

On the Margins of Humanity

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In the current philosophic debates about the moral and legal standing of animals, one of the most common arguments for equality between humans and animals is the appeal to the problem of “marginal humans.” The basic claim of that argument is that because no morally significant feature is common to all and only humans, the standard view on which rights apply to all and only humans is arbitrary and unjust. In particular, rights cannot be in any way based upon the uniquely human capacity to reason since some humans lack that capacity. While normal adult humans can think and act according to abstract knowledge and moral principles, newborn infants cannot yet do so, permanently comatose adults can no longer do so, and the severely retarded never do so. Such “marginal humans” lack the rational capacities of normal adult humans, yet we still grant them the moral and legal protection of rights. Meanwhile, far more sensitive and intelligent animals, such as chimps, dolphins, and even dogs, are used and abused as humans see fit.

From the perspective of the marginal humans argument, limiting rights to humans seems like an unjustifiable form of discrimination in favor of our own human species, i.e. “speciesism.” To protect all humans under the umbrella of moral and legal rights without lapsing into logical incoherence, the criterion for rights must be set lower than the capacity to reason. Yet once that it is done, logic demands that we extend rights to all those who meet that criterion, whether human or not. In short, the marginal humans argument claims that the price of rights for all humans is rights for some animals.

In recent years, this line of argument for granting moral standing and legal protections to animals has proven to be both compelling and resilient in both academic and cultural debates. It seems to effectively demolish the traditional understanding of rights as all and only human rights by forcing a hard choice between rights for only some humans and rights for all humans plus some animals. To many philosophers and laypersons, the latter seems like a more palatable option than the former, in that banning medical testing on mice and rabbits would be preferable to tolerating it on orphaned infants and senile octogenarians. Moreover, the marginal humans argument does not demand allegiance to any particular moral or political theory: it is compatible with Peter Singer’s utilitarian “animal liberation,” Tom Regan’s deontological “animal rights,” and more. Finally, attempted refutations of it often seem to miss their mark by failing to squarely confront the question of why and how all those individual humans without the capacity to reason still deserve moral standing and legal protections.

In this paper, I will critically examine the argument from marginal humans to determine whether it is as powerful and persuasive as it often seems at first glance. I will first review the particular form of the argument used by the two major advocates of moral standing and legal protections for animals: Peter Singer and Tom Regan. (I will not be concerned with the failings of Singer’s utilitarianism or the mysteries of Regan’s appeal to inherent value, but only with the way in which each uses the argument to advance his case for animal liberation or rights.) Then, I’ll hone in upon the fundamental thrust of the argument by distinguishing it from a borderline case problem. Finally, I will examine the merits of two attempted refutations of the marginal

humans argument, as well as consider three basic types of marginal humans in relation to the argument for human-only rights. My basic contention will be that marginal humans are not relevantly similar to animals—meaning that the argument from marginal humans cannot force an either-or choice between rights for just some humans and rights for all humans plus animals.

Peter Singer's Animal Liberation

In his writings on the moral imperative of animal liberation, Peter Singer claims that humans widely suffer from a “latent” and “unjustifiable” prejudice in their “attitudes and practices” towards other animals.¹ People enjoy consuming the flesh of pigs killed in brutal fashion without a second thought, even while harshly condemning the neglectful caretaker of a severely retarded child whose mental life is a pale shadow of the pig's. They'll donate money for medical research that includes painful experiments on innocent rabbits, yet also agitate for better prison conditions for thieves, rapists, and murderers. Such actions are usually defended on the grounds that pigs and rabbits are mere beasts, while even imbeciles and criminals are human.

Singer completely rejects such moral appeals to species-membership as unjustified: they are nothing but “preferring the interests of members of our own species because they are members of our own species.”² Such appeals are fundamentally the same as claims of moral superiority based upon race or sex, now widely recognized as arbitrary and vicious, insofar as those claims depend upon the preference for the interests of one's own race or sex above those of others.³ The moral appeals to species constitute a longstanding legacy of “speciesism” that should be overturned by an animal liberation movement, just as pervasive racism and sexism were undermined by black and women's liberation movements.⁴

According to Singer, ending our present system of unjustifiable discrimination by species means “extend[ing] to other species the basic principle of equality that most of us recognize should be extended to all members of our own species.”⁵ Within Singer's utilitarian framework, the desired equality is equality in the consideration of interests—meaning that “the interests of every being affected by an action are to be taken into account and given the same weight as the like interests of any other being.”⁶ Notably, interests are understood purely in terms of the subjective welfare of the organism, particularly the pleasures and pains it experiences.⁷

While Singer offers little more than vague appeals to intuition to justify his principle of equality in his writings on animal liberation, he does attempt to directly undermine the traditional view of rights for all and only humans by appealing to the thorny problem of marginal humans. In “A Utilitarian Defense of Animal Rights,” he introduces the issue with this thought experiment:

In the past, argument about vivisection has often missed the point, because it has been put in absolutist terms: Would the abolitionist be prepared to let thousands die if they could be saved by experimenting on a single animal? The way to reply to this purely hypothetical question is to pose another: Would the experimenter be prepared to perform his experiment on an orphaned human infant, if that were the only way to save many lives? (I say "orphan" to avoid the complication of parental feelings, although in doing so I am being overfair to the experimenter, since the nonhuman subjects of experiments are not orphans.) If

¹ Peter Singer, “A Utilitarian Defense of Animal Liberation,” in *Environmental Ethics*, ed. Louis Pojman (Stamford, CT: Wadsworth, 2001), 33.

² *Ibid.*, 39.

³ *Ibid.*, 36.

⁴ *Ibid.*, 36, 33.

⁵ *Ibid.*, 33.

⁶ *Ibid.*, 35.

⁷ *Ibid.*

the experimenter is not prepared to use an orphaned human infant, then his readiness to use nonhumans is simple discrimination, since adult apes, cats, mice, and other mammals are more aware of what is happening to them, more self-directing and, so far as we can tell, at least as sensitive to pain, as any human infant. *There seems to be no relevant characteristic that human infants possess that adult mammals do not have to the same or a higher degree.*⁸

Singer's direct comparison of human infants to adult mammals casts doubt upon the standard argument for all and only human rights. That argument depends upon differences between species, particularly upon the human capacity for reason, morality, and law. Singer ignores such differences as irrelevant, instead comparing the mental powers of immature humans to other animals. Then, because "there seems to be no relevant characteristic that human infants possess that adult mammals do not have to the same or a higher degree," the moral and legal protections afforded to human infants seem arbitrary.⁹ Admittedly, Singer's approach is compelling. After all, not all humans surpass all animals in mental capacity; not all humans even have a rudimentary capacity to reason. So why should those humans be protected by morality and law, while more intelligent and sensitive animals are denied equal protections?

A bit later in his essay, Singer offers a more general formulation of the argument from marginal humans in terms of the claimed equality of all humans. He writes:

If equality is to be related to any actual characteristics of humans, these characteristics must be some lowest common denominator, pitched so low that no human lacks them—but then the philosopher comes up against the catch that any such set of characteristics which covers all humans will not be possessed only by humans. In other words, it turns out that in the only sense in which we can truly say, as an assertion of fact, that all humans are equal, at least some members of other species are also equal—equal, that is, to each other and to humans.¹⁰

So if we map all animals onto a single spectrum of mental powers, we will not find a simple, discrete, step-by-step progression by species, e.g. from spiders to goldfish to turtles to robins to rabbits to dogs to chimps to humans. Rather, due to individual variation, each species will overlap with its downstream and upstream neighbors to varying degrees. In particular, some of its members will fail to meet the norms for the species—due to physical immaturity, genetic defects, traumatic injury, degenerative disease, and the like. In the case of humans, the downstream overlap with other species is substantial: we have much to lose precisely because we are normally so very smart. So trained dolphins may understand more language than a severely retarded adult, an octopus will be able to solve puzzles incomprehensible to a toddler, a newborn infant is surpassed by an ordinary house cat, and a comatose adult will be less aware of its surroundings than a goldfish. So, Singer claims, if all humans are deemed equal, then we must also admit that most dolphins, octopi, box turtles, and goldfish are equal to us as well—meaning that they are at least as worthy of moral standing and legal protection as severely retarded adults, normal toddlers, ordinary newborns, and comatose adults.

Ultimately, Singer claims that the marginal humans argument shows that we have no rational grounds upon which to privilege all and only humans above other animals. So if we accept his the utilitarian principle of equal consideration of interests, then we must extend it beyond the human species to encompass all animals with "the capacity for suffering and enjoying things."¹¹ Instead of drawing arbitrary lines by sex, intelligence, race, or species, we should consider the interests of all sentient creatures equally. So if a creature is capable of feeling pleasures and pains, then those pleasures and pains should be considered equally in the

⁸ Ibid., 36. Emphasis added.

⁹ Ibid.

¹⁰ Ibid., 37.

¹¹ Ibid., 35.

moral calculus. Only if “a being is not capable of suffering, or of experiencing enjoyment or happiness” can it be justly excluded, since then “there is nothing to be taken into account.”¹² Such is, in essence, Singer’s use of the marginal humans argument in his defense of animal liberation.

Tom Regan’s Animal Rights

Unlike Singer’s utilitarian focus on animal pleasures and pains, Tom Regan regards the basic evil in our treatment of animals as our willingness to use, abuse, and destroy them to satisfy our human needs and wants.¹³ By hunting deer, experimenting on rabbits, trapping fox, milking cows, and training circus elephants, we treat animals as mere means to our ends and violate their “equal right to be treated with respect.”¹⁴ Simply “giving farm animals more space, more natural environments, more companions does not right the fundamental wrong” involved; it merely whitewashes some of the more obvious signs of the wrong.¹⁵ Such utilitarian proposals to increase animal pleasure and diminish animal pain are fundamentally misguided. Morality demands “the total dissolution of commercial animal agriculture” and more, i.e. a genuinely abolitionist movement.¹⁶

In his writings on animal rights, Regan’s standard strategy is to critically examine various proposed foundations for morality and law, such as contractarianism, the cruelty-kindness view, and utilitarianism.¹⁷ After rejecting each in turn, he then opts for a deontological “rights view” based upon equal inherent value on the grounds that it best “illuminates and explains the foundations of our duties to one another.”¹⁸ Regan designates all sufficiently conscious creatures as “the experiencing subjects of a life”—in the sense that each is “a conscious creature having an individual welfare that has importance to [it] whatever [its] usefulness to others.”¹⁹ Far more controversially, he then claims that, whether human or beast, such creatures possess equal inherent value—and equal rights to respect for that inherent value.²⁰

By his own admission, Regan offers no argument for his inference from a creature being a subject-of-a-life to that creature possessing inherent value.²¹ The appeal to subjects-of-a-life is only supposed to show some “relevant similarity” between all the creatures that we should intuitively regard as possessing equal inherent value, even though some non-subjects-of-a-life (such as “rocks and rivers, trees and glaciers”) may also have inherent value.²² Nonetheless, like Singer, Regan does appeal directly to the argument from marginal humans to dismiss the traditional idea that only humans have rights. In his essay “The Radical Egalitarian Case for Animal Rights,” Regan argues that “attempts to limit [the] scope [of the rights view] to only humans can be shown to be rationally defective” as follows:

¹² Ibid., 36.

¹³ Tom Regan, “The Radical Egalitarian Case for Animal Rights,” in *Environmental Ethics*, ed. Louis Pojman (Stamford, CT: Wadsworth, 2001), 40.

¹⁴ Ibid., 45.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Tom Regan, *The Case for Animal Rights* (Los Angeles: University of California Press, 1983), Tom Regan, “The Case for Animal Rights,” in *The Animal Rights Debate* (New York: Rowman and Littlefield, 2001), Regan, “The Radical Egalitarian Case for Animal Rights.”

¹⁸ Regan, “The Radical Egalitarian Case for Animal Rights,” 44.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Regan, *The Case for Animal Rights*, 247-8.

²² Ibid., 248., Regan, “The Radical Egalitarian Case for Animal Rights,” 44.

Animals, it is true, lack many of the abilities humans possess. They can't read, do higher mathematics, build a bookcase or make *baba ghanoush*. Neither can many human beings, however, and yet we don't (and shouldn't) say that they (these humans) therefore have less inherent value, less of a right to be treated with respect, than do others. It is the similarities between those human beings who most clearly, most non-controversially have such value (the people reading this, for example), not our differences, that matter most. And the really crucial, the basic similarity is simply this: we are each of us the experiencing subject of a life, a conscious creature having an individual welfare that has importance to us whatever our usefulness to others. We want and prefer things, believe and feel things, recall and expect things. And all these dimensions of our life, including our pleasure and pain, our enjoyment and suffering, our satisfaction and frustration, our continued existence or our untimely death—all make a difference to the quality of our life as lived, as experienced, by us as individuals. As the same is true of those animals that concern us (the ones who are eaten and trapped, for example), they too must be viewed as the experiencing subjects of a life, with inherent value of their own.²³

Regan's assertion that "the basic similarity" between those reading his essay (and others who "most clearly, most non-controversially have [inherent] value") is the minimal criterion of being a subject-of-a-life is quite puzzling, since all his readers share a host of far more complex cognitive powers, most notably the capacity to reason abstractly.²⁴ However, his explicit appeal to marginal humans in the next paragraph clarifies the basic thrust of his argument:

There are some who resist the idea that animals have inherent value. "Only humans have such value," they profess. How might this narrow view be defended? Shall we say that only humans have the requisite intelligence, or autonomy, or reason? But there are many, many humans who fail to meet these standards and yet are reasonably viewed as having value above and beyond their usefulness to others. Shall we claim that only humans belong to the right species, the species *Homo sapiens*? But this is blatant speciesism.²⁵

So according to Regan, we cannot deny animals inherent value merely because they lack particular human skills like reading, cooking, or carpentry since many of us lack such skills as well. We must choose some more basic or general similarity as the basis for the equal right to be treated with respect. However, that similarity cannot be anything like "intelligence, or autonomy, or reason," since marginal humans would then be excluded. Thus Regan claims that we must appeal to more basic cognitive capacities like beliefs, desires, and feelings. Since many animals also possess those cognitive capacities, they also possess an equal right to be treated with respect.

Regan also appeals to the problem of marginal humans to bolster his case that inherent value must be equal, i.e. incapable of differing in degrees. He writes:

Well, perhaps some will say that animals have some inherent value, only less than we have. Once again, however, attempts to defend this view can be shown to lack rational justification. What could be the basis of our having more inherent value than animals? Their lack of reason, or autonomy, or intellect? Only if we are willing to make the same judgment in the case of humans who are similarly deficient. But it is not true that such humans—the retarded child, for example, or the mentally deranged—have less inherent value than you or I. Neither, then, can we rationally sustain the view that animals like them in being the experiencing subjects of a life have less inherent value. All who have inherent value have it equally, whether they be human animals or not.²⁶

So if animals are said to have less inherent value than normal adult humans like you and me, then the same must be said about retarded children, mental patients, and the like. Since that's an intuitively unappealing view, we should instead say that inherent value is like an on-off rather light switch rather than a dimmer switch: a creature either has inherent value or it doesn't.

²³ Regan, "The Radical Egalitarian Case for Animal Rights," 44.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

In his more comprehensive discussion of animal rights in *The Case for Animal Rights*, Tom Regan's critical appeal to the duties directly owed to "moral patients" relies heavily upon the marginal humans argument. Following standard usage, Regan describes moral agents as "individuals who have a variety of sophisticated abilities, including in particular the ability to bring impartial moral principles to bear on the determination of what, all considered, morally ought to be done and, having made this determination, to freely choose or fail to choose to act as morality, as they conceive it, requires."²⁷ Absent certain standard excusing conditions such as duress and insanity, moral agents are morally responsible for their actions.²⁸ Normal adult humans are paradigmatic cases of moral agents.²⁹ In contrast, moral patients are creatures which "lack the prerequisites that would enable them to control their own behavior in ways that would make them morally accountable for what they do."³⁰ They can harm others, but not wrong them.³¹ Although "human infants, young children, and the mentally deranged or enfeebled are paradigm cases of... moral patients," the category also includes animals. Significantly, moral patients are not necessarily subjects-of-a-life: all moral patients are conscious and sentient (e.g. turtles, goldfish, and finches), but only those with more complex mental capacities like belief, desire, and memory (e.g. dogs, pigs, and other mammals) are also subjects-of-a-life.³² Armed with this cross-species moral distinction between agents and patients, Regan then considers the kinds of harms that can be inflicted upon each category. While conceding that we can harm moral agents in ways that we cannot harm (subject-of-a-life) moral patients, Regan claims that we can harm both of them in at least some similar ways—such as the deprivation of food and water—that demand similar moral evaluation.³³ So when Regan concludes that moral agents have direct duties not to harm moral patients ("direct" in the sense of duties to them, not merely duties involving them), he is claiming moral standing and legal protection for all subjects-of-a-life, whether human or not. Regan thus creates a single moral category out of marginal humans and sufficiently conscious animals, such that they share a single fate.

Ultimately, the inherent value attributed to subjects-of-a-life is supposed to be a fact that demands our respect. Regan writes that "reason compels us to recognize the equal inherent value of [sufficiently conscious] animals... and with this, their equal right to be treated with respect."³⁴ So we have a unyielding and direct moral duty not to use and abuse animals for our own ends—whether in medical testing, animal agriculture, or sport hunting—whatever the cost in dollars, comfort, or even human life. Such is the end result of Regan's use of the marginal humans argument in his case for animal rights.

The Essence of the Marginal Humans Argument

The marginal humans argument is often interpreted as a borderline case problem, such that marginal humans constitute the problematic border between non-rational beasts and rational humans. Since those marginal humans have some features in common with rational humans and other features in common with non-rational beasts, should they be accorded the moral and legal standing of the former or the latter? If treated as rational humans rather than non-rational beasts,

²⁷ Regan, *The Case for Animal Rights*, 151.

²⁸ *Ibid.*, 152.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, 153.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*, 189.

then aren't we obliged to offer the non-rational beasts the same consideration in virtue of their similarity to marginal humans? While this reading of the marginal humans argument has some merit, it fails to capture its basic point—and so underestimates it. Clearly, the marginal humans argument does not question our capacity to distinguish between humans and beasts. Despite their inability to reason, marginal humans are still human. Nor does it concern any difficulties in applying the proposed criterion of reason to determine which creatures warrant moral and legal standing and which do not. Such practical problems are of little philosophic significance in this case. In short, the marginal humans argument does not claim that beasts deserve the same moral and legal protections as humans because we are unable to adequately differentiate beasts from men or rational from non-rational creatures.

If the marginal humans argument were just such a line-drawing problem, the advocates of animal rights/liberation would not be helping themselves by raising it. After all, the very same objection about line-drawing would apply to Singer's moral distinction between sentient and non-sentient creatures and Regan's moral distinction between subjects-of-a-life and non-subjects-of-a-life—and thus undermine their own positive claims about the scope of liberation/rights. As Regan says with respect to consciousness in animals,

Where one draws the line regarding the presence of consciousness is no easy matter, but our honest uncertainty about this should not paralyze our judgment in all cases. We cannot say exactly how old or how tall someone must be, to be old or tall, respectively, but it does not follow that we cannot recognize that some people are old or tall. Our ignorance about the shadow borders of attributions of consciousness is not reason to withhold the attributions to humans and those animals like us in the relevant respects.³⁵

The mere existence of some borderline cases between two justly-differentiated classes (such as between tall and short, old and young) cannot justify obliterating the difference between those classes (such as by declaring all people to be short and young). Similarly, the fact that marginal humans constitute a problematic border between rational humans and non-rational beasts could not justify according non-rational beasts the moral and legal standing of rational humans. To do that, some more substantive argument against rationality as the dividing line between creatures with and without such standing. After all, if borderline cases undermined such classifications, then the borderline cases associated with Singer's standard of sentience and Regan's standard of subject-of-a-life-hood would require them to extend their respective claims of equal consideration of equal rights not just to all animals, but to the absurdity of plants, and then further.

If the basic point of the marginal humans argument is not the obliteration of a distinction between categories by appeal to borderline cases, then what is it? In short, it is the illumination of an inconsistency in the application of a standard by appeal to unusual cases. The marginal humans argument observes that the species-based distinction between humans and non-humans does not perfectly correspond to the capacity-based distinction of rational versus non-rational. So when advocates of human rights claim special standing for all and only humans based upon the uniquely human capacity to reason, the advocates of animal rights/liberation cry foul by pointing to those just-barely or not-at-all rational marginal humans. So the claimed standard of rationality—and its supposedly impartial case for human rights—seems like nothing more than a smokescreen for a raw assertion privilege for all those lucky members of the human species, whether rational or not. That, the defenders of animal rights/liberation claim, is nothing more than "speciesism." The marginal humans argument thus attacks rationality as a criterion of moral standing, not on the grounds of falsehood, but on the grounds of dishonesty. It says: If the

³⁵ Ibid., 30.

defenders of the criterion of rationality applied it squarely and impartially, they would have to concede that marginal humans deserve equal standing with the beasts. Furthermore, the only way to avoid that unpalatable outcome is to adopt some less demanding criterion that will grant standing to those marginal humans, along with some animals. Such is the most essential and plausible thrust of the marginal humans argument.

Responses to the Marginal Humans Argument

In recent years, some defenders of human rights have directly attacked the marginal humans argument—with varying degrees of success. In *Putting Humans First*, Tibor Machan attempts to refute Singer’s version of the marginal humans argument from within the framework of natural rights-based libertarianism.³⁶ As a methodological starting point, Machan warns that “one cannot make general claims based upon special cases; one cannot even know what constitutes a special case until one first knows what constitutes a normal and typical case.”³⁷ He then argues that the case for human rights “rests primarily not on the particular level of intelligence or mental capacity of individual human agents but rather on their particular type of consciousness, namely what Ayn Rand called ‘volitional consciousness’; it is this form of consciousness that makes us moral agents. Only a human being completely stripped of conscious faculty—for example, an irredeemably brain-dead accident victim—might be said to lack moral agency altogether.”³⁸ Such cases may present us with difficult choices, but they cannot “tell us about the alternatives facing a normally functioning person and how he should conduct himself.”³⁹ Machan does not wish to ignore the difficult cases, but claims that “we can only [deal with them] by applying and adapting the knowledge we acquire from the normal case,” not by “start[ing] with the exception and infer[ing] the rule.”⁴⁰ Later, Machan considers the case of less capable humans, particularly whether we are morally permitted to use them as we do animals. He says no: “We are free to use the lower animals not because they are less capable than us, but because they lack our moral faculty altogether. This is not true of other human beings, whatever their shortcomings may be.”⁴¹ A bit later, Machan concedes that “some people—infants and certain invalids—cannot be characterized as fully responsible moral agents. There are some who have become so ill or incapacitated that we excuse their conduct even when they act in ways we would normally consider reprehensible.”⁴² Unfortunately, Machan does not sketch an account of the rights of such people, but merely notes that “these are exceptions, explained by reference to the special conditions of debilitation or disease.”⁴³

In essence, Machan offers three basic criticisms of the marginal humans argument. First, he rejects its implicit view of mental capacity as nothing but a continuum of degrees, instead claiming that humans differ in kind from other animals, in that (almost) all and only humans possess the “volitional consciousness” required for moral agency. Second, he claims that cases in which humans entirely lack such volitional consciousness are far more rare than suggested by the marginal humans argument, since diminished rational capacity is quite different from absent

³⁶ Tibor Machan, *Putting Humans First* (Oxford: Rowman & Littlefield, 2005).

³⁷ *Ibid.*, 16.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*, 17.

⁴¹ *Ibid.*, 35.

⁴² *Ibid.*, ??? FIND CITE!!!

⁴³ *Ibid.*, 38.

rational capacity. Third, he rejects the attempt to develop any grand theory of animal rights on the basis of those few abnormal humans.

In *The Animal Rights Debate*, Carl Cohen rejects the marginal humans argument on somewhat similar grounds, albeit from a Kantian perspective. By way of background, Cohen argues for human rights based upon the fact that only humans are capable of forming a moral community, since only we can “confront actual or potential conflicts between what is in their own interest and what is just” and then “restrain ourselves... on purely moral grounds.”⁴⁴ He then claims, “only in a community of that kind, a community constituted by beings capable of self-restricting moral judgments, can the concept of a *right* be intelligibly invoked.”⁴⁵ Presumably, the basic idea is that claims of rights are meaningless in dealings with creatures incapable of the moral self-control required to respect those rights. After sketching this general view, Cohen considers a variant of the marginal humans argument as an objection to it. That variant says: Rights are based upon moral capacities, yet even those humans which lack moral capacities have rights, thus rights cannot be grounded in moral capacities.⁴⁶ Cohen regards such objections as “common but miss[ing] the point badly.”⁴⁷

They arise from a misunderstanding of what it means to say that humans live in a moral world. Human children, like elderly adults, have right *because they are human*. Morality is an essential feature of human life; all humans are moral creatures, infants and the senile included. Rights are not doled out to this individual person or that one by somehow establishing the presence in them of some special capacity. This mistaken vision would result in the selective award of rights to some individuals but not others, and the cancellation of rights when capacities fail. On the contrary, rights are *universally* human, arise in the human realm, and apply to humans generally. This criticism (suggesting the loss of rights by the senile or comatose, etc.) mistakenly treats the essential moral feature of humanity as if it were a screen for sorting humans, which it most certainly is not. The capacity for moral judgment that distinguishes humans from animals 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 human 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. It is suppose to suppose that human rights might fluctuate with an individual’s health or dissipate with an individual’s decline. The rights involved are human rights. On the contrary, animals are of such a kind that rights never pertain to them; what humans retain when disabled, rats never had.⁴⁸

Unfortunately, Cohen’s defense against the marginal humans argument in this passage is somewhat murky. Like Machan, he clearly regards the difference between humans and beasts as one of kind rather than degree: human life is “essentially moral,” whereas morality is entirely beyond the ken of beasts. Given that divide, the fluctuations in mental and moral capacity that naturally occur over the course of a person’s lifetime are of little significance to his proper moral or legal standing. Cohen does not directly address the status of humans completely lacking in moral capacity, although he does seem to think that any capacity for such—whether past, present, or future—justifies full human rights.

The marginal humans argument certainly does suffer from an implicit presumption that the mental capacities of the creatures in question differ only by degrees—and necessarily so. The claim that the mental capacities of marginal humans are often surpassed by ordinary beasts requires a simple “who’s smarter?” comparison in which the more complex tasks performed by

⁴⁴ Carl Cohen, “In Defense of the Use of Animals,” in *The Animal Rights Debate* (New York: Rowman and Littlefield, 2001), 36.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 36-7.

⁴⁷ *Ibid.*, 37.

⁴⁸ *Ibid.*

ordinary beasts serve as proof of their greater mental powers. Certainly, Singer routinely treats the human capacity to reason as a mere matter of greater intelligence. And he explicitly claims that human infants differ from adult mammals only in degree.⁴⁹ Regan's more nuanced view of mental capacities reduces the in kind differences between human and animal consciousness to mere degrees by attributing complex mental states like beliefs, concepts, and self-awareness to subjects-of-a-life, even while using those terms in ways that bear no resemblance to the inner life of humans.⁵⁰ For example, subjects-of-a-life are not self-conscious in the human sense of reflecting upon and directing their own conceptual thinking, but merely in the sense of somehow implicitly identifying with their own desires.⁵¹

The uniquely human capacities for abstract reasoning, moral evaluation, self-awareness, self-control, and the like mean that human consciousness is different in kind from that of other animals, not merely in degree. So a simple rank ordering of mental powers along a single dimension is not possible. And more complex behavior is not proof of greater mental powers, since it might also result from a particularly excellent use of lesser powers. More importantly, many marginal humans, particularly young children and retarded adults, clearly possess an immature or primitive form of reason. As such, they fully satisfy the standard criterion for moral and legal standing on their own modest merits. They may not possess the full rational power of Aristotle, but they do not lack reason entirely, as the beasts do. In short, differences in degree of rationality are both possible and actual—and some capacity to reason is a huge step above no capacity to reason.

Differentiating Between Marginal Humans

To more clearly understand the difficulties posed by marginal humans for the advocate of all and only human rights, we need to distinguish between three fundamentally different kinds of cases: (1) impaired rationality, (2) potential rationality, and (3) no rationality. By conflating these cases, the marginal humans argument gives the illusion of strength. So let us consider each in turn.

In cases of impaired rationality, the person is able to reason, but not in complex or demanding ways—perhaps due to mild to moderate retardation, drunkenness, senility, immaturity, or exhaustion. Such a person is still able to think and judge in abstract terms and act accordingly, even if not so clearly or so wisely. Obviously, the proper moral and legal treatment accorded to such people will depend substantially upon the facts of the individual case, such as whether the impairment is voluntary or involuntary, temporary or permanent, and so on. Fortunately, those details are irrelevant in the context of the marginal humans argument, since such people do meet the standard criterion for moral and legal standing, namely rationality. They possess the human *kind* of consciousness, even if not to the same degree as a normal, healthy adult. As such, the marginal humans argument cannot rightly claim that accepting the morality of medical testing upon dogs logically requires us to accept similar medical tests upon three year olds, teenagers with Down's Syndrome, and forgetful octogenarian.

The various cases of potential rationality—paradigmatically human infants—pose a greater philosophical challenge. In the course of developing his marginal humans argument, Singer quickly rejects the potential of human infants to develop full human rationality as irrelevant to ascriptions of moral and legal standing. He claims that such a concern for

⁴⁹ Singer, "A Utilitarian Defense of Animal Liberation," 36.. Emphasis added

⁵⁰ Regan, *The Case for Animal Rights*, 77.

⁵¹ *Ibid.*, 75.

potentiality would demand not merely opposition to abortion (“since the fetus has the same potential as the infant”), but also opposition to contraception and abstinence (“since the egg and sperm, considered jointly, also have the same potential”).⁵² By focusing solely upon actual mental capacities, Singer concludes that a medical experimenter “shows a bias in favor of his own species whenever he carries out an experiment on a nonhuman for a purpose that he would not think justified him in using a human being at an equal or lower level of sentience, awareness, ability to be self-directing, etc.”⁵³

In fact, genuine potential for rationality cannot be so easily dismissed as hocus pocus. If actual rationality were required for moral and legal standing, then a person in a temporary coma—or even just asleep for a few minutes—would lose all his rights: he could be justly killed at all. So obviously potential is relevant in at least some cases. Moreover, Singer’s seemingly simple examples of abortion and contraception open rather large cans of metaphysical worms about whether the possible future qualities of not-yet-existing entities are genuine potentials. After all, a fetus must be born to become an autonomous organism, while the sperm and egg haven’t even fused into an embryo yet. So what is this potential rationality a potential of? Whatever the answer, Singer hasn’t provided a clear or compelling reason to reject the appeal to the infant’s potential for rationality as nonsense. Moreover, all potentials are grounded in actuals—in the sense that the infant must have some actually existing biological features enabling it to develop its rational capacity over time. Those biological features distinguish it from other animals forever incapable of reason. In other words, the infant’s developing capacity for rationality cannot be regarded as equivalent to no capacity for rationality, as the marginal humans argument requires.

The third type of case—humans wholly lacking reason—are more strange for the defender of human rights. The encephalitic baby, although outwardly human, does not possess the require biological components for rational thought any more than a turtle or alligator. Similarly, the man who suffers a massive traumatic brain injury but languishes in a permanent coma has lost all hope of reason. My own view is that the humans vegetating between life and death have no capacity for a remotely human life—and so cannot have the rights that belong to it. So apart from the law wishing to err on the side of caution in order to prevent disastrous mistakes or malicious crimes, and with all due respect to advance directives or family wishes, such people may be hastened to their deaths.

However, my own jumbled thoughts on this matter are of little consequences, since such wholly non-rational people cannot help the advocates of animal right/liberation make their case. After all, when humans utterly lack a capacity for rationality, they do not revert back to the level of animals, but to plants. Yet such vegetative humans fall well outside the scope of Singer’s utilitarianism (since they aren’t sentient) and Regan’s rights view (since they aren’t subjects-of-a-life). So if the thought of denying the protections of rights to vegetative humans were as terrible as doing so with infants, then a much more radical view than animal rights would be required.

Of course, in the shadowy borders between no rationality, partial rationality, and potential rationality, we are likely to find some hard-to-classify humans. While the law may wish to err on the wide of caution, the practical problems of drawing clear lines between such categories could not justify blending the two categories, for all the reasons mentioned earlier. As

⁵² Singer, “A Utilitarian Defense of Animal Liberation,” 36.

⁵³ Ibid.

for the main three categories of marginal humans, the marginal humans argument lacks any firm ground upon which to stand.

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