieving counterfactual recognition to see that (had things gone slightly differently) my biological predecessor could have become a brain-dead infant instead of becoming me. (Or, in slogan form, there but for the grace of God went the thing that became me.) Likewise, I can entertain the possibility of many different fates befalling my biological successor. For example, it could end up in a persistent vegetative state. The crucial point to appreciate, we think, is that we do not have to be identical to our biological predecessors or biological successors to take egoistic concern in their treatment. As persons we are so intimately related to these beings that we will reasonably want to protect them against certain forms of use, neglect, or treatment. Whether that intimate relation is the identity relation seems in this context immaterial.<sup>21</sup>

## 9. Conclusion

When we claim that we cannot recognize ourselves in nonhuman animals, we do not mean to deny that we share important features with these beings: for example, sentience or a capacity for suffering. These matter, and we believe they ground significant ethical duties toward

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<sup>20</sup> Prominent essentialists include Parfit 1984 and McMahan 2002. Some philosophers go further, arguing that strictly speaking, I could not have been anyone other than myself. Our response to the initial objection (below) also applies to this even stricter metaphysical notion of identity.

<sup>21</sup> This echoes Parfit's own point that it is survival that ultimately matters, not identity over time (Parfit 1984: 261-266).

animals. Indeed, it is perfectly consistent with our position that our obligations to non-human animals are quite onerous, and certainly more extensive than current common-sense morality suggests. Nonetheless, these shared features do not suffice to allow us to recognize ourselves in animals. And this means that we cannot place them within the scope of a justice secured by abstractly contracting for mutual advantage. It is this, we claim, that explains why humans—even the so-called marginal cases—have rights that other animals lack.<sup>22</sup>

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