SOME RIGHTS OF SOME NON MORAL AGENTS -

NECESSARY CONDITIONS FOR MORAL RIGHTS POSSESSION

by

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DEDICATION

To my Mother - for her emotional empathy

PREFACE

The recent convergence of a number of technological, medical and social factors has led to a new interest and urgency to philosophical problems about the ascription of rights and the objects of duty. Medical techniques now enable us to keep human bodies functioning even after their consciousness has apparently ceased to function, or has been reduced to a level at which raw sensation seems to be present without the presence of cognitive abilities. The point at which it could be properly said that a person has died has now become unclear, and among the philosophical issues that have achieved new cogency in this context are some relating to rights: On the supposition that functioning, rational, conscious adult humans have a right to life, is there a point at which we can say of a human being that is in some sense still alive, but very much "less than whole" in regard to consciousness, that he no longer has a right to life? We see parallel problems about the beginnings of human life. For various reasons, the morality of abortion has re-emerged as a philosophical, social and legal problem. The zygote and fetus are also "less than whole" human beings - is there a demarcatable point at which we can say that this entity has become a whole enough human being to warrant our ascribing rights to it? Further, since the stages of complexity of human consciousness during growth, on the one hand (as from zygote to adult), and during decay, on the other hand (as during the onset of brain death in the terminally comatose) seem to be analogous to types of consciousness that some

animals possess, we might ask - on the assumption that there is a connection between consciousness and rights possession, whether we must, for the sake of consistency and fairness, give at least some animals the same rights we might be willing to give to humans who are "less than whole" in regard to the degree of consciousness they possess.

If, on the other hand, we want to deny any connection between consciousness and rights possession, we are forced to deal with even more issues about rights ascription. For example, the claim has been made that inanimate entities such as trees, and systems of entities, such as ecological niches, can meaningfully have rights ascribed to them.

In this dissertation I propose to deal with some of the connections between consciousness-possession and rights-possession. I hope to show that at least some of the sorts of rights that an entity may or should have depend on the sorts of interests it possesses and, in turn, the sorts of interests that are cogent to rights ascription are directly correlated to the degree of consciousness an entity possesses.

Some of the terminology I will be using here will, at times, coincide with much of the terminology of Value Theorists such as Perry[1]

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[1] c.f. Ralph Barton Perry, Realms of Value: A Critique of Human Civilization (Cambridge: Harvard University Press, 1954).

and Dewey.[2] However, most of their concern was normative in a fundamental sense; my concern here is, for the most part, not normative in that fundamental sense of trying to establish a foundation for certain ethical beliefs. It will be seen, for example, that I will accept that certain states-of-affairs <u>are</u> taken as valuable enough to be secured or protected by rights. The fundamental normative question - whether these states-of-affairs <u>ought</u> to be taken as valuable is not my major concern. That is, for example, I will not, in general, deal with the distinction between 'being valued' and 'valuable.'

My concern is more about certain questions of extention: Given that there are such states-of-affairs that are considered valuable enough by adult, rational human beings to be protected or secured by rights and, accepting that these states-of-affairs ought to be so protected or secured by rights, to what other entities, aside from adult, rational human beings, are we committed - by principles of justness and fairness - to extend those same rights.[3]

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[2] c.f., John Dewey, "Theory of Valuation," (Chicago: University of Chicago Press, 1939) reprinted in <u>Writers on Ethics</u>, ed. Joseph Katz et. al., (Princeton: D. Van Nostrand Company, Inc., 1962).

[3] After writing this thesis, a recent work that contains some arguments that parallel my own, has been brought to my attention. I have included some discussion of this book in an appendix. The book is: Jonathan Glover, <u>Causing Deaths and Saving Lives</u>. (New York: Penguin Books, 1977).

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INTRODUCTION

It is often easy to attack philosophical theories by bringing forward borderline cases that the theories are incapable of dealing with. My intent here is not to play a game of that sort. The problems about the rights-status of the borderline cases discussed here are too important for games. Because it has been difficult to set out a theory that would give sufficient conditions to use to decide whether these borderline cases fall into the circle of rights possessors, I have chosen a different strategy here - I am attempting to give some criteria which would serve to exclude entities from moral rights possession. That is, I have chosen to work with the problem of setting necessary conditions for rights possession.

In Chapter One, I begin by discussing what I have termed "Moral Agent Theories" of rights possession. I have put a number of traditional and contemporary theories of rights possession together and distilled out what I think they all have in common - a requirement that an entity have some capability of having duties before it can be considered a proper candidate for rights possession. Not all such theories are hard-and-fast in that requirement, and so, in this same Chapter, I have separated moral agent theories into two sorts - (1) Those that take moral agenthood as a necessary condition for rights possession and, (2) Those that take moral agenthood as only a sufficient condition.

In this Chapter I argue that both sorts of theories are inadequate to the problem at hand. The weaker versions of moral agent theories - those that take moral agenthood as only a sufficient condition for rights possession - offer us no moral guidelines to use to decide upon the rights of non moral agents. On the other hand, those stronger versions of moral agent theories - those that require moral agenthood as a necessary con-

dition seem to be inadequate in other ways; First, they seem to yield counterintuitive results; They cut out from rights possessors some entities that seem clearly to be possession of some moral rights - children and some of the insane, for example. Second, and more important, I argue that they have not proved their claim in relation to at least some moral rights - those rights, sometimes called "negative" rights that protect an entity from needless harm. In this Chapter, I also offer a brief discussion of Utilitarianism[1] and, while not excluding the possibility that institutions of rights may best have their foundation in some form of Rule Utilitarianism, suggest that if that is true, then the "spadework" I provide in this thesis is useful if not prerequisite to laying that foundation.

In Chapter Two, after an initial discussion of distinctions among various sorts of rights - 'legal rights' contra 'moral rights', and 'general' contra 'special' rights, for example, I attempt to attack the problem of rights ascription in what I believe is a more fruitful way; I examine rights as serving to protect certain interests. In this Chapter, I first describe what I take 'interests' to be and, starting from the position that certain 'interests' have been taken as valuable enough to be protected or secured by rights by moral agents, I go on to discuss what sorts of non moral agents for reasons of justice and fairness, ought to be protected by those same rights.

In Chapter Three, I have tried to show that the possession of consciousness is one necessary condition for moral rights possession and that, in particular, an entity must be capable of caring about the 'good' protected by a moral right before we have to consider it a candidate for possession of a moral right correlative to that 'good.

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1 Further remarks on utilitarianism appear in the Appendix.

Having set out my position, my discussion in Chapter IV deals more specifically with the right that seems most important to these moral issues - the right to life.[2] In this chapter, I offer a discussion of what'good' the right to life protects. I discuss, for example, whether life itself in any form or of any quality is intrinsically valuable, or whether instead life is really held to be of instrumental or derivative value - that is, thought of as a precondition for the possession or attainment of other states-of-affairs held to be of more fundamental value. I have argued that the latter is the case. In the course of this discussion I have concluded that the necessary condition for possession of a moral right to life and a moral right not to suffer needless pain is the possession of the capability of suffering if the state-of-affairs protected by the right is denied or in danger of being denied. I have included some discussion of the moral rights status of the terminally comatose and of animals in this Chapter, as well as some remarks about the rights of some other non moral agents - unborn humans, human infants, very retarded humans, and the senile.

Chapter IV deals directly with the problem of abortion. Most of the Chapter is a critical discussion of Hare's very interesting position on abortion. His position seemed to be a well-written condensation of many of the claims that I have argued against, and seemed to be a position against which I could lay a summary of the conclusions that I have reached in this thesis.

Finally, an appendix defends my version of a rights theory against certain sorts of attacks made against rights theories in general by utilitarian objectors.

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[2] c.f. Jonathan Glover, op. cit., pp. 119-149.

CHAPTER I

SOME THEORIES OF RIGHTS ASCRIPTION

1. Moral Agent Theories

The adult rational human being is the paradigm of entities that have been taken as objects of direct duties and as possessors of rights. We should not find that very surprising if we even casually look at the claims of the main body of moral theorists, particularly in regard to the criteria they set for rights[3] possession in a state. Typical requirements that are set seem to entail that the candidate for possession of rights have the cognitive capabilities and a degree of rationality[4] that can be possessed only, as far as we now know, by adult[5] rational humans.

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[3] I shall leave discussion of the important distinctions to be made among "rights" (e.g. "moral", "legal", "general") for Chapter II.

[4] "Rational" as opposed to 'irrational' rather than to "non-rational."

[5] There is an ambiguity present between the biological and the ethical senses of the term "adult". Presumably, the biological sense of the term refers to a stage of physical growth or to the stage of sexual maturity. The ethical sense of "adult" makes the phrase "adult rational human" almost redundant: in the ethical sense, it is not stage of physical growth or sexual maturity that makes one "adult", it is instead the point at which one is considered to be rational and able to take on obligations. As A. I. Melden remarks en passant, there is probably no one such demarcatable point in human growth (c.f., A. I. Melden, Rights and Right Conduct: Basil Blackwell, 1959) pp. 4-5).

Consider the following melange of criteria for rights possession that have been set forth at one time or another:

(1) The ability to contract personally and consciously obligations. Thus, for example, Hobbes:

> To make covenants with brute beasts is impossible because, not understanding our speech, they understand not nor accept of any translation of rights, nor can translate any right to another; and without mutual acceptation there is no covenant.[6]

and:

> Signs of contract are either express or by inference. Express are words spoken with understanding of what they signify [emphasis in last phrase mine.] . . .[7]

(2) The ability consciously to set aside personal gain and satisfaction of desires in order to meet obligations. Thus Kant:

> Thus the first proposition of morality is that to have moral worth an action must be done from duty.[8]

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6 Thomas Hobbes, Leviathan: Parts I and II, with an Introduction by Herbert W. Schneider (Indianapolis: Bobbs-Merrill Company, 1958) p. 116.

7 Ibid., p. 113.

8 Immanuel Kant, Foundations of the Metaphysics of Morals, ed. Robert Paul Wolff, trans. Lewis White Beck (Indianapolis: Bobbs-Merrill Company, Inc., 1969) p. 19. While Kant does not directly address himself to the question of rights in this work, I don't think the implication I have drawn here about Kant's position on rights possession misrepresents him.

And:

> It also follows that his [a rational being's] dignity (his perogative) over all merely natural beings entails that he must take his maxims from the point of view which regards himself, and hence also every other rational being, as legislative. (The rational beings are, on this account, called persons.) [Emphasis mine.] [9]

(3) The ability to recognize one's own good, to recognize how one's own good or desires are or are not in accord with a communal good, and the ability to have a conception of ways to achieve those personal goods that are in harmony with the communal good. Thus, Green:

> It is only a man's consciousness of having an object in common with others, a well-being which is consciously his in being theirs and theirs in being his, - only the fact that they are recognized by him and he by them as having this object, - that gives him the claim [to have rights] described.[10]

(4) The ability to make claim personally to what one thinks is one's due. Thus, Benn:

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9 Ibid., p. 64.

10 T. H. Green, Lectures on the Principles of Political Obligation, with an introduction by Lord Lindsay of Birker (Ann Arbor: Ann Arbor Paperbacks, University of Michigan Press, 1967) p. 144.

> . . . it follows that only a moral agent, having the conceptual capabilities of considering whether to insist or not upon his right, of manipulating, too, the "pulls" it gives him on the actions of others, . . . could be said to be a subject of rights.[11]

Under (1), the candidate for rights possession must be capable of more than just parrot-like utterances of phrases like "I promise to give John Silver a doubloon," or "Polly wants the cracker owed her." The entity is required to have some understanding of what it may mean to make a promise or to contract obligations in other ways. It must have the capacity to understand what it means to take on an obligation, both as one who owes and as one who may be owed.

The ability to set aside personal gain and satisfaction of desires in order to meet obligations, as in (2), is also a demand for both a developed ability to conceptualize and the possession of a strong degree of rationality. What is required here is more than the instinctual altruism exhibited by a cat towards its kittens - more than the instinctual or conditioned responses that would, in an animal, mirror actions performed <u>because</u> the entity believes he <u>ought</u> to perform them.

The ability to recognize one's own good and the accompanying requirements set forth in (3) are meant as more than a requirement that

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[11] S. I. Benn, "Abortion, Infanticide, and Respect for Persons," <u>The Problem of Abortion</u>, ed. Joel Feinberg (Belmont, Calif.: Wadsworth Publishing Corp., 1973) p. 99.

the entity simply have a set of dispositions which can be called "desires" or "goals" and which happen to correspond with the desires and goals of others. The candidate for rights possession must have the concepts that he desires x, that others or the community desires y, and that his pursuit or achievement of x would be compatible or incompatible with the achieving of y.

The ability to demand or to make claim to what one thinks is one's due, as in (4) is taken to mean more than simply having an ability to give forth an instinctual response like that of a dog snarling over a bone . The candidate for rights possession must be at least capable of claiming that x is his due and, perhaps more strongly, he may be required to give some reasons to justify his claim - if only to be capable of saying "It is my due as a matter of right."[12]

Moral Agent Requirement for any Object of 'Direct' Duties - Kant

Similar requirements have sometimes been set for candidacy to moral objecthood in general. That is, we have on the one hand, moral agent theorists who hold that moral agenthood is a necessary requirement for rights possession, but not a necessary requirement for being an object of duties. On the other hand, there are those theorists who hold that any possible object of 'direct' duties must be a moral agent. Kant was the classical proponent of the latter position, holding that only

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[12] Ibid., c.f., p. 100.

entities with "rational wills" - entitles that are capable of understanding that their moral actions are implicit instantiations of universal laws which, as such, placed them under obligations, could themselves be the objects of direct duties. In Kant's view we may have duties that involve entities that lack rational wills, but these duties are indirect towards those entities; they are really direct duties towards entities that have rational wills. Thus, we have duties to treat animals with kindness, but kind treatment is not due the animals. Rather, the argument goes, cruel treatment of animals may inure persons to cruel treatment of other persons and persons (i.e., entities with "rational wills") have direct duties to other persons not to be inure to their sufferings. ". . . he who is cruel to animals becomes hard also in his dealings with men."[13] Implied by this position is that, for example, if it could be shown that in general, or in any particular instance, treating an animal cruelly would have no inuring effect on human beings, there would be no duty to refrain from cruel treatment of the animal. In fact, if it could be shown that cruel treatment of animals had a beneficial effect for human beings, it would be our duty to treat them cruelly. Thus, Kant writes: "Vivesectionists, who use living animals for their experiments, certainly act cruelly, although their aim is praiseworthy, and they can justify their cruelty,

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[13] Immanuel Kant, Lectures on Ethics, trans. Louis Infield (New York: Harper & Row, Publishers, 1963) p. 240.

since animals must be regarded as man's instruments; . . ."[14] If, on the other hand, it could be shown that cruel treatment of a human (without his consent) would have beneficial effects for other humans then, regardless of the enormity of the beneficial effects, it would be wrong to use that human cruelly. Humans, because they have rational wills, are to be treated as ends and never to be used solely as instruments to achieve other ends. They are, according to Kant, the sole earthly objects of our direct duties. Animals, and anything else that lacks a "rational will", are "things" which may be used as instruments and towards which we have no direct duties.

A Note on "Moral Agenthood".

Strictly speaking, only theories that require that an entity itself be capable of having duties before it can be considered to be an object of duties or, at least, a possessor of rights, are properly called "moral agent theories."[15] Under that definition, perhaps (3) and (4) (Page 5, above) are not properly categorizable as "moral agent theories". I shall, however, for convenience sake and, I think without serious

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[14] Ibid. p. 240.

[15] "Here it is usually held that to be a moral agent ... one must be free and responsible, with a certain maturity, rationality, and sensitivity - which normal adult human beings are taken to have." Dictionary of Philosophy, 15 ed., s.v. "agent" by William Frankena.

distortion, call any theory that demands that a candidate for rights have cognitive capabilities and a degree of rationality roughly equivalent to the cognitive capabilities and rationality of an adult, sane, normal human being, a 'moral agent theory'.

In general, the cognitive or conceptual requirements of such theories include the possession of at least some of the following:

(1) The ability to have desires coupled with (2) the ability to recognize that others have desires. (3) the ability to recognize that others' desires may or may not be compatible with one's own desires. (4) the ability to have some concept of moral law - i.e., the ability to think (correctly or not) that oneself or others have not done "what one ought to do." (5) the ability to be rational-this demand of rationality requires that the cognitive capabilities just mentioned be present, and adds a "free will" stipulation; stated oversimply, it is the apparent ability to overcome one's desires or inclinations for the sake of trying to do what one thinks one "ought" to do.
Put another way, it is the ability to perform right actions not merely from instinct, but with the idea in mind that one is acting from a sense of duty.

Not every moral agent theorist about rights possession is a moral agent theorist about moral objecthood in general. That is, there are those who hold, contrary to Kant, that we may have direct duties to entities that are not moral agents, but hold too that these entities have no <u>right</u> to the performance of these duties. I shall briefly discuss this noncorrelativity claim later in this chapter.

Some Problems with the Moral Agent Position.

When we try to reconcile a consistent moral agent position on rights with the actual state of rights possession in law, certain differences seem to appear.

Legal Rights Possessors.

In law we notice that there are sorts of entities that, (at the time this is being written), appear to possess rights and yet do not fit the criteria set for moral agenthood. These legal rights possessors may be roughly separated into (at least) three different classes:

(1) Entities that are only potentially moral agents. These would include humans from the time of conception through childhood. Their status as legal rights possessors (particularly before birth) has shifted through the years and still shifting.[16] When they are afforded legal rights, the usual situation is to have a guardian or proxy claim, demand, or waive their rights. They are held to be personally incapable of demanding, claiming, or waiving rights.

(2) Entities that were moral agents at one time, but are now only potentially moral agents. These would include some of the insane and some comatose adults.

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16 c.f., John T. Noonan, Jr. "An Almost Absolute Value in History," The Morality of Abortion, ed. John T. Noonan, Jr. (Cambridge: Harvard University Press, 1970).

(3) Entities that are not thought to be potential moral agents. These are of two sub-classes: (a) those that once were moral agents - the rational, normal adult now dead or irreversibly comatose[17] and (b) those that never were moral agents - humans that are retarded to the degree that they cannot meet the cognitive requirements for moral agenthood.[18] Minimal I.Q. idiots, for example.

Moral Agent Position.

If we shift back from law to philosophy, from legal rights possessors to what moral agent theories imply about rights possession, we find ourselves either in a rather small circle of rights possessors - if the theory takes moral agenthood as a necessary condition for rights possession; or in a circle with an indefinite area - if the theory takes moral agenthood as only a sufficient condition for rights possession.

For the sake of clarity, from this point on, I whall refer to those theories that take moral agenthood as a necessary condition as 'strict moral agenthood theories', and I shall refer to those theories that take moral agenthood as only a sufficient condition for rights possession as 'weak moral agenthood theories.'

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17 A more detailed discussion of "irreversibly comatose" will follow in Chapters III-IV.

18 c.f., Joseph Fletcher, "Indicators of Humanhood: A Tentative Profile of Man," The Hastings Center Report 2 (November, 1972).

If moral agenthood is a necessary condition for the possession of rights, then entities that are not moral agents now seemingly cannot possess rights whether or not they were moral agents at one time or whether or not they are potential, but not actual, moral agents. This point has been recognized by some theorists who hold to some form of a moral agent position, yet it is a point they often seem to slur over. Sometimes they cast about for reasons to enlarge the circle; thus, T. H. Green, a strict moral agent theorist about rights possession:

> We treat life as sacred even in the human embryo, and even in hopeless idiots and lunatics recognize a right to live, a recognition which can only be rationally explained on either or both of two grounds: (1) that we do not consider either their lives, or the society which a man may freely serve, to be limited to this earth, and thus ascribe to them a right to live on the strength of a social capacity which under other conditions may become what it is not here; or (2) that the distinction between curable and incurable, between complete and incomplete, social capacity is so indefinite that we cannot in any case safely assume it to be such as to extinguish the right to live. Or perhaps it may be argued that even in cases where the incapacity is ascertainably incurable, the patient still has a social function... a passive function as the object of affectionate ministrations arising out of family instinct and memories; and that the right to life protected corresponds to this almost to cast about in certain cases for an explanation of the established belief in the sacredness of human life, shows how deeply rooted that belief is unless where some counter belief interferes with it.[19]

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19 Green, op cit., p. 158.

Green's casting about seems to be consistent with present day intuitions about the rights status of at least some of the entities he mentions. Taking moral agenthood as a necessary condition for rights possession seems to shrink the circle of rights possessors to a degree that seems unacceptable and unduly harsh. Thus, for example, a strict contract moral agent theorist, Grice, writes:

> It is an inescapable consequence of the thesis presented in these pages that certain classes cannot have natural rights: animals, the human embryo, future generations, lunatics, and children under the age of say, ten.[20]

While moral intuitions differ about the rights status of zygotes and fetuses and even normal infants, very few would, I think, accept that children and lunatics should be entirely excluded from the circle - at least as far as certain rights such as the right to life and the right not to be put into needless pain are concerned.

On the other hand, if we are tempted to go along with our intuitions or the law in ascribing rights, we find ourselves in the midst of difficulties (which is not unusual for positions taken solely from the point of view of "intuitions.") For example, the status of zygotes and

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20 Geoffrey Russell Grice, The Grounds of Moral Judgement, (Cambridge: Cambridge University Press, 1967) pp. 147f. Grice claims that 'natural' rights are really based on contract.

fetuses in both law and intuition is not stabile. The legal rights status of unborn humans seems to change from time to time and from jurisdiction to jurisdiction. And, at the time this is being written, there seems to be no general consensus of intuition at all about the rights status of unborn humans.

If we are tempted to accept the weak moral agent theories, taking moral agenthood as only a sufficient condition for rights possession, we are left with the question of setting of setting criteria to determine the size of the circle - who and what, aside from moral agents, ought to have rights? That question can be directed at those who take moral agenthood as a sufficient but not necessary condition for rights possession, as well as directed at those who would reject moral agent criteria for rights possession entirely (see, for example, my remarks at the end of this chapter about utilitarian criteria for rights ascription). Should, for example, a very severely retarded child have rights and a normal adult cow not have rights? If it is true, as it has been claimed[21], that a normal adult chimpanzee has cognitive abilities equivalent to that of a normal two year old human child, should adult chimpanzees have the same rights we might give to a two year old human child, or, have the same rights we might give to a human adult whose intelligence has been frozen at the level of a two year old child?

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[21] Peter Jenkins, "Teaching Chimpanzees to Communicate," Animal Rights and Human Obligations ed. Tom Regan and Peter Singer (Englewood Cliffs: Prentice-Hall, 1976) p. 92.

Thus moral agent theories of rights ascription seem to leave us with a dilemma; taken as a call for moral agenthood as a necessary requirement for rights possession, it leaves us with results that seem to be, in part at least, counter-intuitive. Taken as a call for moral agenthood as only a sufficient condition for rights possession, we are left with the problem of finding the necessary conditions.

Fictional Moral Agent Status.

There is one seeming way out for the moral agent theorist, but I believe it ends in a blind alley. The weak moral agent theorist may say that we can include more entities within the circle by means of legal fictions[22]: We can, for example, give a child legal rights by ascribing an imaginary moral agent status to it, and have that moral agent status, with the rights, claims, and duties that flow from it, expressed or taken on by a guardian or proxy. Thus Hobbes writes:

> A person is he whose words or actions are considered either as his own or as representing the words or actions of another man or of any other thing to whom they are attributed, whether truly or by fiction.[23]

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22 c.f., John Chipman Gray, The Nature and Sources of the Law, rev. ed. (New York: The Macmillan Company) reprinted ed. (Boston: Beacon Press, 1963) pp. 30-38.

23 Thomas Hobbes, op cit., p. 132.

And:

> Likewise children, fools, and madmen that have no use of reason may be personated by guardians or curators;. . .[24]

But, within the context of moral agent theory, there is no direct duty to any non moral agent to give it the status of a moral agent. There are no moral guidelines and so no duty to assign the non moral agent a 'fictional will'. We are left with the same problem - if we are willing to accept the concept of fictional moral agent status, who or what should receive that status?

If the moral agent theorist takes an even weaker position, taking moral agenthood as only a sufficient condition for rights possession, not resorting to 'fictional wills', or remain elusive about whether he is taking moral agenthood as a necessary or only a sufficient condition, (For example, Rawls:

> Whether moral personality is also a necessary condition [for being entitled to full justice I shall leave aside.[25])

we remain with those important problems about the status of unborn humans, animals, the severely retarded, and so on.

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[24] Ibid., p. 134.

[25] John Rawls, A Theory of Justice, (Cambridge, Mass: Belknap Press, 1971) p. 506.

2. Humanness as a Sufficient and/or Necessary Condition for Rights Possession

A. Humanness as a Sufficient condition.

One not uncommon implicit or explicit proposal[26] for marking a cut-off line for rights possession is to claim that all humans ought to be put into the circle of rights possessors, and all non humans ought to be put into circles marked "not an object of direct duties" or "owed beneficent treatment without a right to that treatment" or "possible possessor of rights".

The underlying assumption, which I will not discuss at this point, seems to derive from Aquinas or earlier Natural Law positions, and appears to be based on the generalization that "all humans are (potentially, at least) rational."

However, as at least some writers on the abortion issue have pointed out, the proposal sometimes rests on an equivocation of terms as 'humanity', 'human being', 'person', and 'member of the species Homo sapiens':

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[26] c.f., St. Thomas Aquinas, "Summa Theologica: Part I, Question 118 Articles 1-3", trans. Fathers of the English Dominican Province, reprinted in Robert L. Perkins, Abortion: Pro and Con, (Cambridge, Mass.: Schenkmann Publishing Co., 1974) Also see Roger Wertheimer, "Understanding the Abortion Argument", Joel Feinberg, ed., op cit.

> We may thus conclude that as the first ingenous effort to prove that embryo or fetus is a human being attempted to move from "human" to "human being" by an equivocation on "human", here the effort at proof, although more sophisticated, turns on a similar equivocation, this time on "human being", which is taken in the argument as meaning "human organism on entity" and in the conclusion as meaning "bearer of rights, persons, etc." The inference from "human organism or entity" ("human being" in an unusual, lean sense) to "human being" (in the ordinary, rich sense of "bearer of rights, persons, etc.") is not analytic, but trades on the not normally equivocal meaning of "human being".[27]

"Person" is a moral term, and it is analytic that persons have rights. "Human being" is equivocal - it is sometimes used as synonymous with "person" and, when used in that sense, it is analytic that human beings have rights. However, "human being" is sometimes used in a taxonomic sense, not as a moral term but as referring to biological characteristics - as synonymous with "member of the species Homo sapiens". When used in the latter sense, it is true that the biologist can tell us that "humanity begins at conception" or that "there is a human being present from the moment of conception", but those are claims within the realms of biology and biological taxonomy. The inference from the biological claim - that a member of the species Homo sapiens is present from the moment of conception, to the moral claim - that a person is present from the moment of conception, must be supported with further argument.

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27 Robert E. Gahringer, "Observations on the Categorical Proscription of Abortion," in Robert L. Perkins, ed., op cit., p. 58.

B. Humanness as a necessary condition

It does not seem that a strong argument could be presented to show that membership in the species Homo sapiens is a necessary condition for rights possession. One could imagine, for example, some entity, perhaps extra-terrestrial, that met the criteria for moral agenthood (which I agree is a sufficient condition for rights possession), but could not be classified as a member of Homo sapiens.

C. Potential Moral Agenthood and Humanness

Biological humanness as a sufficient condition for rights possession is even less justified in the context of strict moral agenthood theories: (1) Clearly, the normal zygote or fetus is a potential moral agent, but clearly too, the claim that potential moral agents ought to have the same rights as actual moral agents requires a supporting argument. My potential to become President does not alone give me the rights of the Presidency. Nor can one argue that the normal zygote or fetus will become a moral agent in the natural course of events (I shall have more to say on that in Chapter IV.), for the strict moral agenthood theories cannot, as they stand, without auxillary argument, make the claim that a potential moral agent has a right to be made into, or to be allowed to develop into, a moral agent.

3. Rights Possession by Non Moral Agents Seemingly Compatible with Moral Agent Theory.

Although at first examination a rigorous interpretation of strict moral agent theory seems to exclude all non moral agents from the circle of rights possessors, a case can be presented for the claim that

at least some non moral agents can have rights even within the confines of strict moral agent theory.

A. Residual Rights

Those entities that once were moral agents - the dead normal adult, the comatose of both sorts (normal adults now temporarily in coma and normal adults now in irreversible coma) may be the objects of some duties that could be taken as corresponding to rights they still possess. Thus, former moral agents may have entered into contracts, incurred obligations, made claims, or expressed wishes before falling into their present state. One might claim that they have a right to the fulfillment of such contracts, or a right that their wishes be honored, or a right that their claims be dealt with justly.

However, it would seem more consistent with strict moral agent theory to look upon such duties not as correlating to rights, but instead simply as duties to fulfill contracts, or keep promises, which involve the former moral agent. Once made, contracts and promises and just claims achieve a moral force of their own and, if A made a contract before he died, it would be more consistent with strict moral agent theory to say that the duty is not to A to fulfill the contract, but instead a duty to fulfill a contract which involves A.

In any event, this proposal of "residual rights" does not appear to be able to account for the ascription of more basic non-contractual rights to such entities. For example, under law and, probably, under intuition, the intentional killing of a reversibly comatose adult or of an innocent insane adult is still considered to be a violation of a right to life, and the torturing of an insane adult would seem to be a

violation of his rights. It is difficult to see how, for example, protecting such a "person" from being killed or tortured could be interpreted as the protection of a "residual right" or as the honoring of a contract made by the "person" when he was still a moral agent, rather than as the protection of a presently existing right of a person who is not a moral agent.

B. The Violation of Future Rights of Potential Moral Agents.

An argument for the ascription of some rights to the potential moral agents that is compatible with strict moral agent theories might run this way:

Zygotes, fetuses, the reversibly comatose, and the insane are potential moral agents. They have no right to become or to be made into moral agents and we may have no direct duty to them to allow or help them become moral agents. However, we may choose to make them into moral agents - we may carry the child to term and proceed to feed, shelter, socialize, and educate him. When cures are available, we may choose to cure the reversibly comatose or the insane adult. In choosing to make them into moral agents, we take on certain responsibilities in regard to them.[28] Certain rights can under these conditions, be

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[28] This may be cogent to the problem of our obligations to future generations - if we decide to allow there to be future generations of moral agents we may, on that account, have obligations to them (and they, corresponding rights). But we may not have an obligation to allow there to be future generations.

violated "forward in time". For example, suppose that full-fledged persons have a right to enjoy sunsets; the removal of an infant's eyes, although not a violation of a right of the infant, is a violation of a right of the person the infant will become. However, the infant or fetus has no right to become a moral agent or full-fledged person and, presumably, he can - within the context of strict moral agent theories - be prevented from becoming, or not helped to become a moral agent.

Taking into account that possibility of violating future rights in the present, and the notion of residual rights (or duties to fulfill contracts that may involve former moral agents), the following seem to be some implications from strict moral agent theories about the rights status of entities mentioned on pages 12-13 above:

(1) Zygotes, Fetuses, Infants: If abortion or infanticide is performed, there will be no moral agent in the future whose rights would be violated in that future-looking way. Similarly, if the zygote, fetus, or infant is treated in such a way that no moral agent can develop - made severely retarded, for example, no right will be violated.

If the intention is to make the zygote, fetus, or infant into a moral agent, rights can be violated in the forward-looking way described above - but whoever is in control - parent or state, can change their intention and kill or mentally retard the entity before it becomes a moral agent, without violating any right of the entity.

(2) Insane Adult Humans. Definitions and types of insanity vary. The types of insanity cogent here might be described as sorts in which the victim once had the cognitive capabilities prerequisite for moral

agenthood, but now is ruled by "compulsion" (rather than being internally free to act in a moral way), or is in a condition in which he is unable to make claims in the senses described on pages 4, 8, 9 above. (e.g., he is catatonic). This is not to claim that there are no other types of insanity that do not meet these criteria, but are considered sufficient reason to judge a human legally incompetant if he is a victim of one or more of them. Nor is it to claim that there are any actual types of insanity that correspond to the rather antiquated philosophical definitions offered above. One may simply speak of hypothetical cases of insanity in which the victim is unable to meet the requirements for moral agenthood, although he possesses the cognitive capabilities required.

In any event, with these cases, residual rights may be present, and these may effectively preserve a good many of his rights until he is made a "whole" moral agent again. For example, the individual may have contracted for medical care before falling into his present state, and that may entitle him to treatment to make him "whole" again. Too, if culpability on the part of others can be established for his falling into his present state, he may be owed treatment as part of compensation (Imagine for example that his incompetant physician mixed up the LSD with the penicillin.).

However, if no residual rights are present, and no culpability for the insanity can be established, the individual's status in regard to rights seems comparable to that of the zygote, fetus, or infant - if there is an intention to make him whole again, then his rights can be violated only in that future-looking way. Otherwise he has no rights.

(3) Severely Retarded Humans. The situation of those who are so severely retarded that they cannot meet the requirements for moral agenthood now, parallels that of the zygote, fetus, or infant. The entity has no rights now since it is not a moral agent and, if it is prevented from becoming a moral agent by killing it or refusing to effect a cure if one is available, there will be no moral agent in the future whose rights were violated in the past.

Welfare Rights[29] and Non Moral Agents.

At this point someone might be tempted to raise the following sort of objection: "Surely some of these entities have a right to treatment - a right to be made whole again, if possible, or a right to have their potential moral agenthood actualized." Thus H. J. McCloskey,who claims to hold a moral agent position on rights possession writes:"If a minimal I.Q. idiot could be cured by a pill as cheap as an aspirin, it would be reasonable to claim that he has a right to the necessary treatment and that we have a duty to see that it is made available to him."[30]

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[29] For a discussion of the concept of "welfare rights" see Martin Golding, "Towards a Theory of Human Rights," The Monist, 52 (1968.

[30] H. J. McCloskey, "Rights," The Philosophical Quarterly, 15 (1965) p. 123.

Such claims are inconsistent with the basic premise of strict moral agent theory. If moral agenthood is a necessary condition for rights possession (as McCloskey claims in other parts of his paper[31]), then those who are not moral agents cannot possess any rights and it is not reasonable to hold, within the context of these theories, that the minimal I. Q. idiot has a right to a curative pill, were it as cheap as aspirin or as dear as diamonds.

In summation, the addition of residual rights (or 'contractual duties', which I think is a concept more consistent with strict moral agent theories) and forward-looking rights can serve to set some limits to the treatment of non moral agents implied by the strict versions of the theory and may allow them some rights under certain conditions. However, the addition has some implications which may seem odd:

(1) Those entities that are not former or potential moral agents can have no rights: these would include at least most animals and the incurably very severely retarded.

(2) Those entities that once were moral agents may have a residue of rights, or at least be involved as the indirect objects of certain duties that may entitle them to benefits equivalent to those enjoyed by "actual" rights possessors.

(3) Those entities that never were moral agents, but have the potential to become moral agents can have only forward-looking rights. The rights are conditional in the odd ways described on page 20-21 above.

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[31] Ibid., c.f., p. 121.

All that is presented above is in the context of those moral agent theories that take moral agenthood as a necessary condition for rights possession. There may be other reasons, consequentialist, for example, to place strictures on our treatment of non moral agents, but any argument for such strictures must be presented as adjunct to or separate from the arguments of strict moral agent theory and the strictures cannot be set in the form of rights.

4. Non-Correlativity of Duties and Rights - Not Every Duty Entails a Corresponding Right.

There is an approach to dealing with moral agenthood which seems to capture some of our intuitive dissatisfaction with the implications of strict moral agent theory, while not discarding moral agent theory of rights entirely. I believe the approach is wrong in part, and I will discuss my objections to it later in this section.

The general supposition of the argument is that not every direct duty to A entails that A has a right to the performance of that duty. So that we may have direct duties to non moral agents without the non moral agents having rights correlative to those duties. This is in contrast to, for example; Kant's position (see pp.9-10 above).

More specifically, the claims are:

> (1) Only moral agents can have rights.
>
> (2) When a moral agent has a right (for example, a right not to have needless pain inflicted upon him), any B, who is a moral agent, has a duty not to violate that right. (In this case, a duty not to inflict needless pain upon A-at least without the consent of A.)

> (3) We do have duties to non moral agents (for example, a duty not to inflict needless pain on animals). These duties are not indirect - it is not just that they involve the non moral agent, as my duty not to break my neighbor's window involves my neighbor's window, but it is a duty to my neighbor. They are directed at the non moral agent. They are for the sake of the non moral agent.
>
> (4) It is not the case that all my duties to C entail that C has a right to the performance of all those duties; in fact, if C is not a moral agent, it is never the case that C can have a right to the performance of any duty.

The position is usually taken in relation to our treatment of sentient non-human animals, though it could also be taken in relation to our treatment of members of our species that are not moral agents. The position usually assumed is that of a call for a rough-and-ready hedonistic utilitarian treatment of animals towards which, the claim goes, we have duties of beneficience without their having a corresponding right to our beneficence. The position is, as Nozick nicely put it: "utilitarianism for animals, Kantianism for people"[32]. The position is widespread:

Thus, for example, John Chipman Gray writes of statutes for the protection of animals:

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[32] Robert Nozick, Anarchy, State and Utopia (New York: Basic Books, 1974) p. 39.

> It is true that there are everywhere statutes for their protection, but these have generally been made, not for the beast's sake, but to protect the interests of men, their masters. Such statutes have sometimes, however, been enacted for the sake of the beasts themselves ...the true reasons of the statutes [against cruelty] is to preserve the dumb creatures from suffering. Yet even when the statutes have been enacted for the sake of the beasts themselves, the beasts have no rights.[33]

And John Rawls:

> While I have not maintained that the capacity for a sense of justice is necessary to be owed the duties of justice, it does seem we are not required to give strict justice anyway to creatures lacking this capacity. But it does not follow that there are no requirements at all in regard to them, nor in our relations with the natural order. Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case.[34]

And W. D. Ross:

> ... if we think we ought to behave in a certain way to animals, it is out of consideration primarily for <u>their</u> feelings that we think we ought to behave so; we do not think of them merely as a practising-ground for virtue. It is because we think their pain a bad thing that we think we should not gratuitously cause it. [But Ross denies them rights][35]

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[33] John Chipman Gray, op cit., p. 43.

[34] John Rawls, op cit., p. 512.

[35] W. D. Ross, <u>The Right and the Good</u> (Oxford: Clarendon Press, 1930) P. 50.

This particular claim about the non-correlativity of rights and duties rests at least partially on ambiguous grounds. It seems to contain a hidden equivocation on 'beneficence.' If 'beneficence' is taken in the Good Samaritan sense - referring only to positive actions that somehow promote the interests of the object of beneficence, then there is certainly reason to question the claim of <u>any</u> entity to a right to the performance of such actions. That question persists whether or not the entity is a moral agent. If, on a rambling walk through unowned land I were to see an adult human caught in a leg-trap which was not set by me, I might very well stop to question whether or not he has a <u>right</u> to my assistance. There are substantial philosophical problems relating to rights to that sort of beneficence in regard to moral agents.

Typically, however, the claim that we have a duty of beneficence towards non-human sentient creatures is taken to really mean that we have a duty of <u>non-maleficence</u>. Thus, writers will speak of duties not to be cruel to animals, or of duties not to inflict needless pain on animals, more often than they speak of duties to provide animals with pleasure or duties to relieve animals of pain inflicted by others (c.f., quotations on page 31 above).

The neglect of a duty of beneficence in the strict meaning of beneficence - in this context, neglecting to provide sentient non moral agents with pleasure or neglecting to relieve them of suffering inflicted by others, parallels the neglect of good Samaritan duties towards moral

agents in regard to some of the problems relating to rights that are involved.

For example, even if we agree that some non moral agents have some rights - for example, a right not to be put into pain, we may still question whether such non moral agents have a further right to our assistance if we were not the cause of their pain.

However, the neglect of a duty of non-maleficence to non moral agents seems to parallel the violation of a moral agent's right not to have needless pain inflicted upon him. So, for example, suppose B, a moral agent, has a duty not to cause harm to A, a non moral agent, and B intentionally causes harm to A. What has happened seems to more closely resemble, for example, stealing from a beggar than it does neglecting to give money to a beggar. The beggar to whom I have refused alms cannot justly demand them of me, because, if I have a duty to give charity, my duty to give charity is not directed towards anyone in particular - no <u>one</u> person has a claim to my charity[36] and, at the least, it is debatable as to whether my refraining from acting charitably can be taken as the willful infliction of harm on the beggar.

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[36] One can, of course, imagine situations where that may not be true: Suppose that there is such a duty with a correlative right, and I am a Robinson Crusoe with a surplus of food on a desert island, and a starving Friday knocks on the gate of my stockade, palms outstretched.

Stealing from the beggar is another matter; my duty not to steal is directed towards anyone and everyone. My stealing from the beggar would be a clear case of causing harm. Culpability for the infliction of harm is directly assignable to an agent - in this case, me. I have acted in a way that has lessened the "good" of the beggar. He can point a finger and complain, demand explanation and, if none can be given, he can demand that justice be done and recompense be given. The willful act of maleficence towards sentient non moral agents parallels stealing from the beggar. The infliction of needless pain upon a non moral agent is accepted as an evil by the "utilitarianism for animals" theorists. If I were to inflict pain, the animal has an agent at whom he can point the finger or paw of accusation. He can complain and demand explanation. He has (within the context of these theories) a recognized claim not to have pain inflicted upon him. The duty is here defined as for the sake of the entity to which the duty is owed. The earmarks of a violation of a right are present. What are missing are simply two conditions: (1) The entity is not a moral agent. (2) The entity is not personally able to make a claim in the strong sense of "making a claim" described above on pages 9, 10, 11 above.

Thus, for example, Ross writes:

> On the whole, since we mean by a right something that can be justly claimed, we should probably say that animals have not rights, not because the claim to humane treatment would not be just if it were made, but because they cannot make it.[37]

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37 W. D. Ross, The Right and the Good (Oxford: Clarendon Press, 1930) p. 50.

But, as we have seen above (pp. 13 14), it is not the case that one must be a moral agent in order to have legal rights and to have claims under those rights recognized. Proxies, guardians, or the state are allowed to initiate actions and make claims on behalf of entities that are themselves incapable of initiating actions or making claims. Although the practice of appointing guardians or ascribing fictional wills perhaps may be applied inconsistently - for example, denying rights, or fictional wills, or guardians to chimpanzees, while ascribing rights, fictional wills or appointing guardians to minimal I. Q. human idiots, there appears to be no logical inconsistency to the practice itself. That is, it is possible to have a legal system that includes rights possession, that is logically coherent, but that does not make moral agenthood a necessary condition for the possession of legal rights.

The moral agent theorist might persist in his argument in another way - he may claim that if having direct duties to non moral agents would entail (at least in some instances) that the non moral agents have rights correlative to those duties, then there simply can be no direct duties to non moral agents. So, for example, if having a duty to non moral agents not to inflict needless pain on them would entail that they would have a right not to have needless pain inflicted upon them then there can be no such direct duty.

But that escape route seem gratuitous. If moral agents have a right not to have needless pain inflicted upon them, such a right would not seem to be derived from any implicit or explicit contract they have

made with other moral agents, nor derived from their ability to recognize that other moral agents would not like to have needless pain inflicted upon them. It seems more correct to say that the ascription of the right derives from an assumption or recognition that the infliction of needles pain intentionally is wrong because suffering needless pain is intrinsically bad and that entities that are capable of suffering pain - regardless of their capacity or incapacity to be moral agents - have rights not to have needless evils inflicted upon them.

Kant's position coincides with the moral agent position I have just described (p. 35, above). But while Kant has shown, correctly I think, that having a 'rational will' is a sufficient condition for being an object of direct duties, I cannot find an argument in Kant to show that it is a necessary condition. It seems to me that while it may be true that those without rational wills, or those who do not 'use' their rational wills (e.g., a human who always acts rightly from inclination rather than from a sense of duty) may not deserve reward (happiness, for example), that does not imply that they can have evil (cruel treatment, for example) inflicted upon them with impunity.

Kant's error is an example of a general sort of error that occurs in moral agent theories in regard to at least some sorts of rights--ascription - namely, the ascription of rights (sometimes described as 'negative rights') not to be interfered with in pursuits harmless to others, and rights not to be the recipient of needless evils.

One might ask of contract moral agent theorists, for example, whether it is wrong to inflict needless pain upon other moral agents only because the latter have contracted not to have needless pain inflicted upon them, and it is wrong to break contracts. (That is, the wrongness of inflicting needless pain and the wrongness of violating the correlative right is the wrongness of breaking a contract.), or instead the breaking of the contract is secondary, and the wrongness of the action consists in the infliction of needless pain because the infliction of needless pain is itself thought to be wrong. The mistake (at least in so far as negative rights are concerned) is in confusing the 'sanctity' of the contract with the 'sanctity' of what the contract protects.

Thus, for example, Ewing writes:

> The contract theory, even if the "contract" is regarded not as historical but as metaphorical, is open to the same type of objections as is the doctrine of absolute natural rights. No doubt the theory is not at fault in finding the essence of the state in some sort of implicit mutual understanding, but it is not the understanding itself but the good ends it subserves which must be regarded as at any rate the main basis of political obligation and the criterion for determining individual rights.[38]

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[38] Alfred Cyril Ewing, "The Individual, the State, and World Government", reprinted in part in Richard B. Brandt, Value and Obligation (New York: Harcourt, Brace & World, 1961) p. 534.

Similarly, the moral agent theorist who claims that an entity must possess the ability to claim a right as a right before it can be said to be a candidate for rights possession seems guilty of the same sort of error (often compounded with a vagueness about what exactly is meant by an ability to claim a right as a right.): One might ask, for example, that if A and B have the same capacity to suffer equally from pain, but A has the further capacity to claim he has a right not to have pain inflicted upon him, and we are forced to perform an action that will either cause pain to A or an equal amount of pain to B, what weight should, ceteris paribus, A's capacity to claim the right have in our decision as to whether A or whether B should be the recipient of that suffering.

It may be the case that one must have some of the capabilities requisite for moral agenthood in order to have welfare rights - rights to receive goods or benefits from others. I shall not argue that here, but surely it is not the case that one must have all or some of those requisite abilities in order to have the immunities that rights provide from the infliction of recognized evils. The questions revolving around the problem of welfare rights are difficult, but the rights I am concerned with in this dissertation are rights to be protected against the infliction of evils - of, for example, needless pain and, ceteris paribus, the infliction of death and the limitation of freedom in a 'weak' sense of freedom which I shall discuss in later chapters.

Of course it is true that without the presence of moral agents who are capable of having duties, recognizing rights, and setting up legal

institutions to protect rights, it might be meaningless to even speak of rights at all[39] - but that alone does not entail that only those who are themselves capable of having duties and recognizing rights are the sole candidates for the possession of rights.

5. A Few Remarks Concerning Utilitarianism and Rights

Although what I shall write in the balance of this dissertation is, I think, neutral between deontic and teleological theories of rights I would like to put in a few comments about utilitarian bases for rights ascription.

One may argue that the basis for rights ascription should be founded on utilitarian grounds.

As far as act utilitarianism goes, there has always been a conflict between the concept of individual rights and the act utilitarian framework. Rights - negative rights, at least, serve in part to secure individuals against incursions. In an historical perspective, we might say that rights have minimally served to protect or secure individuals against incursions by various "intruders" at different times and in different situations - against incursion by other individuals, against the incursion of monarchs or small power groups and finally against the incursion of the "tyranny of the majority" or the "general happiness or good."

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[39] c.f. Martin Golding, op. cit.

Thus, for example, Braybrooke: "An agent, faced with an assertion of right bearing upon him, cannot excuse himself by saying that the general happiness might possibly be advanced by disregarding the right."[40]

One may try to reconcile individual rights with utilitarian theory by proposing the inclusion of individual rights as rule utilitarian institutions. That is, taking the institution of individual rights as sets of rules that will (it is claimed) in the long run, at least, produce more total good.

Whether or not rights viewed as rule utilitarian devices is a viable approach to grounding rights, I will not comment about here, except to say that while I believe that any interpretation of utilitarianism cannot be reconciled with the claim that there are absolute individual rights, I will be writing only of prima facie rights, allowing for the possibility that a right may be justifiably violated for good enough reasons. The "good enough reason" might involve utilitarian considerations.

As far as what I shall write here, the major questions of my thesis still remain for the utilitarian rights theorist to answer.

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[40] David Braybrooke, Three Tests for Democracy: Personal Rights, Human Welfare, Collective Preference (New York: Randon House, 1968) p. 38.

"Whose and what's interest (or "good") are to be taken into account in setting up institutions of rights?" Only adult humans? Animals? Who and what get the vote, the rights, and the good in society?

If, for example, we were to ally ourselves with the vanishing breed of hedonist rule utilitarians, we might be forced to conclude that if animals are capable of sensations of pleasure and pain then there might be more good produced if we were to set up institutions of rights that protected animals at the expense of humans.

The traditional utilitarians were not unaware of that possibility.[41] but tended to ignore that problem in the bulk of their writing, concentrating instead on utilitarian legislation for humans.

The rule utilitarian who wants to incorporate institutions or rights in his society may wish to exclude animals on the grounds that they are not capable of enjoying the "good" that he thinks ought to be promoted. I will not argue with that, but will say that much of what I have to say here - particularly in Chapters II, III, IV, could prove useful, if not necessary, to his attempt to prove that.

So we see that if we are to accept institutions of rights at all, moral agent theories seem inadequate to the task of dealing with important cases in which the ascription of rights is in question. Strict moral agent theories seem both counter-intuitive and unproven at least so far as their criteria for the ascription of some negative rights are concerned, and weak moral agent theories are inadequate in the sense that they provide us with no guidelines to use in determining the rights status of these important cases.

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41 See, for example, John Stuart Mill, "A Defense of Bentham", reprinted in Tom Regan and Peter Singer, op. cit.

CHAPTER II

RIGHTS AND THEIR RELATION TO INTERESTS, ENDS, AND GOALS

1. Some Introductory Remarks About Rights

To go back a few steps, the rights I am concerned with in this dissertation are members of a sub-class of moral rights, as opposed to the class of legal rights.

Legal right is a descriptive term - it refers to a right that is actually recognized in a legal system. Moral right is a prescriptive term - it refers to a right that may not actually be recognized within a legal system or within a society, but ought to be recognized.

That there is a difference between the two (legal rights and moral rights) is often illustrated by contrasting the legal position of a slave in the United States in the 1850's with his moral position. His legal rights, if any, were fewer than his moral rights. On the other side of the coin, it is now generally accepted that an absolute monarch's legal rights in his regime usually exceed his moral rights.

Distinctions About Moral Rights

Within the realm of moral rights, there are further distinctions that can be made: There are moral rights that have sometimes been referred to as special rights[1]; these are rights that arise out of

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[1] c.f., H. L. A. Hart, "Are There Any Natural Rights?", Human Rights, ed. A. I. Melden (Belmont, California: Wadsworth Publication, 1970) pp. 68-72.

particular contracts, promises, or agreements made between or among moral agents. If, for example, A lends B an amount of money upon the promise by B that B will return the money within 30 days, A has a special moral right to have the money returned by the end of those 30 days. Special rights arise out of particular situations, usually as the result of agreements made among persons, and usually apply only to the persons involved in the agreement.

Another example of special rights, might be those privileges that accrue to someone who is a member of an organization - for example, the right to enter and take part in meetings of that organization.

The situation in regard to special rights becomes a bit complicated; Whether there are special rights at all or whether there are specific special rights may depend on whether there is a general[2] moral right to have contracts, promises, and agreements or specific sorts of contracts, promises, and agreements, honored. So, A's right to the return of his money in the example cited above may depend on the recognition that there is a general moral right that makes such promises binding. In the second example cited above , whether or not someone has special rights as a member of the organization may depend on whether there is a recognition of a general moral right to form exclusive organizations. General rights do not, it is claimed, arise out of agreements or contracts.

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[2] Ibid.

They may also be taken as equivalent to natural rights - but the latter term can be, at the least, misleading.

My concern here is not with special rights, but with general moral rights. General moral rights present their own problems:

There are problems relating to their "genesis" - where do they come from? I have dealt briefly with one claim about their genesis in Chapter I. That is the claim that general rights do arise somewhat like special rights - out of agreements made by entities capable of making agreements and capable of recognizing and heeding to agreements once they are made. I have, also in Chapter I, objected to an addendum that is sometimes made to that claim - that only those entities that are capable of making and heeding to such agreements can have general rights.

However, I think that part of the above account of the genesis of general rights is correct: It is true that without the presence of moral agents that are capable of recognizing rights, protecting rights and, perhaps, setting rights in a legal framework, it would make no sense to speak of rights at all.

I have briefly touched on another view of the genesis of general moral rights in Chapter I. This is the view that they are natural possessions of humans. That is, that one has only to be human to have these rights. Aside from my discussion in Chapter I (pp. 20-21), I might add that a close examination of this view would show it to be not very different from what I have called a "weak moral agent theory"

of rights. Historically, the position traces back at least to St. Thomas[3], and is based on a claim that humans have these rights because they are, by nature, rational. But taken as a claim that all members of the species Homo sapiens are rational or potentially rational, the claim seems to be false (see pp. 20-21 above and discussion in Chapter IV). If something else is meant by "human", the view runs into the other difficulties which I have discussed in Chapter I.

There is another view of the genesis of general rights which is closer to my own, and is the sort of view that I will accept and work with here. Versions of this position have been given in the past by writers such as T. H. Green,[4] and more recently by writers such as Richard B. Brandt[5], Martin Golding[6], and Gregory Vlastos[7]. Roughly, the view is that certain goals or ends or states-of-affairs are recognized or ought to be recognized as very valuable or good for individuals,

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[3] The roots go deeper than that. See, for example, the discussion by Julius Stone, The Province and Function of Law, (Cambridge: Harvard University Press, 1950) pp. 215-220.

[4] T. H. Greene, Lectures on the Principles.

[5] Richard B. Brandt, "The Morality of Abortion", Robert L. Perkins, ed., Abortion: Pro and Con.

[6] Martin Golding, "Towards a Theory of Human Rights."

[7] Gregory Vlastos, "Justice and Equality", A. I. Melden, ed. Human Rights.

or at least not harmful to others, and consequently ought to be protected or secured for the individuals by ascribing them rights in regard to these goals, or ends, or states-of-affairs. This view brings to mind at least three questions about rights:

(1) What are these goals, ends, or states-of-affairs that ought to be secured and protected?

(2) To what degree ought they to be protected and secured?

(3) For whom or what ought they to be protected and secured?

Each question presents its own sorts of difficulties.

To the first question; It has generally been recognized that "among these goods" are <u>life</u> and <u>not to have needless pain inflicted upon one</u>. These are the rights that seem most relevant to the problems forming around the "borderline cases" I am concerned with here, and these are the rights I shall focus on in the balance of this dissertation - though I will not and can not avoid discussion of other rights if only because, as we shall see, rights are often inextricably intertwined. I will not, however, attempt to give an exhaustive list of general rights.

To the second question: There are few writers who now believe that any moral rights are <u>absolute</u>. That is, there are few who hold that there are not circumstances under which an individual's moral rights cannot be justly overridden. I shall go along with the assumption

(taken by Wasserstrom[8], for example) that moral rights are always prima facie, in spite of some difficulties expressed by some[9] about the use of that term in regard to rights. That is to say, minimally, rights are safeguards for individuals against incursions by other individuals, by governments, by the demands of the public interest, or the general will, or against the utilitarian "tyranny of the majority." When A has a right, A has a prima facie claim, and the burden of justification falls upon anyone who violates or attempts to violate that right. But the possession of a right is also prima facie in that it is not an absolute safeguard. There may be morally justified reasons to override an individual's enjoyment of his rights in certain situations. The reasons that would justify overriding the enjoyment of a right cannot be minor or trivial, but I will not attempt to discuss here what reasons are not "minor" or "trivial." I do think that problems about overriding rights will loom large if what I shall conclude here is correct. That is, an implication of my conclusions is that the circle of legal rights possessors should be larger in at least some respects than it now is in at least some legal systems. So, for example, I believe that

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8 Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination," A. I. Melden, ed. Human Rights, p. 101, referring to difficulties expressed by Melden in Rights and Right Conduct. Also see Richard B. Brandt, Ethical Theory, (Englewood Cliffs: Prentice-Hall, 1959) Chapter 17.

9 A. I. Melden, Rights and Right Conduct (Oxford: Basil Blackwell, 1959).

at least some animals should have legal rights extended to them. Problems about overriding rights justly (and perhaps problems about rights in general [10]) arise only when there is scarcity and conflict among rights possessors. To enlarge the circle of rights possessors is usually to increase scarcity and conflict - there are more claimants to the same limited amount of "goods."

The third question - the scope of rights possessors is, of course, the major topic of this dissertation. I will say only one thing about it here; it may be the case (and this is a point often overlooked in the literature) that an entity can have some moral rights without necessarily having all moral rights. Perhaps, for example, an entity can have a moral right not to be treated cruelly and yet not have a right to life.

2. Some Remarks About Intuitions About Rights Possession, Moral Agent Theory, and Some Types of Consequentialist Arguments.

Intuitions may differ about the moral rights status of non moral agents such as animals, unborn human children, irreversibly comatose adult humans and even normal human infants, but it seems clear that at least some non moral agents have moral rights. These would include

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[10] Martin Golding, ibid.

adult, irrational humans (the catatonic, for example) and human imbeciles (human beings whose I. Q. are frozen somewhere between the normal human child's level at five to seven years old [11]). Members of each of these groups are thought of as lacking the ability to make claims in the strong sense of making claims, and lacking the ability to have duties. They are in the condition that W. D. Ross attributes to animals in the quotation given on page 33 above.

Ross's claim may sound plausible as it stands-referring to animals, but seems less than plausible if we substitute "catatonic adult human" or "human imbecile" for "animal" in it.

Regardless of an irrational adult human's inability to meet moral agent criteria, and whether or not he could be said to be owed treatment, protection, or care as part of legal compensation, or as part of a residual special right derived from a medical contract he made before falling into his present state, it seems clear that he has certain moral rights - a right to life and a right not to be put into needless pain, for example. There have been attempts by moral agent theorists to ground these intuitions within the context of their theories, but I think they have been unsuccessful in capturing the ground for these intuitions.

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[11] Arthur P. Noyes and Lawrence C. Kolb, Modern Clinical Psychiatry (Philadelphia: W. B. Saunders Co., 1966) pp. 278-280.

Attempts to Ascribe Rights to These Entities on Consequentialist Grounds

Attempts have been made to ascribe rights to these entities on consequentialist grounds of various sorts. Thus, for example, Scriven:

> Why should we feel obligations toward the terminally or lifetime sick and insane ...? It is because of the desirability of Good Samaritan insurance for ourselves or those whom we love . . . that care for the indigent can be defended.[12]

Or Benn, who claims that the criteria for rights possession are too stringent for infants (and, by extension, presumably too stringent for some of the insane and imbeciles) to meet:

> . . . to have a right presupposes not only the capacity to desire the object in question, but to be aware of oneself as the subject of enterprises and projects that could be forwarded by choosing to exercise one's rights.[13]

And:

> I characterize a person, therefore, as someone aware of himself, not just as process or happening, but as agent, ...[14]

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12 Michael Scriven, Primary Philosophy (New York: McGraw-Hill, 1966) p. 89.

13 S. I. Benn, "Abortion, Infanticide, and Respect for Persons", Feinberg, ed. Problem of Abortion, p. 99.

14 Ibid., p. 99.

And:

> If my account of the preconditions of a right to life is correct, it seems unlikely that a child would satisfy them until many months after birth. And in that case, the principle that a person has a right to life would not protect infants until well beyond the very early weeks that Tooley seems to envisage.[15]

However, Benn claims that considerate treatment is due infants (and, presumably, fetuses, the insane, and imbeciles) because if we don't treat all infants [and the insane and imbeciles] well, we may become callous in our treatment of those we may want to take care of:

> For not to do so for some - those we regard as expendable or dispensible - might well lead us into a callous unconcern for others too.[16]

Intuitions may be unclear about the status of unborn humans and infants, but surely our reasons for believing that the insane and imbeciles have rights are not consequentialist in the sense that we are not concerned with their condition, but instead solely with the effects of their maltreatment on ourselves or others. Further, it would seem false to conclude, as Benn would be forced to, that if it could be

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15 Ibid., p. 102.

16 Ibid., p. 102.

shown that killing or torturing the catatonic did not lead to callousness, it would not be wrong to kill or torture the catatonic.

Nor does Scriven's argument seem any better - that moral agents have rights because they are moral agents, while the insane have rights because moral agents would fear for their own chances if they fell into similar straits, and so guard against that possibility by ascribing rights to the insane. (Imagine that there was a vaccine for schizophrenia, and all moral agents had been vaccinated. Would Scriven really believe that, under those conditions, it would be permissable to kill the remaining schizophrenics?)

Potentiality of Moral Agenthood as an Attempt to Deal With the Counter-Intuitive Implications of Moral Agent Theory.

Still another attempt to reconcile intuitions with the counter-intuitive implications of moral agent theory falls back upon a claim about potentiality. The insane and imbecilic are potential moral agents and, as such, ought to have rights. I have given some strict objections to this sort of claim in Chapter I; but forgetting those objections for the moment, we might ask if it is really on grounds of potentiality to moral agenthood that we are led to believe that the insane and imbecilic have at least some rights. Suppose we had every reason to believe that a particular case of insanity or imbecility was incurable - would that change our minds about the rights of the incurable individual?

I do not want to claim that intuitions are a sufficient base upon which one can build a solid moral argument.[17] That seems to be a particularly hopeless approach to the problem of these 'borderline' cases about which intuitions seem to differ so much - especially in regard to the status of unborn human children. At best, intuitions reflect a certain comfort or discomfort with a position which discomfort or comfort is an indication that there is a more solid argument beneath the intuitions. In Chapter One I have at least hinted at what seems to a more well-founded justification for our ascription of rights to some of these non moral agents - that they can, regardless of their capacity to make claims, or contract, or personally have duties, suffer from the denial of these rights in the same ways that moral agents can suffer from the denial of these rights, and that their non moral agent status is irrelevant to the question of whether or not it would be fair to grant or to deny them these rights.

3. Rights as the Protection of Interests, Ends, or Goals

I think a clearer and more useful picture of rights and their extension would emerge if we were to examine rights in their role as the protection of certain interests, ends, or goals. In this view, the

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17 c. f., R. M. Hare, "Abortion and the Golden Rule," Philosophy and Public Affairs 3 (Spring, 1975) pp. 201f, pp. 214f.

criteria for the ascription of rights to an entity are not a function of the entity's actual or potential "merit", as moral agent theories seem to imply.

Instead, the ascription of at least some rights - 'negative rights' goes along with a recognition or acceptance by adult, rational human beings that certain "states-of-affairs" have sufficient value to individuals to warrant the protection or securement of these "states-of-affairs" against incursion or frustration in order that the individual can "enjoy" these states-of-affairs unimpeded.

(I have used "states-of-affairs" as a place-holder for what I believe can be more accurately described as interests, ends, or goals. So that it is interests, ends, and goals that are protected or secured by rights.)

But because adult, rational human beings decide what "states-of-affairs" ought to be protected or secured does not entail that there are no constraints on their handing out of rights. There are constraints that go along with principles of fairness. Moral agents, in a sense, "make" rights but, if they are willing to protect certain of their own interests or goals with corresponding rights because they value those interests and goals, they must be prepared to extend those same rights to any entity that values those same interests or goals. They have considered, correctly or not, these interests and goals not only as <u>valued</u>, but as objectively <u>valuable</u>. Unless these "rights-makers" can show that, although an entity incapable of "making" rights or having duties can suffer if deprived of these rights, there are cogent reasons to exclude

it from having rights, fairness would dictate that the rights be extended to it.

Some may say that such a claim begins hanging in the air, supported by its own bootstraps. That is, I will not attempt to give much justification[18] for why certain interests and goals ought to be protected or secured by rights. I have not, and will not, deal much with that fundamental normative question. I will simply accept - with some supporting quotations - some proposed moral rights as moral rights. (More specifically, those rights that are most relevant to the borderline cases with which this dissertation is concerned - the right to life, and, the right not to have needless pain inflicted upon one.) I will discuss how these rights relate to interests and goals and then discuss the extension of these rights - that is, who and what ought to have these rights as a matter of justice and fairness. I will not try to provide an exhaustive list of moral rights.

I do think, however, that some support for my 'midair' position can be given. Thus, for example, Vlastos in an imaginary explanation to imaginary Martians from an imaginary meritarian community writes:

> "To understand our code [of human rights] you should take into account how very different from yours is our own estimate of the relative worth of the welfare and freedom of different individuals. We agree with you that not all individuals

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[18] But some attempt at justification will appear en passant throughout, and more substantially in later section dealing with the right to life.

> are capable of experiencing the same values. But there is a wide variety of cases in which persons are capable of this. Thus, to take a perfectly clear case, no matter how A and B might differ in taste and style of life, they would both crave relief from acute physical pain. In that case we would put the same value on giving this to either of them, regardless of the fact that A might be a talented, brilliantly successful person, B 'a mere nobody'".[19]

Thus we may account for the ascription of certain rights to entities such as the insane and imbecilic not on tenuous claims about their potential moral agenthood, or on still more tenuous consequentialist claims about the results on moral agents if we were to deny non moral agents rights, but instead on the grounds that we recognize that they have interests in certain "goods" or "states of being" in common with the rest of us and that we, who have the capability of making claims in the strong sense and the capability to attempt to make moral rights into legal rights, recognize these sorts of "goods" or "states of being" as things that ought to be safeguarded or secured with corresponding rights. So that, we recognize that the insane and the imbecilic have the same interests in freedom from the infliction of needless pain, or the same interest in life that we have and, as a matter of justice and fairness, include them among those who will be protected with those rights - even, in certain circumstances, to the extent of protecting them against their own actions.

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19 Gregory Vlastos, "Justice and Equality", A. I. Melden, ed. Human Rights, p. 93.

On the other hand, there may be entities - such as unborn humans - that do not share the same interests, and so may be justly excluded from the circle of protection of these rights.

Now Vlastos writes of what he calls "human rights", yet there is nothing in what he says that would make humanness either a necessary or sufficient condition for the possession of these rights. Thus, in offering a "translation" (his term) of "'individual human worth'" he suggests the following as a non-exhaustive list of what things are of worth to individuals:

> ...(a) I might refer as [i.e., what he means by] "happiness", if I could use this term as Plato and Aristotle used eudaimonia, i.e. without the exclusively hedonistic connotations which have been clamped on it. It will be less misleading to use "well-being" or "welfare" for what I intend here: that is, the enjoyment of value in all the forms in which it can be experienced by human beings. To (b) I shall refer as "freedom", bringing under this term not only conscious choices and deliberate decisions but also those subtler modulations and more spontaneous expressions of individual preferences which could scarcely be called "choices" or "decisions" without some forcing of language. ... So in translating "A's human worth" into "the worth of A's well-being and freedom" we are certainly meeting the condition that the former expression is to stand for whatever it is about A which, unlike his merit, has individual worth. [20]

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20 Ibid., p. 92.

We are not assured that each and every "human" and only humans meet the criteria given by Vlastos. In fact, I think that a glance at both quotations might bring to mind the question: "Why not at least some animals too?" Some writers, taking a tack similar to Vlastos', tying A's rights to the recognition that A has interests in certain states-of affairs in common with others, have been willing to include animals within the circle of "human" rights possessors. Thus, for example, Leonard Nelson: "Under the moral law, all beings who have interests are subjects of rights, while all those who in addition to having interests, are capable of grasping the demands of duty, are subjects of duties."[21]

And, again Nelson: ". . . we have defined animals as carriers of interests, even though we have also defined them as nonrational beings."[22]

A Claim that Animals Can Neither Possess Rights Nor Have Interests Flaws in the Claim, and an Analysis of "Interest."

However, at least one writer who ties rights to interests claims that the circle of rights possessors remains small because the sorts of things that can have interests are few. H. J. McCloskey:

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21 Leonard Nelson, System of Ethics, trans. N. Guterman, (New Haven: Yale University Press, 1956), p. 136.

22 Ibid., p. 138.

> Moral rights can be possessed by beings who can claim them, and by those who can have them claimed on their behalf by others and whose interests are violated or disregarded if the rights are not respected. The concept of interests which is so important here is an obscure and elusive one.... They [interests] suggest that which is or ought to be or which would be of concern to the person/being. It is partly for this reason-because the concept of interests has this evaluative-prescriptive overtone-that we decline to speak of the interests of animals and speak rather of their welfare.[23]

McCloskey argues further that since rights are "possessed", animals cannot possess rights because they are incapable of possessing anything:

> (Consider 'possess' in its literal sense. Can a horse possess anything, e.g. its stable, its rug, in a literal sense of 'possess'?) [24]

McCloskey's claims seem to have little merit and much unclarity. For one, it is difficult to unravel what he means by a "literal sense of 'possess'". A horse possesses four legs. McCloskey himself uses the possessive in referring to the horse -"its stable", "its rug."

If McCloskey means by "literal" possession 'possess' in the sense of legal possession, then his claim seems both circular and false.

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23 H. J. McCloskey, "Rights" Philosophical Quarterly 15 (1965) p. 124.

24 Ibid., p. 123.

Certainly a horse can have legal possession if the courts so decide A legal system can give a horse a legal right to a rug and in one fell swoop, give the horse possession of the rug and a right to possess the rug. It is particularly difficult to make sense of McCloskey's claim that horses cannot possess rights. Possessing a right is not, contrary to McCloskey's analogy, quite the same thing as possessing a material object although there may be a connection (as when one has a right to possess a particular material object. One can be said to possess a legal right when the right is recognized in a legal system as belonging to one, and one can be said to possess a moral right when it can be shown that, regardless of one's actual standing in a society or legal system, one ought to have the right.

McCloskey might be trying to say that a rights possessor must be capable of enjoying the right as a right[25] - to be capable of resting secure knowing it has a right. In that sense, it is very likely true that the horse is incapable of enjoying a right as a right. Most likely the horse cannot discuss with its stablemates the nuances or even the basics of what it means to "have a right to property." Nor, most likely is it capable of knowing that once it has a right to its rug.

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[25] c.f., S. I. Benn, "Abortion, Infanticide, and Respect for Person", Feinberg, ed. Problem of Abortion.

it can snuggle to it, comforted by the thought that the law will protect it from rug thieves. But McCloskey cannot mean all that because, as he says later on: "It is true that I may possess rights and not know or enjoy my possession of them."[26]

4. Interests

Whether or not horses can have interests in rugs, or interests in anything else is another question. If not "obscure and elusive" (McCloskey's phrase - see quotation page 58 above.), the concept of interest is at least ambiguous. There are legal connotations to the term, economic connotations and, of course, social and political connotations. In philosophy the term has been used loosely and in a number of disparate ways by writers such as Ihering[27], Nelson[28], and Perry[29], to name just a few examples.

Because of all the baggage it has acquired, I would prefer to drop the term 'interest' itself and speak instead of certain concepts that are, I believe, central to the meaning of the term as it is used by a

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[26] H. J. McCloskey, ibid. p. 125.

[27] c.f., Rudolph von Ihering, Law as a Means to an End (New York: Kelley, 1968).

[28] Leonard Nelson, Systems of Ethics.

[29] Ralph Barton Perry, Realms of Value.

cluster of writers (Brandt, Feinberg, McCloskey, and Nelson, for example) who rely heavily on the term when writing about the 'borderline cases' I am concerned with here. The concepts that I believe are central to their uses of the term are 'goals', 'ends', 'desires', and 'states-of-affairs instrumental to achieving goals and ends.' I believe these writers tend to equivocate among these particular meanings of 'interest' and what follows is an attempt to uncover some distinctions in the use of the term - important distinctions that, as I have said and hope to show, these writers tend to confuse when using the term 'interest' in their discussions.

Ordinarily, the term 'interest' seems to be used in one of two main senses: (1) Sometimes we take it as referring to a mental state. When used in this way, (a) sometimes the term is meant as almost synonymous with 'want' or 'desire'; thus, for example, "He is interested in seeing that film." That is, he would like to see that film. Similarly, we might say "He is interested in buying that painting." (b) Sometimes the term is taken in a similar way, but used to refer to a dispositional state. Thus, for example, "He is interested in film." - which might mean that he likes to see films or that he likes to discuss film-making. (c) Sometimes 'interest' is taken to refer to a state of attention, with or without the connotation of liking or desiring. Thus, "He is interested in that film which he is watching." or "The fish is showing interest in the bait."

Presumably, each of the above could be described as instances in which there is, as McCloskey puts it, "concern" (see quotation page 58 above.) on the part of the subject. The subject is concerned with the object of interest. As given, there are no evaluative-prescriptive over-

tones to any of the uses of 'interest' described above. That is, the subject is concerned with the object of interest, but there is no implication that he ought or ought not be concerned; not is there any implication that the object of interest is of concern to the subject for anything other than its own (intrinsic) sake. In each of the instances we may be simply describing a mental state or giving a 'character description' of the subject.

In these sense of 'interest' described above, one cannot be interested in x without being aware of x, for to have a mental state interest in x is one sort of way of being aware of x. (2) The second main sense in which 'interest' is used is in an instrumental sense. The second main sense seems unrelated to the first. 'Interest' here is meant roughly as something equivalent to 'instrumental for the attainment of', or 'needed for the attainment of.'[30] In usage, this sense can usually be differentiated from the first, 'mental state' sense because it will or can occur in sentences coupled with the indefinite article and/or propositions. For example, "A has an interest in x." or "X is in or to A's interests." We cannot translate the mental state sentence to these forms without radically changing what we mean to say. If, for example, we were to say "A is interested in that film" (mental state use),

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30 c.f., David Braybrooke, "Let Needs Diminish That Preferences May Prosper," Studies in Moral Philosophy, American Philosophical Quarterly Monograph Series, ed. Nicholas Rescher (Oxford: Basil Blackwell, 1968.)

that sentence would not be synonymous with "A has an interest in that film" or "That film is in or to A's interests." As I have said above, the mental state use of 'interest' entails that the subject is aware of the object of interest: But this use has no prescriptive overtones. When used in the second main sense, it is possible, as we shall see below, that the subject has no awareness of what is to or in his interests and, further, in the second main sense there is a prescriptive overtone. In the second main sense-when we say, for example, "X is in or to A's interests" - we are, (with important stipulations to be discussed below), making a judgment about what ought to be of concern to the entity.

There can be situations in which A is not interested (mental state sense) in something which may be in his interests (instrumental sense). Thus we can say, without oddity or contradiction, "He is not interested in working on his dissertation although it would be in his interests to do so." Similarly, it could be the case that A is interested (mental sense) in something that is not to his (instrumental) interests: "A is interested in seeing that film although it would be to his interests to go to that lecture instead." In A's mental attitude towards what is in or to his interests, A may be interested in, uninterested in [indifferent to] or A may have a negative attitude (interest) towards what is to his interests. In instances in which A is uninterested, his lack of interest may be of three sorts: (a) A is aware that x is to or in his interests, but doesn't care, (b) A is unaware that x is to or in his interests but is capable of becoming aware that x is to or in his interests-at which point his attitude might change from uninterest to either negative or positive interest.

So far, what I have said about the second main sense of 'interest' at least roughly coincides with Barry's claim; " . . . a policy, law or institution is in someone's interest if it increases his opportunities to get what he wants - whatever that may be."[31]

However, I would differ with Barry in offering the following as another possibility: (c) A may be unaware that x is to or in his interests and may be incapable of becoming aware that x is to his interests. That is, I will claim that it makes sense to speak of "X being in or to A's interests" even if A is incapable of having the correlative want (or concern) so X may be in A's interest in the sense that it would 'increase his opportunity' to achieve y, but A may be incapable of wanting y and/or incapable of wanting x.

I want to claim that when the latter is the case, the fact that x is in or to A's interest will have no moral force. That is, it is only when there can be at least a capability of an entity having a want tied to its instrumental interest that we have a moral compulsion to consider the interest as possibly protectable by a corresponding right.

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31 Brian Barry, "Justice and the Common Good," Political Philosophy ed. Anthony Quinton (Oxford: Oxford University Press, 1967) p. 115.

5. The Ascription of Interests.

At least some animals and at least some humans of very low intelligence are clearly capable of having 'mental state' interests. Certainly that is true when we use 'interest' in a sense related to 'like' or 'desire'. Thus, "The dog is interested in (chewing on, playing with, eating) that bone. "It is also clear that such entities can have mental state interests when we use the term in a sense more central to its meaning as "engaging or exciting and holding the attention or curiosity."[32] In fact, in this sense, we are ordinarily willing to attribute interests to animals that are, presumably, rather low on the scale of consciousness. Thus again, for example, "The fish is showing interest in the bait."

We are less likely to attribute dispositional interests to animals, but that seems to be because one way of differentiating among individual conscious entities is to differentiate their particular dispositional interests, and we just don't usually bother to differentiate individuals of a species of animals. We, in general, tend to perceive all animals of a type as the same, not discriminating among individual behavior patterns or 'personalities.' We are more apt to do so with housepets however, and I don't think that when we do we are necessarily engaging in excessive anthropomorphizing. It seems clear that some cats are interested in ants, closely scrutinizing their meanderings, while other cats may ignore ants entirely.

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[32] The American College Dictionary (New York: Random House, 1962) s. v. 'interest'.

In any event, close studies of certain animals - chimpanzees for example, contain data that would seem to force one to conclude that individual chimpanzees, at least, can have individual interests in the dispositional sense of the term.[33] So that it may not be wrong to say that chimp A finds rubber balls interesting, while chimp B is more interested in blocks of wood.

The Ascription of Instrumental Interests

To say that "X is in A's interests" is to say something very different than "A is interested in x." The phrase "in or to one's interests" is, as I have said above, instrumental in implication. The sentences in which it occurs seem to be shortened forms of implicit conditional sentences or claims. That is, to say "X is in or to A's interests" appears to automatically imply a suppressed conditional claim of the sort: "If A is to achieve y, it would be in or to A's interests to do x, or to have x done for him, or to have x." While this analysis is arguable, I shall take the position that if we say that "X is to A's interests", it is because we believe that x would be instrumental, or probably necessary, or a means, or is needed, to achieve either (1) Some goal desired by A or, (2) Some further end that we believe is desirable for A to achieve.

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[33] c.f. Peter Jenkins, "Teaching Chimpanzees," Animal Rights and Human Obligations, ed. Tom Regan and Peter Singer.

It is here where the stipulation noted before about "ought" (page 62 above) becomes important: We may say that if A wants to achieve y, he ought to do x, or that it would be in or to his interests to do x (or have x done, or to have x); that does not entail, however, that we approve of y, or that y is a goal that A ought to (be allowed) to achieve, or ought to want to achieve.

Thus, for example, we might say "If A wants to rob that bank, it would be in his interests to examine the alarm system first." Or, there may be cases in which we might think y is an allowable goal for A to attempt to achieve, but is a goal that we do not think would be desirable for A to achieve - for example: "If A wants to drink himself to death, it would be in his interests to stock up on whiskey before that prohibition law is enacted." Admittedly, the latter sort of example seems odd, and the sentence would probably be said with a touch of sarcasm - "If A <u>really</u> wants to drink himself to death . . . " One might be tempted to say that we wouldn't want to say that x is in A's interests unless we thought that x was either a means towards some goal of A of which we approved, or a means towards some goal of A which, though we may not think of as a desirable goal for A to try to achieve, we would not think of as harmful to A if he were to achieve it. That is, some goal not necessarily good for A to achieve, but not harmful to A to achieve.

Certain states-of-affairs can be either instrumental interests of A or goals of A, or both means (instrumental interests) and goals (loosely speaking, goals are mental interests the objects of which are desired for their own sake) for A. However, when we speak of a state-of-affairs being an end for A or a goal (desired for its own sake) for A, it would

be incorrect - in that context - to say that y is in or to A's interests. Thus, for example, if I believe that being in a state of good health is intrinsically desirable for me, it would be incorrect (in that context) as I will use the term to speak of good health as being "in or to my interests". If I were to say or speak of good health as being in or to my interests, it would only be in a context in which there is an implication at least that there is some further goal that I desire and that I believe that good health would be a means or instrumental in achieving that goal - as, for example, a precondition for the goal of becoming a good athlete.

But, of course, a particular state-of-affairs may be both a goal and of (instrumental) interest for me. I may, for example, desire to be in good health for the sake of being in good health (good health as a goal) and, at the same time, I may also desire to be a good athlete, in which case good health is also to or in my interests. Or, I may desire not to be in severe pain because I simply do not enjoy severe pain (severe pain is of disvalue as a goal or is of intrinsic disvalue to me) and I may, at the same time, also desire not to be in severe pain because it interferes with my work (freedom from severe pain here is to or in my interests).

While all that I have just said seems to be in accord with, rather than tearing at our ordinary use of 'interest' and may seem trivial, I think that these distinctions have been blurred over by some writers and caused difficulties in their arguments. I think that will become more apparent in my discussion of Stone, Nelson. and Feinberg which follows in the next chapters.

A Few Words on Goals and Ends.

I shall use 'goal' in the sense of 'some state-of-affairs that is desired by A for its own sake.' That is, in terms of 'interests', a goal is a mental interest of A - it is something that A is interested in achieving or wants or desires to achieve. [Although Ziff claims, rightly I believe, that to say "A desires x" or "A wants x" is usually meant as a much stronger statement than "A is interested in achieving x." Thus:

> If a man desperately hopes and prays for a stay of execution, should we say "He is interested in a stay of execution,"? A man who hopes for a stay of execution could be, or could also be, interested in a stay of execution: but then he would be a queerly calm sort of person.[34]

Nevertheless I shall leave that distinction blurred, since I do not think that anything I have to say here hinges on it.]

As for 'end', I shall use that term in a sort of teleological Aristolelian way: An end is a state of well-being, a state of good for an entity. An entity may or may not in fact desire (have a mental interest in) its end(s). That is, its ends may not be its goals. Nor may an entity necessarily be capable (actually or potentially) or having a desire (mental interest) in its ends.

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34 Paul Ziff, "The Word 'Good'," Semantic Analysis (Ithaca: Cornell University Press, 1960) p. 218.

From this point on I shall, for clarity's sake, use the term 'interest' when referring to mental state interests, and the term 'Interest' when referring to the instrumental sense of the word.

In regard to Interests, I shall assume in what follows that, given the primary assumption that an Interest is something which is thought necessary or instrumental or a means to the achievement of an end or goal, to frustrate A's Interests usually is to frustrate A's achievement of the goal or end correlative to the Interest.

Rights, Interests, Interests, Ends, Goals, and the Violation of Rights.

Rights serve to protect or secure individuals in certain states-of-affairs and these states-of-affairs can, I believe, be entirely and completely analyzed in terms of interests, Interests, or goals as I have defined or used those terms above.

Rights must be susceptible to violation and it will, I think, prove useful to show how the violation of a right ties in to the interference with interests, Interests, or goals.

(1) Violations of Rights Taken Solely as Interferences With Interests.

One might be tempted to postulate that the violation of a right of A is always an interference with an Interest of A. However we would not want to say that the interference with any Interest of an entity would necessarily be a violation of a right of that entity. That is, not all Interests of individuals are morally acceptable. Therefore, I shall formulate this claim in the negative.:

F1. If action ø does not interfere with A's Interests, then action ø is not a violation of any right of A.

But the following strong objection might be raised to the postulated formulation: Even if A's pursuing, obtaining, or possessing x is not to his Interest, we may want to say that A may still have a right to pursue, obtain, or possess x. Thus, it may be in A's Interests to stay at home and work on his dissertation, but that is not sufficient reason to paternally prevent him from going to a theater or seeing a film if he chooses to see a film rather than work. In fact, A's going to the theater would be a paradigm instance of exercizing one sort of right - a liberty not to act to further one's Interests (or, really in this example, a liberty to act in a way that goes contrary to one's Interests),[35] but instead to act according to one's desires (interests) whether or not acting according to one's desires is to one's Interest.

(2) Violations of Rights Taken Solely as Interferences with Interests.

On the other hand, to formulate the conditions under which a right is violated solely as cases in which an interest is interfered with, leaves us with other difficulties:

F2. If action ϕ does not directly interfere with A's interests, then action ϕ is not a violation of any right of A.

One sort of difficulty is the following: A may have no interest in the performance or non-performance of ϕ, but the performance or non-performance of ϕ may be a precondition for the coming about of some x about which A may have a direct interest.

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35 c.f. A. I. Melden, Rights and Right Conduct, p. 3.

So, for example, Tooley's account of a violation of a right to life[36] seems to follow F2 and runs into trouble. Summarily, his argument is as follows:

(1) Rights must be violable

(2) A right is violated when an actual past, or potential correlative desire for the good afforded by the right is frustrated

(3) The right to life can be violated only if the entity has had a past desire to live, or has a present desire to live, or is capable of having a desire to live.

(4) Since 'having a desire to live' is a complex concept, having a desire to live requires a fairly high level of conceptual ability.

(5) Among other things, kittens and human fetuses do not have the conceptual ability to have a desire for life, therefore one cannot violate any right of theirs by killing them.

However:

> . . . how is one to explain the kitten's right not to be tortured? The answer is that a desire not to suffer pain can be ascribed to something without assuming it is capable of envisaging a future for itself. . . The state desired - the absence of a particular sensation - can be described in a purely phenomenalistic language, and hence without the concept of a continuing self. As long as the newborn kitten possesses the relevant phenomenal concepts, it can truly be said to desire that a certain sensation not to be tortured even though we cannot ascribe it a right to life.[37]

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36 Michael Tooley, "A Defense of Abortion and Infanticide," Problem of Abortion, ed. Joel Feinberg, pp. 60-65 passim.

37 Ibid., pp. 72-73.

The difficulty here is that it might also make sense to say that the kitten can have the "relevant phenomenal concepts" when it is in pleasure. If it can be implied from Tooley's argument that the kitten has a right to pleasure sensations while it has them, then certainly killing a kitten that is in a pleasure state is the violation of a right - perhaps a right to life. The kitten's being alive is a pre-condition for its remaining in a pleasure state, although it is not capable of having an interest in (having the "correlative desire" for) life. To generalize, an interest in x by A may be interfered with by actions about which A has no knowledge and hence no correlative interests (desires). The key difficulty in the formulation (F2) is the term 'directly'. The key difficulty in Tooley's argument (of which F2 is the skeletal form) is his claim that there must be a correlative desire for the good afforded by the right.

Bearing in mind the difficulties in both F1 and F2, one might be tempted to postulate the following amended formulation:

> F3. If action ø cannot go contrary to A's Interests, or A does not desire that action ø not be done, or A is not interested in some x which could not obtain if action ø were to be done, then there can be no direct duty to A to refrain from doing action ø, and hence it would not be a violation of any right of A if action ø were to be done.

But the amended formulation, F3, runs into difficulty in the following sort of situation:

> Action ø will not interfere with A's Interests.
> A does not desire that action ø not be done,
> nor does A now desire some x which he will not

be able to attain if action ø is done. However, A is capable of desiring some x which he will not be able to attain if action ø is done now.

That is, we might well want to say that although A has no present desire to enjoy a right he has and, perhaps, even waives the enjoyment of that right now, it would be a violation of his right to cut off any future possibility of his enjoyment of that right. For example, if A has a right to freedom and doesn't desire to take advantage of that right now, or even voluntarily waives his enjoyment of that right now, it would be wrong to perform some action that would prevent his possible future enjoyment of that right.

[We are still speaking within the context of general rights. The situation in regard to special rights may differ. For example (see the example of a special right given above, top of page 41.) if A waives his right to the return of the money by B, he has waived that right forever.]

That sort of difficulty will not occur if we could be sure that A's desires will not change in time, and that A's Interests and goals will not change in time. In that case we may have the following emended formulation:

F4 If action ø cannot go against A's Interests, and A is not capable of having an interest in some x which could not obtain if action ø were to be done, then there can be no direct duty to A to refrain from doing action ø, and hence, it would not be a violation of a right of A if action ø were to be done.

This leaves one possible further difficulty; suppose there is some end, y, for A which A is incapable of desiring. That is, y is an end for A but cannot be a goal for A. Under F4, to frustrate the coming about of that end would not be a violation of any right of A. I do want to hold to that F4 position, and I will offer support for that position in the following chapters.

In general, looking upon rights as serving the role of protecting interests, Interests, and ends, seems a more fruitful and viable approach to deciding the rights status of entities that are not moral agents.

CHAPTER III

INTERESTS, VEGETABLES, AND THE RIGHT TO LIFE

There are writers who hold that the possession of moral rights is directly correlated to the possession of interests/ Interests in the senses in which I have used the terms, but they differ in their claims about what sorts of things can have interests/Interests.

On the one hand, for example, there is H. J. McCloskey who is willing to ascribe Interests only to rational creatures - that is, to a class of entities that seems coextensive with the class of moral agents.[1] On the other hand, and to the other extreme, for example, there are writers such as Christopher Stone who are willing to ascribe Interests to inanimate objects as well as to groupings of inanimate objects, and are further willing to ascribe rights to those objects or groups of objects to protect their "Interests."

1. Can Trees Have Standing? - The interests/Interests of Plants, '"Natural" Objects', and Ecological Systems.

Christopher Stone agrees that rights are tied to interests - or, at least, Interests.

Suits involving 'natural objects' - which may be such things as trees, streams, forests and lakes, or ecological systems that involve

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[1] c.f. H. J. McCloskey, "Rights", Philosophy Quarterly 15, p. 123.

a balance of conditions among, for example, a lake, the stream that feeds the lake, the plants and animals within the stream and lake, and the animals in the area, have traditionally revolved around the effects of "tampering" with the natural objects upon human interests/Interests affected by such tampering. Thus, a company dumping pollutants into a stream may be sued by a farmer downstream of the company for damages he or his property suffers as a result of the pollution. The stream itself has no legal standing, no rights in the matter.

However, Stone believes that the stream does have an Interest in not being polluted and thus, he claims, it makes sense to say that suit can be brought in the name of the stream, regardless of the effect or non-effect of the pollution upon human lower riparians. In Stone's view, the stream has an Interest in not being polluted and thus is a proper candidate for possession of a right not to be polluted and accompanying rights to recompense and restoration if it is polluted:

> Natural objects would have standing in their own right, to be asserted by a guardian; their own damages would be ascertained as an independent factor in weighing judicial relief; and they would be the recipients of legal awards for their own benefit.[2]

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[2] Christopher D. Stone, Should Trees Have Standing? (New York: Avon Books, 1975) p. 75.

Stone does not seem to be making a claim that natural objects have interests, or that the possession of interests is relevant to rights-ascription. His claim is that natural objects can have Interests in the sense that they can be benefited or harmed, and in the sense that they have 'needs':

> The first objection to this claim is that it would be impossible for the guardian to judge the needs of the river or forest in its charge; indeed, the very concept of "needs" it might be said, could be used here only in the most metaphorical way.[3]
>
> . . . As for the first objection, I think it is too easy to overstate the problem. Natural objects <u>can</u> communicate their wants (needs) to us, and in ways that are not terribly ambiguous. I am sure that I can judge with as much certainty and meaningfulness whether and when my lawn wants (needs) water, as the Attorney General can judge whether and when the United States wants (needs) to take an appeal from an adverse judgment by a lower court. The lawn tells me that it wants water by a certain dryness of the blades and soil-immediately obvious to the touch-the appearance of bald spots,yellowing, and a lack of springiness after being walked on ...[4]

Surely Stone oversimplifies here. It is not apparent that each and every thing which could be called a natural object can meaningfully be said to have 'wants' or 'needs', or can be said to be capable of

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3
Ibid., p. 56.

4
Ibid.

being benefited or harmed. Imagine, for example, a natural object - "The Great Agate Boulder" a solitary boulder of agate out on a barren desert. The boulder is no doubt unique, unusual and, perhaps, beautiful. Perhaps too there is no doubt that destroying it or even tampering with its shape would be a great aesthetic loss to humankind. But what sense could be made of the claim that the boulder itself has an Interest in remaining untampered with? In what non-metaphorical sense could it be claimed that the agate prospector chipping off pieces is "harming" the boulder, or claimed that the boulder itself could be benefited (much less its "needs" or "wants" satisfied) by remaining intact from the ravages of agate prospectors?

What von Wright says of artefacts certainly holds true of natural objects of this sort at least:

> Can, for example, artefacts and other inanimate beings have a good? It is not unnatural to say that lubrication is beneficial or good for the car, or that violent shocks will do harm to a watch. The goodness of a car or a watch is an instrumental goodness for some human purposes. Therefore that which is good for the car or watch is something which will keep it fit or in good order with a view to its serving a purpose well. It may be argued that, since the goodness of the car or watch is relative to human ends and purposes, that which is good for the car or watch cannot properly be said to serve the good of the car or watch themselves. If it serves anybody's good at all, it will be the good of the human being to whom the instrument belongs or who uses it.[5]

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5 Georg Henrik von Wright, The Varieties of Goodness (New York: Humanities Press, 1973) p. 50.

Aggregates or Aggregations.

It seems to me that what holds true of single inorganic natural objects also holds true of aggregates or aggregations of inorganic or inorganic and organic objects (e.g., of ecological "systems" such as watersheds and parks). Whether these groupings are taken as composed solely of inorganic entities - for example, The Grand Canyon or The Petrified Forest, or of interdependent combinations of inorganic and organic entities - for example, a watershed with its streams, lakes, animals, and trees, the groupings can only be said to have a 'good' (using von Wright's term) relative to human[6] wants and needs. "Injury" or "harm" that can be inflicted upon such aggregates should more properly said to be damage to their utilitarian or aesthetic usefulness.

Moreover, the very characterization of these groupings as aggregates - as sorts of "wholes", than as separate items, can often be said to be only a human characterization, rather than a characterization of a 'natural kind.' There does not appear to be any natural cut-off point that would justify us in saying, for example, that "Lake A, the streams a, b and c that feed it, and the stands of trees d, e, and f that surround lake and streams comprise a whole."

Stone anticipates this objection in a slightly different context:

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[6] I shall leave it as 'human' here, though an implication of Chapter IV will be that at least some animals ought to be included, and some humans' discluded.

> It is true there is a labyrinth of ontological problems we could become lost in here; which natural objects are we going to countenance as jural "persons" - the ecology of a bay? the oyster bed on its floor? each oyster? If a guardianship can be established over a forest, someone may ask, why not over an earthworm? Are we to concern ourselves with a watershed, a tributary, or a river? Suppose a guardian is appointed by a county court with respect to a stream, and a federal court appoints a guardian, with different ideas, for the larger river basin system of which the stream is a part?[7]

Stone goes on to simply evade these"ontological problems" and writes as if they will become simple cases of conflict of Interests that the courts can decide each on its merit.[8] But that is an evasion; the questions don't turn to that direction (conflicts of Interests) unless it can be determined that there are, in fact, Interests that can be specified. The original question remains - can some of these claimed candidates for guardianship and rights really be said to have a good, or a benefit, or specifiable Interests?

My negative answer to the rhetorical question is not meant to be taken as a denial that it sometimes makes sense to speak of some of these agregations as sorts of unities - as "entities". (For example, particular lakes), it is meant to deny that any Interests involved would be that of

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7 Christopher D. Stone, Should Trees., p. 44.

8 Ibid.

the aggregate itself rather than of human Interests or, perhaps, individual Interests of members of the aggregate (e.g. individual animals or plants).

Furthermore, in most cases - even when it does make sense to speak of the aggregate as a unity, it may be impossible to determine what the "natural end" of the system may be except in terms of human wants or needs. For example, the lake that becomes clogged with algae (either "naturally" or as a result of pollution with detergents) is undergoing a change into a bog. What is the "natural end" of the process - the clear lake, the intermediate swamp, the bog, or, perhaps, the ultimate deposit of peat or coal?

2. Individual Plants: Do Plants Have interests/Interests, Ends or Goals?

1. A claim may be made that plants have interests. That is, that plants have mental states.

2. A claim may be made that plants have both Interests and interests.

3. A claim may be made that plants have Interests, but not interests.

In support of claim 1., the following sort of argument is usually offered:

(a) Plants respond to stimuli: they usually grow towards light, their roots usually grow towards higher concentrations of water. These responses are, in general, conducive to their survival.

(b) Some plants, such as the sensitive mimosa, respond to touch.

The response of the sensitive mimosa to touch - the closing of its leaves - seems to be "aversive", and seems to be conducive to the plant's survival. It usually closes its leaves in response to stimuli that are, in general, detrimental to its survival.

(c) We notice in our own case that stimuli that are (in general) injurious (detrimental to survival) cause aversive reactions on our part. These aversive reactions are often accompanied by feelings of pain.

(d) Therefore, by analogy, (the argument goes), can't we say that the "aversive" behavior exhibited by plants is accompanied by feelings of pain in the plant.

Objections to the Argument.

To raise the problem of plant perception or sensation is to raise the whole problem of the relation of 'response' to 'behavior', and the problem of the relation of 'behavior' to 'consciousness'. The claim that I shall be making here - that plants are incapable of having interests (mental states), as commonsensical as it is, is not that easy to defend with a knock-down argument. But I shall try.

The "aversive behavior" of plants can be taken as analagous to simple autonomic reflex reactions in our own case. Eye-blinks, knee-jerks, are reactions to stimuli that are, in general, injurious and yet these reactions are often unaccompanied by sensation.

The die-hard objector might protest that while I the person don't feel the eye-blink or the knee-jerk, that doesn't warrant the further assumption that the system composed of the relevant muscles and nerves doesn't feel pain. That is, when tapped on the knee, I may feel nothing, but perhaps my knee does. Brought back to the plant (the argument goes),

the chemically or mechanically explainable "tropism" may also involve sensation. So the cause of the mimosa's closing of its leaves is not simply chemical, but is an aversive reaction to pain or, at least, is a chemical reaction accompanied by pain.

But there is no reason to believe that the mimosa or my knee feel pain rather than pleasure, much less that the mimosa or my knee feel anything: If we, for example, think of pain and pleasure sensations as serving an evolutionary adaptive function, there is more reason to believe that there are no pain or pleasure sensations in either plant or knee, because such sensations would serve no function. Yet the argument that plants do have sensations of pleasure and pain seems to be based on an argument from evolutionary adaption (see steps (a) - (c) in the argument above.).

Pain functions in an adaptive way. Painful stimuli are usually stimuli that are injurious to an organism, stimuli that are counter-adaptive to an organism's survival. However, in this schema, pain serves an "<u>educational</u>" function. The burnt child shuns the fire, the memory of the pain that accompanied the injurious stimulus will prevent the child from repeating the experiment and causing injury to his hand again.

Plants are, for the most part, sessile and, as far as all confirmed evidence indicates, they are incapable of learning from their counter-adaptive "mistakes". On that ground alone, there is no reason to believe that plants are capable of pain sensations. Similarly for pleasure. Pleasurable stimuli, though in a more complex way, are usually conducive to survival of the organism or of its species. There is no evidence to

suppose that plants are capable of learning to seek pleasurable stimuli.

Two objections may be raised here:

First, that in evolutionary theory it appears to be the case that a feature that has adaptive potentiality may appear in member of a species before it can be utilized by the species or those members of the species that have the feature. Thus, for example, the mouth structure prerequisite for speech may be present before an animal has the cerebral complexity necessary to utilize the mouth structure. Or, perhaps, the cerebral complexity necessary for speech may appear before the animal has the mouth structure necessary for verbalization.

Brought back to the plants, it may be argued that they may have developed the capacity for pleasure and pain sensations even though learning mechanisms have not yet evolved.

I confess that I can offer only an inductive argument against this objection: Capacity for pain or pleasure feeling seems to necessitate the presence of a neural cell network, or at least something analagous to a neural network. That is <u>not</u> to claim a CNS-mind <u>identity</u> theory, but instead to suggest that there is at least some connection between the capacity to have feelings and the presence of a central nervous system or its analog. Plants have no such network, or anything analagous to such a network.

The second objection to the claim that plants are not capable of pain and pleasure sensations - again within the context of evolutionary theory, concerns "degenerate evolution": A feature may be present in an organism that is no longer functional, but was functional in the fore-

bears of the individual or the species to which the individual belongs.

That may very well be the case in regard to pain and pleasure sensation in certain organisms. Thus, for example, there seems to be good evidence to believe that at least certain Mollusca have the capacity to feel pain and to learn from painful experiences.[9] Clams and oysters, both Mollusca, are sessile for most of their lives and appear to be incapable of learning, yet they may have "de-evolved" from a molluscoid ancestor that was capable of utilizing pain for learning, and they may retain the capacity to feel pain in spite of an inability to make use of the capacity. But that is a problem about clams and oysters and a comparatively few other similar organisms. There is no evidence to suppose that plants have "de-evolved" from sensate organisms.

Claim 2. Plants may have Interests but not interests.

Can Plants Have Interests?

Leonard Nelson claims that because we could not determine what a plant's Interests are - if, in fact, they have Interests, we could not determine how we ought to treat plants:

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9 M. S. Wells, "What the Octopus Makes of it: Our World From Another Point of View," Readings in Animal Behavior, ed. Thomas E. McGill (New York: Holt, Rinehart and Winston, Inc., 1965).

> For all we know, the stone may have an interest in being trampled on by us, or a cabbage in being eaten. From the fact that we do not know whether we are confronted with interests, we cannot infer what interests we have to take into consideration.[10]

The problem with Nelson is that he seems to be confusing the two major senses of 'interest' - the sense related to the mental states with the sense related to "needs" or "benefits".

If he means that plants do not have determinable (in my terminology) 'interests', then I think he is right. However, if he means that plants do not have determinable (again in my terminology) 'Interests' then, as I shall argue below, I think he is wrong.

Joel Feinberg is more illuminating in his claim that plants have no Interests: "Trees are not the sort of beings who have their 'own sakes'"[11] and:

> ... to say that a tree needs sunshine and water is to say that without them it cannot grow and survive; but unless the growth and survival of trees are matters of human concern, affecting human interests, practical or aesthetic, the needs of trees alone will not be the basis of any claim of what is "due" them in their own right. Plants may need things in order to discharge their functions, but their functions are assigned by human interests, not their own.[12]

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10 Leonard Nelson, System of Ethics, p. 140.

11 Joel Feinberg, "The Rights of Animals and Future Generations," Philosophy and the Environmental Crisis, ed. William Blackstone (Athens, Georgia: University of Georgia Press, 1974) p. 50.

12 Ibid., p. 54.

And, finally, although we speak of plants "flourishing" and "thriving", Feinberg believes that to claim that the application of these terms to plants indicates that they do have Interests is to take botanical terms which have become fixed metaphors when applied to humans, and wrongly apply the metaphor back to plants.

I think that Feinberg's analysis is too cavalier and, I believe, that it does make sense - non-metaphorical sense, to claim that plants do have Interests:

1. Individual plants are not just aggregates, they are organisms. They are specifiable as entities.
2. They have self-regulatory and "repair functions" that serve, however crudely, to preserve the "integrity" of the organism.
3. Saying that a plant is 'thriving' or 'doing well' or 'doing poorly', or that it is 'healthy' or unhealthy' is clearly more than uttering a series of metaphors. Those each appear to be non-metaphorical descriptive terms that can be used to describe a plant's condition.
4. One can, for example, 'deprive' a plant of water and that does not seem to be the same thing as, for example, "depriving" a car of gasoline or oil. The plantman who says: "This mimosa needs more water" does not seem to be analagous to the garageman who says: "This car needs more oil."

Plants do seem to have states of well-being and states of health and, by extension, there are actions that will further or hinder those states - that is to say, plants have Interests.

Von Wright's comments seem appropriate here in regard to the Interests of plants:

> A being, of whose good it is meaningful to talk, is one who can meaningfully be said to be well or ill, to thrive, to flourish, be happy or miserable.[13]

> The attributes which go along with meaningful use of the phrase 'the good of X', may be called biological in a broad sense. By this I do not mean that they were terms, of which biologists make frequent use. 'Happiness' and 'welfare' cannot be said to belong to the professional vocabulary of biologists. What I mean by calling the terms 'biological' is that they are used as attributes of beings, of whom it is meaningful to say that they have a life. The question 'What kind or species of being have a good?' is therefore broadly identifal with the question "what kind or species of being have a life?' And one can say that it is metaphorical to speak of the good of a being, to the same extent as it is metaphorical to speak of the life of that being.[14]

3. Do Plants Have Rights?

We have seen in Chapter I that the possession of a moral personality is not a necessary condition for legal rights possession and we have seen that membership in the species Homo sapiens is neither a necessary nor a sufficient condition for legal rights possession.

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13 von Wright, Varieties, p. 50.

14 Ibid., p. 50.

Since an entity with Interests can be represented by a guardian and can have those Interests protected by legal rights, it would appear that plants can have legal rights. However, there remain important questions - "Do we have a duty to plants to give plants rights?" Would it be unjust, or unfair to deny rights to plants? Do plants have moral rights?

Let me offer a very strong example of a "human" right, accept it as just (i.e. as a moral right) and see (by a circuitous argument) whether we have an obligation to "give" that right to plants.

Article 26 of the Universal Declaration of Human Rights states:

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[15]

If we are to recognize Article 26 as a valid statement of a right, including a welfare right to be assured that an attempt will be made to have one's "well-being" secured, are we, for the sake of justice and fairness, compelled to extend this right to plants?

Certainly the Article is to be taken to refer to states of physical well-being as well as states of mental well-being. It is clear that

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15 United Nations Declaration of Human Rights, Article 26.

plants are incapable of the latter, but it clear that plants are capable of the former.

Now an entity may have a moral right to an Interest and that right may be violated whether or not the entity has an interest in that Interest. (see Chapter II). However, suppose the entity is incapable of having an interest in the end - no interest in that for which the Interest is a means. Suppose the entity doesn't care about its well-being, or desires not to be in a state of well-being. Can we then violate its right to that state, or its right to the means to achieve that state, by interfering with the state of interfering with the means to achieve that state?

My negative answer to the question about the moral rights of plants follows in a lemma concerning adult, rational, human beings.

Is Suicide or Aiding Suicide a Violation of a Right to Life?

On the assumption that adult, rational human beings have a right to life; Can they violate their own right to life and/or Can they waive their own right to life?

There are various arguments designed to show that one has a duty not to commit suicide or that one has no right to commit suicide. Briefly described, they are as follows:

1. Theologically based arguments designed to show that one's life is not one's own, but belongs to God(s). Plato sometimes uses this argument[16] as does Locke (see discussion below, pp. 116).

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[16] c.f. Crito 51d-53e. Phaedo 62b-f.

2. There are arguments designed to show that suicide is wrong because one has duties and obligations to others and to commit suicide would be to "abandon one's post."

(a) This sort of argument may be based on a claim that one has to discharge obligations incurred in the past: During one's life one has reaped the harvest sown by others, benefited by the help of others - both individuals and society at large, and one owes a debt to those others or to society. One ought not abandon one's obligations by taking one's own life. Plato appears to have used this argument also.[17]

(b) There is a Kantian version of this argument: Regardless of whether or not one has incurred past obligations to society, one has present and future obligations to individuals - including oneself, and, to take one's own life is to abandon those duties.

(c) There is an argument based on a claim that the right to life is a 'mandatory right'.[18] That is, that there are some rights - such as a child's right to an education, that one has a duty not to waive, or that one simply cannot waive. The claim is that the right to life is one such 'mandatory right'.

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17 c.f., Crito , ibid.

18 c.f., Joel Feinberg, "Voluntary Euthanasia and the Inalienable Right to Life," Philosophy and Public Affairs 7 (Winter, 1978) p. 104.

3. There are also consequentialist arguments against suicide: For example, permitting suicide, even if seemingly justifiable in a particular case, sets a bad example and may lead to a general lessening of respect for life.

4. There are arguments based on a claim that suicide is irrational - this is a complex claim:

(a) Sometimes it is meant as a claim that the suicidal person probably has a wrong set of beliefs. Thus, for example, a person may wrongly believe (either because he has been misinformed, or because he has an irrational conceptual scheme) that he has a malignancy which will lead to pain, deterioration of mental and physical capacities and, finally, death. Based on the mistaken belief, the person may decide to take his own life and, while we may believe that he would have the right to commit suicide if his beliefs were correct, we know his beliefs to be false and believe that, under the circumstances, he has not the right to commit suicide.

(b) Sometimes claim 4 is based on belief that it is analytically true that someone who is suicidal is irrational. That is, that not only are there never rational reasons to commit suicide, but being suicidal is itself a mark of irrationality.

I shall ignore the theological arguments and, in order to sidestep some of the other arguments (e.g. 2 (a) and 3), I shall pull out the philosopher's map of terra incognita for a desert island.

On this particular island is an adult human, in good health, and in full possession of his mental faculties and who, if asked, will claim that he is in a state of well-being. Let us call him 'Epicurus'. He has no obligations to discharge to others, if he were to commit suicide there would be no-one around whose attitude towards the sanctity of human life might be changed by his act. He states that he cares not whether he lives or dies - "Death is nothing to him."

The first argument against his suicide (not quite mentioned among the arguments given above) is an old and, I think, valid one: Not caring whether one lives or dies is incompatible with having a desire to commit suicide, for having a desire to commit suicide is to care whether one lives or dies.

However, the situation changes: Bion lands on the island. Would Bion violate Epicurus' right to life if, after hearing Epicurus' claims, he were to kill Epicurus?

While I think that some of the arguments against suicide or consenting to one's own death have been avoided in this desert island example, a couple still remain - namely, 4 (b) and 4 (c) (pp. 92-93) above. I think that in this case, they can be taken as the same argument - that the right to life is a mandatory right, that one has a duty to oneself to stay alive and that one cannot waive one's right to life. That is, that suicide, or consenting to one's own death, is a violation of a right to life.

However, as Feinberg indicates,[19] the notion of a mandatory right against oneself seems implausible. I believe a child's "mandatory" right to an education seems better described as two situations, one involving

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19 Ibid., pp. 119-120.

a right - the child's right to an education, granted to the child because it is believed to be in his Interests to be educated, the other involving a duty to society - a duty imposed upon the child (or the child's guardians) to be educated because an uneducated person will very likely be a burden on society or on other persons. In the case of suicide, Feinberg:

> But how could my suicide violate my <u>own</u> right to life? Is that right a claim against myself as well as against others? Do I treat myself unjustly if I deliberately end my life for what seem to me the best reasons? Am I my own victim in that case? Do I have a moral grievance against myself? Is suicide just another case of murder? Am I really two persons for the purpose of moral judgment, one an evil wrong-doer and the other the wronged victim of the first's evil deed, . . . [these] paradoxes may derive, . . . from the conceptual violence they do to the integrity of the self and the way we understand the concept of a right.[20]

As for the Kantian objection to suicide, it may seem that a case may be made for his position. <u>If</u> (going back to Epicurus alone on the island) Epicurus were to have a desire for suicide, presumably there would be something he would want to accomplish by means of his suicide. (As I have said above, if he had a desire for suicide that would not be compatible with his claiming that he does not care whether he lives or dies.) In that case, Kant might say that he would be using himself as a means and perhaps a good case could be made that he has a duty not to

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20 <u>Ibid.</u>, p. 120.

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The right to life is peculiar in many ways. Among the ways it is peculiar is the following: Some rights, such as the right to free speech, may be waived on occasion by the right-possessor without entailing that

[21] There may be a built in Kantian difficulty here which I will ignore: Presumably, Bion would have some reason to kill Epicurus and that might put him in the moral Kantian position of using Epicurus as a means.

if they are waived, and the waiver is acted upon, the right is waived forever. Or, perhaps to state the matter more correctly, the enjoyment of the right to free speech may be waived on one occasion, but the right itself remains - one can exercise the right to free speech at another time. On the other hand, if the right to life is waived, and the waiver is acted upon, then - for all intents and purposes,[22] both the enjoyment of the right and the right itself, are forever lost to the possessor. If one doesn't choose to speak now, one may still speak tomorrow. If one doesn't choose to live now, and that choice is acted upon, one cannot live tomorrow.

I think that there is where the key objection to Bion's killing of Epicurus lies: People are notorious for changing their minds. Today's Epicurean may be a Stoic tomorrow and Bion can neither be certain of Epicurus' true state of mind today, nor be sure of what his state of mind tomorrow might have been if he kills him today. It might be the case that Epicurus is not steadfast in his belief, and to kill him is to cut off the possibility of his changing his beliefs forever. If Bion could be sure that Epicurus would not change his mind, then I cannot see how it would be a violation of his right to life to kill him.

We may, as will be seen below, hold life to be so valuable to people to protect it with a corresponding right. However, we cannot force one who does not hold life to be valuable, and is rational in his belief, to value life. Thus Feinberg:

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[22] One may construct a case in which the right is retrievable: e.g., suppose we accept a cardiac arrest criterion for death; someone might volunteer to undergo cardiac arrest and resuscitation as part of a demonstration or experiment.

> . . . a free and autonomous person can renounce and relinquish any right, provided only that his choice is fully informed, well considered, and uncoerced, that is to say, fully voluntary.[23]

But - given the irreversibility of Bion's possible action, I believe that it would probably be wrong for him to kill Epicurus for, to quote Feinberg again: "It may well be, as I have argued elsewhere, that there is no practicable and reliable way of discovering whether a choice to abjure a natural right is fully voluntary."[24]

Plants Again.

We cannot be sure of the steadfastness or the rationality of adult humans' states of mind, but we can be sure of the steadfastness of plants. Plants, health or unhealthy, in states of well-being, or in states of ill-being, have no minds to change, are incapable, no actions that could be described as 'voluntary'. They are incapable of caring about their wellbeing, their states of health, or their lives and so, it would not be a violation of any presemptive moral right of theirs to kill them or to deny them states of well-being. It makes no difference to them if they do or don't possess those 'good'.

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23 Joel Feinberg,"Voluntary Euthanasia", pp. 122-123.

24 Ibid., p. 123.

By extension, it would not be a violation of any presumptive moral rights of plants to, so-to-speak, tread on their Interests.

Moreover, I believe that we can generalize: An entity which is by nature incapable of caring about any Interest or end that we, in general, recognize with a corresponding right for adult normal humans, is not itself a candidate for such a right. Further, if the entity is incapable of caring about any Interest thought to be necessary or a means to achieve that end, it is not a candidate for any right to such Interests. That is, the Interest must be a means to achieve some possible goal of an entity (as opposed to simply an end for the entity) or the entity must be capable of having an interest in the Interest in order for us to have a duty to consider the entity a possible candidate for a right in regard to that Interest.

I believe that the conclusions reached in the foregoing discussion can prove very useful when applied to those "borderline" cases which this dissertation is about

4. Some First Remarks About 'Life', 'The Right to Life' and How They Relate to interests, Interests, Goals and Ends.

Preliminary Remarks.

Many of the problems relating to the right to life, the value of life, life itself and its cessation, arise only as a result of modern medical technology. This is particularly true, of course, of the problems relating to the rights status of the "irreversibly comatose."

In the past, it was the case that when a person[25] 'died' there was little or no problem about specifying the moment of death or specifying the moment at which it no longer made sense to say "This entity has a right to life." The criterion for death used was usually irreversible cardiac arrest which, in the past, meant the concomitant arrest of almost all other functions. Somatic functions and mental functions associated with the person ceased at virtually the same time.

[Note that questions about the continuance of mental functions in some other sphere of existence need not concern us here; Unless it can be shown that a disembodied soul (if such things exist) has some effect on our embodied world, or that our actions have some effect on disembodied souls, the problems relating to a right to life, duties to persons, and so on, need not include problems about the rights of souls. The law and ethics, having no way to ascertain how many angels can or want or need to fit on pinheads, cannot begin to deal with problems about the property rights of angels. Of course even religions that beliefs about the indestructability of the soul have much to say about killing and death - terms that relate to the termination of existence of the "Strawsonian person."

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25 I am using 'person' here roughly in Strawson's sense (c.f., P. F. Strawson, Individuals (New York: Anchor Books, 1963) esp. Chapter Three, as referring to entities to which both mental and spatio-temporal predicates are applicable.

So too, for example, that archetypical dualist, Descartes, believing in the continuance of the soul after death, nevertheless had a description of what occurs when a "person" dies:

> The Difference That Exists Between a Living Body and a Dead Body.
>
> ... let us consider that death never comes to pass by reason of the soul, but only because one of the principle parts of the body decays; and we may judge that the body of a living man differs from that of a dead man just as does a watch or other automaton (i.e. a machine that moves of itself), when it is wound up and contains in itself the corporeal principle of those movements for which it is designed along with all that is requisite for its action, from the same watch or other machine when it is broken and when the principle of its movement ceases to act.[27]

Because of the recent developments in medical technology death of a person may not be so simply determinable as it has been in the past. It no longer seems to be the case that somatic functions and mental functions necessarily cease concomitantly.

Brain and Mind

In all that follows I shall be making one major assumption: that mental states and functions in an embodies person are intimately tied to the presence of a functioning, or partially functioning, central nervous system (CNS). I believe this assumption is neutral among various

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26 Rene Descartes, "The Passions of the Soul", The Philosophical Works of Descartes, ed. & trans. Elizabeth Haldane and G.R.T. Ross (New York: Dover Books, 1955) reprint of corrected 1931 ed., p. 33.

theories of mind and brain: it allows for identity theory as well as allowing for epiphenomenal, interactionist, and parallelist theories.

So I shall assume that sensations, desires, thoughts, memories, and consciousness in general require, in the embodied person, the presence of a CNS or its analogue and that further, specific sections of the CNS can be related to those various mental states or functions. That is, each mental state or function is associated with some determinable section or sections of the CNS. That is not to disallow the possibility that if a section, A, of the CNS normally associated with some mental state or function is destroyed it cannot be replaced in its function with some other section, B. It <u>is</u> to disallow that a mental state or function can be present in an embodied person if <u>no</u> such section A or B is functioning.

<u>Somatic Life as an interest, Interest, or End.</u>
<u>1. An Interest</u>.

> Because in man there is first of all an inclination to good in accordance with the nature he has in common with all substances, inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life and warding off its obstacles belongs to the natural law.[28] [Aquinas]

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St. Thomas Aquinas, in Perkins op.cit.

There has often been an inclination towards a certain kind of confusion in ascribing a desire for self-preservation to organisms. The confusion is between function and purpose. The fact that an organism can be described as functioning in ways that tend to preserve its integrity or its life does not alone warrant the further inference that the organism "seeks the preservation of its own being." As we have seen in the case of plants (pp. 82-86 above), functioning of the self-preserving sort does not warrant the inference that any mental states are present, much less a complex mental state such as a seeking or desire for self-preservation.

Another example of this sort of error appears to be present in Nelson who writes, under the heading 'Animal's Interest in Living':

> The foregoing conclusions hold true no matter what animal interest is in question. On the basis of them we can decide, for instance, whether it is permissable to kill animals painlessly. We merely have to ask whether we ourselves, if we were to be killed painlessly, would consent to be killed for that reason. We would not, because our interest in living would be injured if we were killed, by whatever method, painless or cruel.[29]

Of course it is not clear here whether Nelson means by 'interest' what I have called an "interest" or what I have called an "Interest." If he does mean "interest" - that is, if he is ascribing to animals a

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29 Leonard Nelson, System of Ethics, p. 141.

desire to live but not the capability to express that desire, his claim seems unwarranted. Certainly there are organisms that are capable of having pain sensations but are not capable of having the more complex mental states prerequisite for being able to have "a desire to live." If, on the other hand, he means to be applying some version of the Golden Rule, then certainly it is true of many animals that _if_ I were that animal, I would not care whether or not I were killed painlessly, because if I _were_ that animal, I would not have the mental capabilities to care. However the application of the Golden Rule argument might work in regard to _suffering_.[30]

We must be wary in our ascription of desires and their contents to animals. Thus, for example, Dennet warns:

> Does Fido really discriminate the object _as_ a steak, or would 'meat' or 'food' have been more accurate choices? Presumably the signal's stimulus conditions are more specific than would be implied by the word 'food', and we can expect the dog to show more interest in steak than in dog biscuits, so 'food' does not seem to be a good choice from the view of either stimulus conditions or behaviour, but 'meat' suggests too much. Surely the animal does not recognize the object as a butchered animal part, which is what the word 'meat' connotes, and 'steak' has even more specific implications. Should we be worried by these implications? Yes, if what we are trying to do is 'specify the concepts' that operate in the dog's direction of behaviour.[31]

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30 c.f., R. M. Hare, _Freedom and Reason_ (New York: Oxford University Press, Galaxy Books, 1969) pp. 223-224.

31 D. C. Dennett, _Content and Consciousness_ (New York: Humanities Press, 1969) p. 84. Also see p. 116.

And T. H. Green, although not known particularly for his work in philosophy of mind, gives an interesting description of some of the problems involved in specifying the content of a desire (in a long argument against classical utilitarian theory). His initial claim is that much of the previous writings about certain mental states were vague and ambiguous. In particular, he claims, that is true of the writers who made use of such terms as 'consciousness', 'self-consciousness', 'sensation', and 'desire'. He appears to believe that our ordinary use of language tends to feed these ambiguities. For example, when writers deal with 'sensation', their automatic assumption is that sensation is sensation of <u>something</u>.[32] Thus, for example, if an organism is having a sensation caused by its having been stuck with a pin, we may unwarrantedly assume that the organism is conscious <u>of the pin</u> or of <u>the pricking</u> of the pin as the cause of pain. But saying that the organism is conscious of a pinprick may simply mean that the organism is having the sort of sensation that is caused by having a pin stuck in it, and is not necessarily cognizant of <u>what</u> caused the sensation or <u>how</u> the sensation was caused.

There are, continues Green, further ambiguities having to do with the <u>subject</u> of sensation. While all sensation presupposes a subject that is feeling the sensation - a "unitary self that is conscious of the

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[32] c.f., T. H. Green, <u>Prologomena to Ethics</u>, ed. A. C. Bradley (New York: Thomas Y. Crowell Co.) Apollo Edition, 1969) pp. 123-127.

sensation," that alone does not entail that the subject of the sensation is cognizant that it is a subject (an "I") that is having a sensation. Thus, the organism feeling a pinprick may not be cognizant of something on the order of "I am having a pain."

As is the case with the object of sensation - where in some instances the subject is cognizant of the object or cause, and in some cases it is not, so it is with the subject of sensation - there are cognitive and non-cognitive senses of 'self-consciousness'. In the simpler, non-cognizant sense, claims Green, it is not that there is no meaningful application of the term 'self-consciousness' - for a sensation is always a sensation presented to or belonging to some particular conscious entity, but that there is another, more proper (claims Green) application of the term 'self-consciousness'. The more proper use is applicable in cases in which there is a "distinguishing presentation of self as at once the subject of feelings and other than them."[33] That is, the subject must be capable of having a concept that it is a self that has sensations, or that has desires for certain states-of-affairs to be realized.

Green claims that the ambiguities about the ascription of mental states in general hold true for specific sorts of mental states such as desires. For example, we sometimes use 'desire' as if it meant merely "that felt impulse after riddance from pain which carries with it to the

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[33] Ibid., p. 123.

individual"[34] or, on the side of pleasure, "that felt want which survives a feeling of pleasure."[35] If these impulses are what we mean by "a desire for pleasure" or "a desire to be rid of pain", then organisms pretty far down the evolutionary scale can be said to have desires, for 'desire' is used here without any assumption about the presence of cognitive content. Humans, however (according to Green) are capable of having desires in the full sense - they are capable of being aware that there is a self that is desiring, and capable of being aware of what is desired.

As a case in point, Green presents a discussion of the ambiguities present in a statement such as "A desires food". Presumably, we would say in many cases that A desires food because A is hungry, but Green claims that by saying "A is hungry" we could mean any one of the following:

1. A has a painful sensation.
2. A has a painful sensation followed by an impulse to "obtain food." (Shock quotes because there is no cognizance of what the impulse is directed towards.)
3. A has an association derived impulse - "An impulse excited by the image of a pleasure previously experienced in eating."

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34 Ibid., p. 124.

35 Ibid., p. 124.

4. A has a desire for food in the "proper" sense - ". . . for something which the desiring subject presents to itself as distinct at once from itself . . ."[37]

Having a Desire to Live

It is not enough to say that because A always behaves in ways that are conducive to its survival, even if A has a set of desires, which if satisfied, will keep it alive and well, that "A has a desire for self-preservation" or "A" has a desire to live."

What is involved or necessary for "having a desire for self preservation" or "having a desire to live" is, I think, well described by Tooley. If we were to substitute "a right to life" in the following, I think the following description by Tooley will serve well as a set of criteria for "having a desire to live":

> Requirement 1: The capacity to envisage a future for oneself, and to have desires about one's future states. In order for something to have a right to life it must now possess, or have possessed at some time in the past, the capacity to understand what it would be like for it to continue to exist, together with the capacity to have desires about its future states.
>
> Requirement 2: The capacity to have a concept of a self.
>
> In order for something to have a right to life [desire to live] it must either now possess, or have previously possessed, the capacity to have the concept of a self, i.e., the concept of a continuing subject of experiences and other mental states.

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37 Ibid., p. 154.

Requirement 3: Being a Self.

> In order for something to have a right to life [desire to live] it must now be, or have been at some time in the past, a conscious, continuing subject of experiences and other mental states.

Requirement 4: Self-consciousness.

> In order for something to have a right to life [desire to live] it must now be the case, or it must have been the case at some time in the past, that the organism possesses the concept of the self as a continuing subject of experiences and other mental states, that it is such an entity, and that it believes that it is such an entity.

Requirement 5: The capacity for self-consciousness.

> In order for something to have a serious right to life [desire to live] it must either now possess, or have previously possessed, the capacity for self-consciousness.[38]

There is no doubt that it is difficult to say at what point in the evolutionary scale, or at what point in the development of a normal human being, an animal or the normal human being could be said to have "a desire (interest) to live" or "a desire for self-preservation," rather than just a set of desires - instinctual or otherwise acquired, the satisfaction of which would happen to be conducive to the survival of

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38 Michael Tooley, "A Defense of Abortion and Infanticide," p. 91.

the animal or the human. One reasonable approach to take in deciding would be to judiciously make use of Morgan's Principle of Parsimony - on the one hand, not taking the Cartesian approach of attributing no mental states to animals but, on the other hand, refraining from attributing more consciousness or a higher level of consciousness to organisms than is necessary for explaining their behavior patterns.

In certain instances, disambiguating the level of consciousness or cognitive ability present in an organism is easy to do. Thus, for example, there is the courting "dance" of the stickleback fish[39]. During the time of mating, the male stickleback "performs a 'courtship dance'" for a ready female. A hasty observation of the dance might lead one to conclude that the male "has the dance in mind" - knows what he is doing, knows the proper steps beforehand, and so on. More careful observation shows that each move the male makes is a response to a move the female makes. If the female does not make the appropriate response, the male will not continue with his next step. Thus, it seems, the male does not have the dance "in mind" or a concept of the dance, but instead his actions are instinctual, immediate reactions to signals from the female.

One might be tempted to object that the male may very well have a concept of the dance and also has a concept of 'rejection', so that if and when the female "decides" to reject his advances, the male realizes

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[39] C.U.M. Smith, The Brain (New York: Capricorn Books, 1970) p. 241.

the futility of the situation and wisely gives up.

But the evidence against the objection is strong. The fact that stickleback behavior is fixed, varying very little from stickleback to stickleback, the fact that the stickleback will try no other courtship approach[39], the fact that the stickleback seems to show no aesthetic appreciation for dance in general - shows no interest in dancing or watching dance other than in mating situations, added to the lack of evidence that there is no non-dance related behavior that would lead one to suspect that the stickleback is capable or having concepts on the level of 'dancing' or 'rejection', all lead to the conclusion that the stickleback has no concept of 'a dance'.

Similar conclusions can be reached about the squirrel that seems to store away food for the winter. One might, at first hasty glance, interpret the squirrel's behavior as indicating that the squirrel has a concept of the future, concepts about the difficulties of finding food in the coming months, and a desire that it survive the hard times ahead. In short, one might be tempted to conclude that the squirrel possesses all the concepts that Tooley, for example, would consider sufficient evidence to warrant the conclusion that the squirrel has a desire for life (or for self-preservation).

But just as one swallow doesn't make a summer, a swallow's return to northern regions doesn't alone warrant the inference that the swallow

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[39] Ibid.

has a belief that winter is over in those regions. So too, an isolated behavior pattern, as complex as it seems, doesn't alone warrant the inference that the squirrel has the cognitive capability to possess a desire for self-preservation. More likely, the squirrel - and most higher mammals (perhaps with the exception of some adult normal non-human primates) do not have the requisite cognitive ability and perhaps, as Tooley conjectures,[40] it is likely that normal humans don't acquire the capability until they are at least some months old. Some members of Homo sapiens are probably never capable of having the concepts or the requisite capability to have the concepts.[41]

In the case of the squirrel, for example, it would be odd to think that the squirrel has the requisite concepts for desire for self-preservation, yet is "retarded" in all other respects. That is, that it doesn't exhibit other behavior of the sort that would warrant the assumption that it is "intelligent." For example, in terrain where buried food would be hard to find, it doesn't put marker of some sort, or if placed in a cage in the autumn and given acorns, it will continue to try to bury them in the hard cage floor - a good indication that its food storing behavior is instinctual, rather than intelligent.

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[40] Michael Tooley, "A Defense of Abortion and Infanticide," p. 91.

[41] Joseph Fletcher, "Indicators of Humanhood: A Tentative Profile of Man," Hastings.

5. Somatic Life as an interest, Interest, or End. 2. An Interest.

As we have seen above in the discussion of plants (pp. 76-99.), an entity's lack of a capacity to have an interest in x does not entail that the entity lacks an Interest in x. So, for example, if plant A is 'thriving' and 'flourishing', having sufficient water might be a pre-condition - a need or Interest for its remaining in that state. And too, being alive might be said to be an Interest for the plant - as a ground for its being in a state of well-being ('thriving' and 'flourishing').

So too, Tooley's kitten (Chapter II, pp. 71-73 above.). If it could be said to have an interest in pleasure states while it is in them, will have an Interest in living while it is in a pleasure state, because its being alive is a precondition for its remaining in a state of pleasure.

(1) 'Somatic life' can be an interest when it is not an Interest or not generally believed to be an Interest. An adult human who has the capacity to have a conception of "life" and "self-continuance" may, for example, desire to live in spite of the fact that he believes, truly or not, that living will in no way be in his Interest. He may believe, for example, that he is slipping into a state in which only somatic life will be present (no sensation or cognition) and still express a desire that he be kept alive both before reaching that state and after reaching that state.

Thus, we have found that while an entity that has 'goods' - ends, can be ascribed legal rights which protect or secure those ends and/or the means to attain those ends, there is no duty to consider such an entity a candidate for those rights unless it is capable of caring about either the end, or the means to attain that end.

CHAPTER IV

THE RIGHT TO LIFE - A RIGHT TO WHAT?

1. Somatic Life, Comatosity, and the Right to Life.

When we say "A has a right to life," what exactly does A have a right to? I don't quite mean that as a question about a possible distinction between "A right to life" and "A right not to be killed." That is, the former might imply that if A has a right to life, we have prima facie duties to try to keep him alive, while the latter might imply "simply" that we have a prima facie duty not to intentionally kill A. Much may hang on that distinction and, while part of my discussion will involve that distinction, I am here solely concerned with the object of the right. That is, what is meant by 'life' in "a right to life" or, to rephrase "a right not to be killed", what is meant by 'life' in "a right not to have one's life taken."

The question might be rephrased as: "Is A's right to life the protection of an Interest (that is, the protection of a means towards some goal or end), or is it the protection of a goal or end (That is, a fundamental right - one that protects something that is taken to be inherently valuable rather than valuable as a means or ground to achieve something else that is considered of fundamental value.)?"

For example, suppose that A believes correctly that the following are true:

1. He is slipping towards an irreversible coma.

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2. He will pass through three stages:

   (a) A stage in which all consciousness (sensation and thought) is permanently gone, but spontaneous respiration and circulation of blood are present. ("neo-cortical death")

   (b) A stage in which spontaneous respiration and circulation of blood are present, but intravenous feeding and other care will be necessary to sustain those life-functions still present.

   (c) A stage in which spontaneous respiration and circulation are no longer present - he will need respirators, feeding, and care to keep him "alive."

Before slipping into comatosity, A expresses a desire not to have his life terminated in any of these stages and further claims that to do so would be a violation of his right to life.

We may allow that he has made contractual provisions for the necessary machinery and care. In that case, the removal of the respirator and denial of care would be a violation of a special right or, (see Chapter I pp. 22-23) the breaking of a contract that involves A, but does not involve a direct duty to A to fulfill the contract. But is A justified in maintaining that to terminate his life during any of these stages of comatosity would be a violation of his (general) right to life?

We note that in stage (a) A's body will, for a while at least, be able to maintain itself although no consciousness is present.

In stages (b) and (c), A needs external help to keep him alive. One might think that alone is sufficient reason to remove the respirators without violating his right to life, but an advocate of A may maintain that the removal of a necessary respiratory apparatus from an unwilling, conscious adult would be a violation of his right to life and so, argues

A's advocate, the removal of the apparatus from A would be a violation of A's right to life.

What Does the Right to Life Protect?

The historical literature seems mixed, understandably so, since such situations did not arise in this form until recently. Taken literally, the Biblical injunction "Thou shall not kill." must be taken as prohibiting killing of all types - plants, animals, comatose, and conscious humans.

The Declaration of Independence of the United States taken literally, implies that human life of any quality is valuable, and that the right to life is not a derived right (That is, not the protection of an Interest.):

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.[1]

On the other hand, Hobbes, who would seem a likely candidate for one who would think that life itself in whatever form is of basic value or, at least, universally held to be of basic value and so ought to be secured in society with a non-derivative right, writes on the one hand:

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[1] Declaration of Independence of the United States.

> THE RIGHT OF NATURE, which Writers commonly call Jus Natural, is the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life . . .[2]

taken literally, that seems to imply that life itself, in whatever form (in humans, at least), is of basic value and that the right to life instantiated in a legal system is non-derivative and protects somatic life as well as conscious life.

On the other hand, we also find in Hobbes:

> 6. Right defined. And forasmuch as necessity of nature maketh men to will and desire bonum sibi, that which is good for themselves, and to avoid that which is hurtful; but most of all the terrible enemy of nature, death, from which we expect both the loss of all power, and also the greatest of bodily pains in the losing; it is not against reason that a man doth all he can to preserve his own body and limbs both from death and pain.[3]

Here one wonders if Hobbes is not taking life itself to be of basic value and protectable by a fundamental right, but instead means that it is not life itself that is valued or valuable, and that the right to life, or the value of life is to be derived from two more fundamental values or

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2 Thomas Hobbes, Leviathan, ed. C. B. MacPherson (Middlesex: Penguin Books, 1961) p. 189.

3 Thomas Hobbes, "De Corpore Politico," Body, Mind and Citizen, ed. Richard S. Peters (New York: Collier Books, 1962) p. 278.

rights (1) a right not to be put into pain (or a disvalue of pain) and (2) a right not to be impeded in one's powers.

Locke seems to hold that the right to life is derivable from a "theological property right":

> For men being all the workmanship of one omnipotent and infinitely wise Maker - all the servants of one sovereign Master, sent into the world by His order, and about His business- they are His property, whose workmanship they are, made to last, during His, not one another's pleasure; and being fashioned with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours.[4]

We are the fruit of God's labor - His property, and therefore have no right to kill ourselves or others. Locke's "right to life" is not, then correlative to direct duties to other persons, but instead a direct duty to God (who has a correlative property right) that involves persons as the objects of indirect duties. Presumably, our duty to God in regard to killing persons excludes the permissibility of killing persons even when they possess only somatic life. Though that may be arguable, since it is difficult to tell when God is ready to take back His property, and

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[4] John Locke, Two Treatises of Government, ed. Peter Laslett (New York: Mentor Books, 1963) p. 311.

we have permission or even an obligation to help Him retrieve His property.

For Kant, the implication is that the right to somatic life is derivative. Possession of somatic life is, for possessors of earthly rational wills at least, a precondition for the exercise of their wills, and the possibility of exercising the rational will is the fundamental right:

> If the body were related to life not as a condition but as an accident or circumstance so that we could at will divest ourselves of it; . . . then the body would be subject to our free will and we could rightly have disposal of it. . . . If a man destroys his body and so his life, he does it by the use of his will, which is itself destroyed in the process. But to use the power of a free will for its own destruction is contradictory.[5]

If we may extract a right to life from what Kant says, it would seem that somatic life (life without a will) is not protectable under that right. That is, that for us, the value of somatic life is only derivative - it is a ground that we need for what is valuable - the rational will. [One might interject here that the implication of what Kant says seems to be that suicide is permissable under certain circumstances as, for example, when someone can be sure that he is slipping into a state of comatosity in which state he will no longer possess a rational will. He may take a slow-acting poison which would take effect after he becomes comatose.]

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5 Immanuel Kant, Lectures on Ethics, p. 147.

More recently, we see a writer like Green seemingly taking the right to somatic life as derivative:

> They [rights of life and liberty] may, however, be reckoned in a special sense personal even by those who consider all rights personal, because the person's possession of a body and its exclusive determination by his own will is the condition of his exercizing any other rights, - indeed, of all manifestation of personality. Prevent a man from possessing property (in the ordinary sense), and his personality may still remain. Prevent him, (if it were possible) from using his body to express a will, and the will itself could not become a reality; he would not really be a person
>
> 151. If there are such things as rights at all, then, there must be a right to life and liliberty, or, to put it more properly, to free life. No distinction can be made between the right to life and the right to liberty, for there can be no right to mere life, no right to life on the part of a being that has not also the right to use the life according to the motions of its own will.[6] [emphasises mine]

It does seem to be possible, in cases of irreversible comatosity, to have life without having a "will", and, it is clear that Green believes that there is no such thing as a 'right to somatic life.'

And H. L. A. Hart seems to derive the right to life in any sense of "life from a right to freedom:

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6 T. H. Green, Lectures on the Principles, p. 165.

> Further explanation of the perplexing terminology of freedom is, I fear, necessary. Coercion includes, besides preventing a person from doing what he chooses, making his choice less eligible by threats; restraint includes any action designed to make the exercise of choice impossible and so includes killing or enslaving a person.[7]

Although not directing himself to the right to life, by implication Wasserstrom seems commited to the view that the right to somatic life, at least, is derivative:

> Thus we can answer the question of why have rights at all, we can then ask and answer the question of what things - among others - ought to be protected by rights. And the answer, I take it, is that one ought to be able to claim as entitlements those minimal things without which it is impossible to develop one's capabilities [emphasis mine] and live a life as a human being. Hence, to take one thing that is a precondition of well-being the relief from acute physical pain, this is the kind of enjoyment that ought to be protected as a right of some kind because without such relief there is precious little that one can effectively do or become. And similarly for the opportunity to make choices, examine beliefs, and the like.[8]

The implication I draw is that somatic life is valuable not in and of itself, but because it is "one of those minimal things without which it is impossible to develop one's capabilities.

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7 H. L. A. Hart, "Are There Any Natural Rights," Human Rights, ed. Melden, p. 61.n.

8 Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination," Human Rights, ed. Melden, p. 105.

Some Comments on the Preceding Positions.

I shall take the liberty of dismissing Locke's claim, if only because of the difficulty - to understate the case - of verifying his claim about the property rights of God. His claim would seem unfounded even if de-theologized and amended, perhaps to a claim that A's life is his own property because he has labored for it, thus making an individual's right to life derivative from a fundamental right to the fruit of his own labor: First, it would be difficult to unpack what he might mean by 'labor' in this case:[9] Second, we could imagine a case in which an individual could not be said to have labored for his life, yet, intuitively, we would nevertheless think it wrong to kill him: Imagine individual B, a conscious rational adult human who has suffered all his life from a disease (perhaps paralysis) that prevented him from nourishing himself, from working for profit, from breathing without the aid of a respirator. He has his life only through the labor of others. Would we be willing to say that B has no right to life, or that his life is at the disposal of those who have kept him alive through their labors?

Hobbes taken as believing that the right to life (or the right to try to preserve one's life, or the value of life) is fundamental because it is based on a natural, universal instinctual desire for self-

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[9] c.f., James Rachels, "Do Animals Have a Right to Liberty," and Donald Vandeveer, "Defending Animals by Appeal to Rights," both in Animal Rights and Human Obligations, ed. Regan and Singer.

preservation ("every man . . . shuns . . . death; and this he doth, by a certain impulsion of nature, no less than that whereby a stone moves downward."[10] seems wrong. We have seen the difficulties inherent in claims about "instincts for self-preservation" in Chapter III (c.f. pp.102-113.) and the claim in the quotation above seems to fare no better after close analysis than does the claim expressed by Aquinas (of which Hobbes is almost a paraphrase) about inclinations (see page 107 above.) for self-preservation. Taken as believing that the value we place on life is conceptual and derivative, as the second quotation from Hobbes (pp. 118-120 above.) seems to imply, Hobbes seems more believable. It does seem, for example, that we have as much to fear from irreversible coma, where all our "powers" are lost, as we do from "total" death.

If Aquinas and Hobbes were correct in thinking that there is such a thing as an instinctual or natural tendency to value life or disvalue death, then one might be able to produce a quasi-naturalistic argument to support a right to life from their claim: We all, instinctually by nature, value life in all its forms in ourselves, and disvalue death; therefore, we protect and secure (or try to protect and secure) individuals against premature death at the hands of moral agents - those that are capable of taking regard of the law and the consequences that might ensue from breaking it, by making a right to life basic to legal systems

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[10] Thomas Hobbes, "Philosophical Rudiments Concerning Government and Society," Leviathan ed. Macpherson, p. 28.

and adding to the law sanctions as a deterrent to moral agents of "ill-will."

Aquinas, at least, (see quotations above, p. 102.) seems to hold that every organism with 'instincts' has an instinct to avoid death. If that were the case then it would seem, as I have said in Chapter II, no just reason to deny a right to life to any organism that has the appropriate instinct, within the context of this "naturalistic argument."

However, to cut the discussion short, it is unlikely that any organisms - including humans - have an instinctive fear of death or an instinctive desire for self preservation. Such a claim seems almost incoherent on even superficial examination - unless we are willing to accept and/or are able to show the presence of innate concepts. It is reasonable to assume that there are inborn instincts to avoid or to seek rather complex objects that appear in an organism's sensory field. Thus, it may well be the case that many animals instinctively flee from snake-like objects or instinctively avoid precipices, and it is the case that snakes and precipices can be fatal. But to avoid a snake or a precipice, or to begin to suckle at the sight of a nipple is simply to avoid a snake or a precipice or to suckle at a nipple. Such responses may be conducive to survival, but there is no reason to believe that the organism has survival qua survival in mind. Neither death nor life are the sorts of "objects" that can appear in perceptual fields. Going back to the previous discussion, the recognition of what 'self-preservation' (and 'death') is, requires the presence of a fairly complex ability to conceptualize.

2. The Right to Life as Derivative from a Right to Freedom or Liberty.

Some of the other writers mentioned or quoted above (Green, Hart, Kant) take killing as an extreme form of restraint. That is, they seem to take a right to freedom or liberty as fundamental, and take the right to life as derivative from the right to liberty. Presumably, then, any entity with a capability of free action should have a right to life.

However, a close examination of these writers reveals a wide divergence (and, too, some unclarity) in what they take a capacity for free action to be.[11] To the one extreme, we have Kant, who takes the capacity to overcome one's desires to do, or try to do, what one thinks is right to do. That is, only moral agents are capable of free choice and, by extension, only moral agents have a right to life.

To the other extreme, we have Vlastos, who takes free action much less rigorously - to be free to choose seems simply to be able to act according to one's desires and, seemingly, Vlastos takes 'desire' or 'choice', at least, in a very broad sense. Freedom for Vlastos includes:

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[11] A generalization about the capacity for "free will" may be made here, which is outside the province of this paper, and which may or may not be true. It seems that theorists in the Rationalist-fold (Kant included, for the sake of generalization) look upon "choice" and "free decision" as stemming from a conflict between two mental faculties - "will" and "desire"; Theorists in an Empiricist-fold, seem to discard "will" and look upon "choice" and "free decision" as the outcome of a conflict among "desires".

> . . . not only conscious choices and deliberate decisions but also those subtler modifications and more spontaneous expressions of individual preferences which could scarcely be called "choices" or "decisions" without some forcing of language.[12]

In the Kantian framework, it is clear that the irreversibly comatose A has lost his right to life. He has been reduced to a state in which he has no longer a 'legislative will'. He is no longer capable of overcoming desires for the sake of what he thinks he ought to do, since he no longer has either desires or a concept of 'ought'.

For Green also, it seems clear that A no longer has a right to life; medical technology has, after all, made it possible for him to be in a condition that "Prevent[s] him . . . from using his body to express a will . . ." [c.f., quotation p. 120 above]

For Hart taken literally, since A is now in a condition in which he is no longer capable of exercising choice, killing A in coma would not be a restraint of A, and therefore would not be a violation of a right to freedom and hence not a violation of a right to life.

For Wasserstrom, A is no longer in a condition in or from which he can "develop his capabilities" or in a condition from which he has the "opportunity to make choices, examine beliefs, and the like." and hence is no longer protected by any "human" rights.

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12 Gregory Vlastos, "Justice and Equality," Human Rights ed. Melden.

For Vlastos, A is neither in a condition from which he can exercise "choice", nor in a condition to live a life of well-being. Although Vlastos doesn't present these two rights (the right to exercise choice and the right to live a life of well-being) as an exhaustive list of basic rights it would still seem, by implication, that A has lost his right to life.

Would it be a Restraint on A's Freedom to End his Somatic Life?

Of course one might object that I have been too cavalier in my application of the quoted criteria for possession of a right to life. The case of A is not the usual case of comatosity that "transplanters" like to deal with - A is not a willing donor. On the contrary, the case of A presents a peculiar difficulty, for while it is true that he is no longer capable of choice and no longer meets the criteria set by the writers mentioned, the fact is that he once did meet the criteria. He was once capable of exercising choice and he did make a choice about his somatic continuance. Now, certainly one may "restrain" a person by frustrating at t_2 the satisfaction of a choice or desire he had at t_1, about what he would like to be the case at t_3. My freedom of choice certainly extends to what I would like to be the case in the future as well as what I would like to be the case in the present.

While it is true that A has expressed a desire or interest in his future somatic continuance, his desire or interest seems analagous to the interest someone might have about the disposition of his body after his somatic death. There may be reasons to consider and, perhaps, honor his wishes (In A's case there is strong reason - he has contracted and

and paid for care.), but not to do so would not be a violation of his right to life. A may have a right to be kept alive, or we may have a duty to keep him alive. (That is, a duty to fulfill the terms of the contract for services he made.), but, oddly enough, not a moral right to life. His right to be kept alive - if we want to consider it a right, seems to be on the order of a "residual right" (see Chapter I, pp.[22] -23.) that A has to dispose of his property - in this case, his body.

Perhaps this could be seen more clearly in examining another imaginary case: B, who is going to pass through the same stages of comatosity as A. B, however, has expressed no desires at all about his somatic continuance. Unlike Epicurus (Chapter III, pp. 93-97 above.) who claimed he didn't care whether he lived or died and so, perhaps, could be said to have willingly and voluntarily waived his right to life, B expressed no care one way or another, and it could not be said that he willingly and voluntarily waived his right to life. It seems clearer in this case that it would not be a violation of B's right to life to end his somatic life in stages (b) or (c) of his coma. He has nothing to gain or lose, there are no choices he can make, and he will not suffer, or be harmed, or be benefited if his somatic life were to be terminated.

Some Additional and Summary Remarks.

In summation, let me emphasize some points that are explicit or implicit in what I have said above:

1. Terminating A's or B's life in stages (b) or (c) of their coma would not be an act of mercy for either A or B. Dyck, for example, seems off the mark when, in referring to proper treatment of the irreversibly comatose, he writes: "There comes a point when the decision to let die

can be made out of mercy [for the victim] . . ."[13] It is almost because the term 'mercy' is inapplicable in these cases that the right to life is not violated. If we mean by an "act of mercy" one that relieves suffering of the beneficiary of the act, the term is inapplicable because there is no suffering of the "beneficiary."

2. I am not claiming that it would not be wrong to terminate A's life (When A has expressed a desire or made a contract that involves the non-termination of his somatic life), or that it might not be a violation of some right or rights of A to terminate his life. I am claiming that such a termination would not be a violation of any presumptive right to life of A.

3. I am leaving a distinction to be made between the moment of death and the moment the right to life has been lost. That is, death can occur after the right to life has been lost. For example, it is clear that in stage (b) of comatosity there exists, for a while at least, an organism capable of "living on its own." That capability seems irrelevant to the issue of determining when the right to life has been lost. Thus, for example, the Harvard Criteria[14] for determining death

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13 Arthur Dyck, "Beneficent Euthanasia and Benemortasia: Alternate Views of Mercy," Beneficient Euthanasia, ed. Marvin Kohl (Buffalo: Prometheus Books, 1975) p. 126.

14 Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, "A Definition of Irreversible Coma," Journal of American Medical Association 205.

seems a curious mixture of an implicit assumption that brain death is the relevant factor in determining the moment or time of death (Under that schema, the right to life is lost when the criteria for death are met.), but death can be declared when the organism is in some sense alive, but needs machinery to keep its body functioning. As I have said above in another context, we would not say that a paralyzed adult conscious human has lost his right to life because he cannot breathe or his blood cannot circulate without the help of machinery.

On the other hand, a statement such as the following is also ambiguous:

> Once neocortical death has been unequivocally established and the possibility of any recovery of consciousness and intellectual activity thereby excluded, the question must be asked, although this patient breathes spontaneously, is he or she alive?[15]

If the writers (Brierly, et.al.) mean "Is this <u>particular</u> person (the person who had a set of personal memories, wants, experiences, and so on) alive?" then, I agree the answer to their rhetorical question is "No". If they mean, however, "Is there an organism alive?", the answer must be "Yes" - whether or not its life is sustained by machinery. And, if they mean that there is an organism alive, but one that no longer has a right to life, then I agree that although there is an organism alive it is "as good as dead" and there would be nothing <u>prima facie</u> wrong with disconnecting any life sustaining machinery.

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15 Brierly, J. B., et al. "Neocortical Death after Cardiac Arrest." <u>The Lancet</u>, September 1971.

3. Is There Such a Thing as "Irreversible Coma"?

At least one writer has expressed qualms about the use of the Harvard Criteria and, presumably any similar set of criteria, for determining death. By extension, his argument could be directed against some of the claims I have made about the criteria to be used to determine when a right to life has been lost. Thus, Baumrin writes:

> . . . the finding that coma is reversible is itself a technology-conditioned judgment, not a physical fact, and the technology may change. Second, there is here a suppressed premise that living in an irreversible coma is not a life worth living. This premise is open to a number of objections: (i) we do not know what the comatose patient experiences; (ii) we do not know that experience itself is a necessary condition for a worthwhile life (just because it is a constant concomitant of our own waking life we are very likely to believe that one must always have it; but we who sleep and do not remember do not think our nights wasted or our lives shorn of value); and (iii) we do not know what of our own conceptions of the value of life we must give up by countenancing with moral equinimity the conscious, willful sacrifice of other people's lives. It is not so much that we will be brutalized but that we will be made apprehensive.[16]

To Baumrin's point (iii) I will give little comment, except to point out that, like all consequentialist arguments of this sort, the inference to the conclusion is debatable. One wonders, for example, whether people might live in less fear with less apprehension knowing

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16 Bernard Baumrin, "On Choosing Between Lives," Man and Medicine 2 (1977).

that there would be enough organs available for transplant to ensure that they would not have to worry about a scarcity of corneas, hearts, or kidneys if they should ever need a transplant organ. And, if the practice of organ donations became widespread, people might feel more secure and less apprehensive in general, living in a society that had such an abundance of agape.

To Baumrin's point (ii): We should not confuse the sleeping quick with the dead or with the "irreversibly" comatose. Sleeping persons not only do have experiences such as dreams but, even when in dreamless sleep, they can be said to be in some state of consciousness. They can be wakened by alarm clocks, they are sometimes able to hold conversations, they are able to feel pain.[17] There is a useful distinction made by Scriven between being 'Unconscious,(or "Nonconscious") and being unconscious.[18] By example, stones are Unconscious, people asleep and people in mild coma are unconscious, but Conscious. People can pass through degrees of unconsciousness ranging from light sleep states, through deep sleep states, through various degrees of coma. If the coma is severe enough (presumably when the degree of damage to the CNS is sufficiently great), there comes a point at which it could be said of them, as it is

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[17] c.f., Jay Kantor, Pinching and Dreaming," Philosophical Studies 21 (January/February, 1970_.

[18] Michael Scriven, "The Mechanical Concept of Mind," Minds and Machines, ed. Alan Ross Anderson (Englewood Cliffs: Prentice-Hall, 1964)

said of stones, that they are Unconscious (or, if one prefers, 'non-conscious'). To say that "we do not know what the comatose person experiences" strikes me as analagous to saying "We do not know what the stone experiences." Surely there must be some sort of criteria we can use to distinguish things that are Conscious from things that are Unconscious (or non-conscious). The absence of appropriate behavior plus the evidence of severe enough CNS damage would seem to be enough to warrant the assumption that there are cases of which we can say the comatose person experiences nothing. How much of the CNS must be destroyed before we can say no experience is present is debatable, though it appears that if the CNS is destroyed somewhere along and above part of the brainstem, experience is gone although autonomic reflexes and functions such as spontaneous respiration may continue.[19]

Ressurection

We are brought now to Baumrin's initial argument - that calling a coma "irreversible" is a comment about the state of the art rather than a statement about logical impossibility. Taking Baumrin's argument further, the implication is that any set of criteria that presumes to define "irreversible death" - be it based on absence of CNS function, cardiac arrest, or lack of somatic activity - must be open to change, depending on the state of technology. So that, in a sense, we haven't the right to call anyone in any state "irreversibly dead - even the embalmed cadaver in a funeral "home."

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19 c.f., J. B. Brierley, et.al. "Neocortical Death.", also Ronald Melzack, The Puzzle of Pain (New York: Basic Books, 1973). Chapter 4.

The quasi-materialist position on consciousness that I have taken (see, for example, Chapter III, pp. 101-102 above.) does seem to commit me to the conclusion that coma and person-death are never, in principle, irreversible. Whatever it is that makes A the person he is - whether it is his set of memories, a conception of self, or something else, it would appear that there is the possibility of reconstituting the appropriate neurons and their appropriate states, e.g., the possibility of restoring the neurons associated with particular memories.[20] Of course, if that is true, the technological capability to do so will be long in coming. In the meantime, there remains the question of what to do with those now believed to be irreversibly dead now. Do we have some obligation to keep them alive and/or whole as long as possible although the capability to restore their personhood, if it is in fact a logical possibility, may not be technically possible for a hundred years? Should we

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[20] One might object that one's memories are memories of past events and that one cannot, in principle, repeat the events of the past. But if memories are "embedded" in neuron structures, it would seem that if a person's neuron structures can be replaced, the configuration of the structure that "holds" the memory can be re-configured also. To this, one might object that feeding "false" memories into a person, even if they are replicas of real memories lost, will result in a different person with the same but not identical memories. However, common sense would seem to dictate that we should consider the individual to be the same (identical person "reconstituted" or, in a very literal sense, "re-minded" of his experiences. (But, of course, there is a mare's nest of problems here: Suppose, for example, that cloned twins with blank brains are given the same set of neuron configurations. Their experiences upon waking from the operation would immediately differ, if only because they perceive the world from different spatial locations. But suppose we kept them in a dark, soundproof room - what would differentiate them as persons?)

simply say that there are consequentialist arguments to either keep the comatose alive (for example, to learn more about the CNS) or kill them (for the same reason of learning.)

Aside from reasons of triage - medical and cryonic facilities are scarce at this time, we might learn more about how to reconstitute personality by studying dead tissue.

But those are consequentialist nuances of decision, and I confess that I am at a loss about our prima facie duties to such "persons"; and their correlative rights, if any.

4. More on the Right to Life, The Rights of Animals, Rights and Suffering.

While we have seen that one extreme position on rights possession - the Kantian - seems too strict, the less extreme position, also deriving a right to life from a right to liberty - Vlasto's position - seems to imply some odd results. It seems to imply that any organism capable of sensation has a right to life.

That is, if we are to allow, as his statement implies (p. 127 above.) that choosing doesn't entail that one is cognizant of what one is choosing, then one could, for example, say that any organism that flees from painful stimuli and/or moves towards pleasurable stimuli is, in those situations, "choosing". If one is hesitant about accepting that, it may seem more reasonable phrased in terms of limitation on freedom, that is, in terms of restraint or coercion. To prevent an organism from avoiding a painful stimulus or seeking a pleasurable stimulus is a limitation on freedom.

Thus, for example, T. H. Huxley;

> For an agent is free when there is nothing to prevent him from doing what he desires to do. If a greyhound chases a hare, he is a free agent, because his action is in entire accordance with his strong desire to catch the hare; while so long as he is held back by the leash he is not free, being prevented by external force from following his inclination. And the ascription of freedom to the greyhound under the former circumstances is by no means inconsistent with the other aspects of the facts of the chase - that he is a machine impelled to the chase, and caused, at the same time, to have the desire to catch the game by the impression which the rays of light proceeding from the hare make upon his eyes, and through them upon his brain.[21]

If the right to freedom (or a right to be free from constraint, restraint, and coercion) is a fundamental right from which the right to life is derived, and Vlastos' definition of freedom (and, perhaps Hart's initial definitions of 'restraint' and 'coercion' [see p. 121 above.]) is allowed, then we might be forced to conclude that animals pretty far down the evolutionary scale have a moral right to life.

The capability for choice and free action and the capability for sensation seem to coincide under this conception of freedom. That is, to have simple sensations (of pain and/or pleasure) is to have desires

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21 T. H. Huxley, "Animal Automata," reprinted in part in Body, Mind and Death, ed. Anthony Flew (New York: Macmillan, 1964) p. 204.

in some sense, and to have desires is to have preferences. The organism with sensation capabilities "chooses" to avoid pain and "chooses" to seek, or stay in, pleasure states.[22]

Sensation and the Right to Life.

That organisms capable of sensation will avoid pain and stay in pleasure states if possible, seems to be the basis for the claim made by Pluhar in his article "Abortion and Simple Consciousness"[23] that killing any organism capable of simple sensation is prima facie wrong. Pluhar's discussion is framed in the language of duties rather than in the language of rights, but I think that difference (which he himself often seems to ignore) can be ignored in this discussion without raising serious difficulties.

His major points, really not argued for, are that Tooley's requirement that an organism have self-consciousness before it could be said to be seriously wrong to kill it, and Brandt's claim that sensation plus memory (or consciousness of continuity of self) are necessary qualities that an organism must have in order for it to be said that it is seriously wrong to kill that organism[24], are counter-intuitive.

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22 c.f., quotation from Vlastos, p. 123.

23 Werner S. Pluhar, "Abortion and Simple consciousness," Journal of Philosophy 74 (March, 1977).

24 Ibid., p. 161.

Pluhar agrees with Tooley that infants do not meet the criterion of self-consciousness, and claims that Brandt's requirement of consciousness of continuity of self would make it permissable to kill the senile.[25] Pluhar takes it as self-evident that killing the senile, "persons of very low intelligence"[26], and infants, is wrong.

His only defense of his position (that it is prima facie wrong to kill any sentient creature) seems to be a rhetorical paragraph directed against Tooley:

> Tooley admits that at some stage fetuses (and of course infants) do become capable of desiring that a given sensation, such as pain, not exist. As a consequence, we are told, it is "undesirable" that more pain than necessary be inflicted upon a fetus during abortion. The reason given for this exceptional status of the desire to be rid of pain is that pain sensations, and only pain sensations, are "rudimentary". Hence, once the pain is minimized, Purdy and Tooley "do not think that the fetus has any desires that are violated by abortion." The reader is not told why positive desires, e.g., the desire that some pleasurable sensation "exist," cannot likewise be rudimentary, but instead have to be expressed in philosophical terminology.[27]

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25 Ibid., p. 162.

26 Ibid., p. 161.

27 Ibid., p. 163.

Pluhar goes on to conclude that killing any sentient creature is prima facie wrong, but that the degree of wrongness depends directly on the degree of sentience the organism possesses.

Aside from some intuitions that one may have about Pluhar's claim that every sentient creature has some claim to life, I think there are more serious difficulties with his claims. (What follows will include some implicit and explicit comments about killing as a violation of a right to freedom or choice in the broad Vlastos-like sense of 'choice'.):

Imagine organisms with the following sorts of consciousness characteristics (Whether such organisms actually, or naturally exist is of no matter - though I do believe that some organisms that actually do exist could fit these characteristics if they sustained the appropriate sort of damage to their central nervous systems.):

Organism A. Organism A is mobile and is capable of possessing two and only two types of mental states: (a) a neutral state - the organism is alive, but has no sensations. It could be described as being in a "ready-state" for the second type of mental state it is capable of having - (b) a pain state - the organism can have pain sensations and, when in pain, will try to exhibit escape behavior from the pain-causing stimulus. (To avoid complications[28], there are no such things as "pleasurable pains", for this organism, at least.)

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[28] That is, I shall avoid the issue of whether there can be "pleasurable pains." For these organisms, at least, any pain they experience is not pleasant and can be categorized as 'suffering.'

Since the organism does try to escape painful stimuli, I think it could be capable of choice in at least that weak sense of choice described by Vlastos. Looked at again from the other side, I think we would say that to prevent the organism from escaping the painful stimulus would be to restrain it - to limit its freedom in that weak sense of 'freedom.'

However, I do not think that organism A is a candidate for a moral right to life, or that it would be wrong to (painlessly)kill it:

If A is in a state of pain, one can relieve it of pain in one of two ways - (i) By bringing it to a neutral state in which it is still alive, but feeling nothing or (ii) by killing it.

Killing the organism doesn't wrong it; it loses nothing of value to itself, or nothing that it is capable of valuing by being killed. As far as it is concerned, there is no difference between it's being a neutral state and it's being dead.

That is not meant to imply that it would not be wrong, or a possible violation of a moral right of A, to intentionally put it into a pain state. In fact, if we do accept that there is a non-derivative moral right not to be put into pain, then I believe fairness would dictate that that right be extended to A. However, if a moral agent C intentionally put A into pain, the implication here is that he could right his wrong action in one of two ways, either one of which would be just for A - he could either bring A back to a neutral state, or he could kill A.

So the capability of simple sensation does not seem to warrant the conclusion that it is always <u>prima facie</u> wrong to kill an organism with that that capability.

However, I think what Pluhar really wants to say is that it is prima facie wrong to kill organisms capable of having pleasure sensations on the assumption that, ceteris paribus, pleasure is always of value to the organism that has the pleasure sensation or is capable of having pleasure sensations.

So let us imagine Organism B: Organism B is an immobile organism that enjoys pleasure states while it is in them, yet does not resist (or miss the pleasure state) when removed from the pleasurable stimulus. B has the capability for only two states of consciousness; (a) a pleasure state and (b), a neutral state. B has no pre-apprehension of pleasure, no seeking of pleasure (or pleasurable stimuli), no wanting or missing of pleasure states when it is not in a pleasure state.

I would think that Pluhar would want to say that it would be prima facie wrong to kill B, but I believe he would be wrong to claim that. I don't think that it would be correct to conclude that removing B from a pleasure state by either killing B or bringing B to a neutral state would be wronging B or would be the violation of any right of B, even a presumptive moral right to pleasure.

Here we have a case of "what one doesn't know cannot harm one." or, really, "what one is incapable of knowing and being bothered about, cannot wrong one." The organism B, as "constructed", neither looks forward to being in a pleasure state (i.e., desires to be in a pleasure state when it is not in one), nor misses pleasure states when not in them (when deprived of pleasure). B is incapable of feeling deprived of pleasure, Moreover, as "constructed", B enjoys its pleasure states but is incapable of having a desire to remain in those states.

[One might object, if one were a hedonistic utilitarian, that it would be wrong to kill B or to bring B to a neutral state. But such an objection would be ill-taken; such an action, in the utilitarian schema, would be, as it stands, wrong, but not wronging B. That is, for example, the hedonistic utilitarian simple would have to say that if we could transfer B's pleasure to C without any loss of the amount or quality of pleasure, no wrong would be done by such an action - the amount of pleasure in the universe has not been diminished, and that is what counts not to whom the pleasure "belongs."]

B does not suffer either from being killed or from being brought to a neutral state, given its limited consciousness capabilities. I do not think it makes sense to say that it is really deprived of anything, or at least that it is being wronged or harmed by being deprived of anything if it is killed or put into a neutral state.

Organism C: Organism C is more complex than A or B. It is mobile, and it instinctively moves towards objects in its perceptual field which, if it manages to reach, give it pleasure sensations. C is still very simple-minded with a single-minded purpose to its life - when pleasure-giving object x appears in its perceptual field, it moves towards it and, having reached it, "bathes" in pleasure-sensation. If C cannot reach x, it experiences nothing that could be called 'pain', 'suffering', or (mental) 'frustration'.

I think that we should be willing to ascribe at least one desire to C - a desire to reach x. The desire is, of course, non-propositional - C is incapable of desiring that it reach x, nor is C capable of recognizing x "as an x". One might be reluctant to call C's 'instinct to

reach x' a desire, but no other term seems to apply better. (C moves itself so, for example, we wouldn't want to say that C is simply "pushed to move towards x.")

Here again, although the case in regard to possible rights of C may seem more complex (That is, we may speak of a right to pursue pleasure or the pleasure-producing stimulus, and, perhaps, of a possible right to the pleasure once attained.), I don't think that C would be wronged, or any possible presumptive moral right of C violated, if C were to be prevented from attaining x or, once having attained x, if C were to be killed. If we are willing to speak of C "having a desire for x and/or the concomitant pleasure if C attains x" - and, as I have said above, I think that 'desire' is the proper term to describe C's mental state - and, second, if we want to speak of desires as states-of-affairs that must be capable of being frustrated, then C does have a desire that can be frustrated. But the frustration is mechanical; there is no <u>feeling</u> of frustration, no anguish, no suffering on the part of C. C is, from the outside - from <u>our</u> point of view - <u>missing</u> attaining x and the accompanying pleasure, but C does not and cannot <u>itself</u> <u>miss</u> attaining x or the accompanying pleasure that would go along with its attainment of x.

Before far - seeing, but hasty objections are raised, let me say that: (1) A in a neutral state is <u>not</u> comparable to a sleeping adult human, (2) B in pleasure is <u>not</u> comparable to an adult human "lost in the throes of ectasy", (3) Preventing C from attaining x is <u>not</u> comparable to withholding information, or objects, or anything that might be of interest or Interest to an unknowing adult human.

I am speaking here solely of organisms with very limited mental capabilities.

Organism D: Organism D has an instinctual drive towards x, and the attainment of x gives D pleasure. If D is impeded in its movement towards x, D does feel frustrated. That is, D suffers, or feels pain, or discomfort if it cannot attain x when x appears in its perceptual field. However, D neither has the conceptual capability to desire x as an x, nor the conceptual capability to realize or know or believe that it is being frustrated or that it is being impeded or restrained.

Suffering and Rights.

It is at this point, I believe, that it makes sense to speak of the possibility of D having a right in regard to x. (That is not to say that D has a moral right in regard to x - for example, if D's single-minded desire was to devour adult humans, we probably wouldn't want to allow D the right even to freely pursue the satisfaction of its desire.) That is, it is at the point at which an organism has the capability to suffer from an interference with its pursuit of a state-of-affairs x or can suffer if, having attained that state-of-affairs, x, x is taken from it without its consent. D can suffer if impeded or restrained in its pursuit of x and, although the suffering may be instinctual (that is, D doesn't know that it is in a state of suffering, or doesn't know why it is suffering), it now seems meaningful to speak of D being wronged if denied x, or if impeded in its pursuit of x. The attainment or non-attainment of x makes a difference to the organism.

But that is not to claim that there is now sufficient reason to say that D has a moral right to life. That is, it would not wrong D to

painlessly kill it while it was in pursuit of x, or even after it had attained x. It is only in relation to its single-minded purpose of attaining x that D can be wronged - it is only x that D cares about and, although D's being alive is a precondition for D's pursuing, attaining, and/or enjoying x, D will not suffer if it is killed. It can suffer only in regard to the frustration or restraint that might be put in the way of its achievement of that single object of its consciousness.

To kill it would not seem wrong, although to interfere with its pursuit of x while leaving it alive, and thus causing it to suffer, might be considered a possible violation of a possible moral right of D - a moral right to freedom, in the weak sense of freedom.

Some Conclusions.

While we could keep on constructing organisms with more complex degrees of consciousness, I believe enough has been established to conclude the following:

(1) That an organism has the capability for simple sensation is not sufficient to warrant the conclusion that we have a duty to refrain from killing it, or that it has a corresponding right not to be killed.

(2) Killing an organism that is capable of liberty or freedom in a "weak" sense of the terms, is not necessarily a violation of a presumptive right to freedom that the organism may have, even if the organism is incapable of waiving that presumptive right to freedom. That is, it may be possible for an organism to have a moral right to freedom (if it can suffer from restraint), without also having a moral right to life. So the right to life is not simply derivable from a right to (weak) freedom.

(3) (Really a reiteration of earlier conclusions). If we are to take "freedom" in a stronger, say Kantian, sense, and say that the right to life is derivable from the right to (strong) freedom, and the capability of acting or willing freely and morally in the strong sense is prerequisite for having a right to life, then we are left with the counter-intuitive result that, for example, (some of) the insane do not have a right to life, as well as that difficulty expressed in Chapter 1 (p.) about the question of the relation of the possession of a rational will as a precondition for immunity from the infliction of evil as well as being a precondition for deserving 'benefits'.

(4) We have had further evidence that it may be meaningful to ascribe some 'general'rights to an entity without being commited to ascribe all general rights to it.

(5) Most important, what appears to have emerged from the preceding discussion is that the denial of a right to A, or the violation of a right of A, is somehow tied to the organism's capability of suffering if it is denied the right, or if the right is ascribed to it, but violated.

"Suffering" is to be taken here in its emotional or sensual sense, as opposed to a mechanistic use the term is sometimes put to as in, for example, "The ship suffered damage during the storm," or "The tree suffered damage as a result of the high winds," or even "His arm suffered damage in the accident." The organism denied the right, or whose right is violated, or in threat of violation must at least be capable of feeling pain, or discomfort, or anguish, or - to use a term that has both conceptual and emotional elements in its meaning - capable of feeling indignant at the denial of the right or at its violation.

I am still working here within the framework of 'capability', so what I have to say does not apply, for example, to the "brainwashed" slave who may not feel indignant or suffer from the denial of freedom. He at least has the capability of suffering or feeling indignant because he has been denied a legal right to freedom (or, to put it differently, because his moral right to freedom has been violated).

That there must be a capability of suffering or indignation at the denial of a right is not to be taken to mean, as Benn, for example means it (see Chapter I, p.6,8 above) that there must be the capability of suffering or indignation that a right qua right has been denied or violated. It is to be taken as a meaning that there must be, on the part of the would-be right possessor, the capability of suffering from the failure to protect or secure the state-of-affairs the right is meant to protect or secure.

Tied to what I have said about interests/Interests, the following seem to be necessary if we are to say that A has a right in regard to x or y:

1. A must have the capability of having an interest in what the right secures or protects, either directly - i.e., where the right protects the state-of-affairs y itself; or, indirectly (as a right that protects an Interest), where the right protects or secures some x that is thought to be necessary as a means to attain y, and the interference with which will probably[29] interfere with A's attainment of y.

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[29] One's goal may be to be wealthy, and probably a good education is in one's Interest if one wants to achieve wealth. But one may, educated or not, inherit money or win the lottery.

2. A must have the capability of suffering in the ways described above if that interest is interfered with.

5. The Right to Life Connected to Suffering

The right to life is unusual among the general rights in that, if there is suffering, the suffering always precedes the denial of the right to the individual, or the general violation of the right in society. That is, one can suffer if one's right not to be subjected to needless pain is violated while and after it is being or has been violated, and one may suffer fear and apprehension when in a situation or system in which one is not protected by the right, or in a situation or system in which one is technically protected by the right (i.e., the right is in the law-books), but the right is actually constantly violated in practice.

However, one does not suffer if one's right to life has been violated for, after all, one is then beyond suffering; one suffers only beforehand - only in apprehension that the right may be violated, or that there is no such protection against violation that is secured in practice and law.

As has been pointed out by writers at least as far back as Hobbes (in his non-instinctual moments), normal adult human beings have the conceptual capability to place an extreme disvalue on death and usually do place an extreme disvalue on death. Whether the disvalue we place on our death is rational (as I believe can be shown) or irrational, we place enough disvalue upon death to protect against killing by securing individuals with a corresponding right not to be killed.

As I have said before (c.f. Chapter III, pp. 102-112), to have the consciousness capability to have a concept of what it means to die entails having a capability to abstract. Death, as I have said before, is not

something that appears in our perceptual field as a food pellet appears in a rat's perceptual field. Along with that capability to abstract, the capability to disvalue death or fear or suffer at the possibility of death also requires at least the same conceptual capability. The idea of their "natural death" is of disvalue to most people, the idea of an "unatural death" - in the same sense of being intentionally (or negligently) killed for arbitrary or slight reasons - existing as a real possibility in society can, to understate Hobbes' position, put a damper on our life activities. Although there may be nothing to fear about death itself, since there is no suffering after death (or irreversible comatosity), we can and usually do suffer or are apprehensive about the fact that if one were to be killed, all experience that we hold to be valuable would go. Without a right to life that exists in law and is protected in practice, there is the further presence of the Hobbesian "paranoia" that, without the right to life, accompanied by the threat of punishment if that right were to be violated, we would skulk about in fear, weighted down by armor, unable to go about freely or sleep peacefully. A right to life (or a right against being killed) at least gives security against those who are capable of being deterred by the threat of punishment. Perhaps, then, it is all that that is the foundation and justification for saying that there is a moral right to life.

But, to stress again the fallacy of certain moral agent theories of rights (including Hobbes' - c.f., Chapter I, p. 5), although it is true that there could be no talk of rights, no setting up of legal frameworks to support rights unless there were those capable of setting up legal framework and capable of guarding or securing those rights,

that does not entail that only those with those capabilities should be protected by those rights. It is the "good" that is protected by the right, or the "evil" that is secured against by the right, not the right itself qua right, nor the sanctity of the agreements or contracts or frameworks that set rights into law.

Thus, although it is those who put a disvalue on death and are capable of setting up a legal framework to protect against killing who, in a sense, "make the rights", and it is only those who are capable of having duties that have duties to heed to rights, justice would dictate that the right should be extended to any entity that can (in the case of the right to life) suffer at the thought of being killed.

Some Objections and Replies to Objections.

Some objections have been raised to this line of reasoning[30] using the following sorts of arguments:

A. (i) Sleeping or temporarily unconscious adult humans have no desires, no interests.

(ii) Therefore they, while sleeping have no fear or apprehension about death or about anything else that might be protected by a right.

(iii) My line of reasoning would seem to entail that [from premises (i) and (ii)] it would not be a violation of a right to life (or, perhaps, any right) to kill a sleeping or temporarily unconscious adult human.

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30 c.f., Michael Tooley, "Abortion and Infanticide."

This attempt at a reductio hangs on a few misconceptions;

1. I have nowhere said that it is permissable to kill those capable of disvaluing death. As it stands, my argument entails only that it is permissable to kill those incapable of disvaluing death.

2. Since killing is, for all intents, irreversible and since the evidence is that most adult humans do not want to die, there is a good probability that any sleeping or temporarily unconcscious adult human is one of those who disvalues death.

3. (This is both an objection to premise (i) of the attempted reductio, and a support of points (1) and (2) above.) It is a false and narrow construal of what we mean when we say "A desires x" or "A fears x" to limit the application of those statements to cases in which A is having an 'occurrent' or 'episodic' desire. It makes perfect sense to say of people that they have desires or fears while they are asleep.[31] Surely we may look down at a person and, knowing enough about his background, say truthfully of him that, for example, he has a desire to be an epistemologist; or to look at Robinson Crusoe sleeping in his fortified enclosure and say of him that he is afraid of cannibal attacks. Sleeping adults and - depending on the degree and nature of the state - unconscious adults, do have desires. To be willing to ascribe desires only when there is actual appropriate behavior taking place in relation

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[31] c.f., Jay Kantor, "Pinching and Dreaming," Philosophical Studies.

to the object of desire or fear is an absurd application of extreme behaviorism. I may still be said to have a desire to finish writing this chapter even if I am at the movies, or asleep and not presently thinking about the contents of this chapter, pen in hand. If you don't think so, then meet me at the movies and ask me, or wake me from sleep and ask me.

B. The suicidal. Another objection to this line of reasoning[32] is a claim that I have said would sanction killing the suicidally depressed. That is, they no longer fear death or, at least, fear life more than they fear death.

Aside from what I have said before about "capability of having the appropriate concepts", this objection seems unjustified on other grounds. Those who are in suicidal depressions are often in temporary states in which, because of temporary external circumstances and irrational beliefs, they are confused in their thinking. The potential "aide" to the potential suicide must bear in mind that, like Epicurus, the potential suicide might change his mind if left alive. Again, given that death is to all intents, irreversible, it would take a great deal of evidence to show that the potential suicide is not confused, or is in possession of all the information about his chances.

However, if the cause for the suicidal depression or the desire for suicide can be shown to be irreversible - perhaps due to irreversible

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[32] c.f., Tooley, ibid.

CNS changes, or perhaps the potential suicide could give good reasons for his value of death over his value of life, then perhaps there might be cause to say his decision is rational and voluntary (c.f. Chapter III, pp. 95- above.) and cause to say that it would not be a violation of a right to life to aid in his suicide.

C. Children. Perhaps death and all it entails is a difficult concept to grasp, but certainly some concept of death and its significance can be understood in rather simple terms. That is, the requirement that one have a concept of death is not a requirement that one must have a full understanding of '<u>Das Nicht</u>' and its significance. If a child has reached an age at which he can understand that there is a "state" which he could be in that would mean that he would never again have experiences and that, if he were in this "state", as Benn[33] and the existentialists put it, all his "projects" would be ended, then I think it is fair to say that the child has a concept of death. Most likely the child will not desire to be in such a "state" and will likely fear the possibility.

The normal child before that age does not have the capability to have the relevant concepts, but is potentially capable of having the relevant concepts and disvalues. The import of that I will leave for a later discussion of abortion and infanticide.

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[33] S. I. Benn, "Abortion, Infanticide, and Respect for Persons," <u>Problem of Abortion</u>, p. 99.

D. Very retarded humans and animals. If the human is so severely retarded as to be incapable of ever grasping the concept of death, or disvaluing death, then it does follow from what I have said that it has no right to life - although it may have other rights because it may suffer in other ways. That is also the case for animals other than humans that do not have the requisite capabilities.

Though note that one may choose to keep the retarded human or the animal alive and, while it is kept alive, it probably has some rights, depending on the degree of retardation or consciousness. Both retarded humans and some animals probably have rights not to be put into needless pain and a right to some degree of freedom (which, under the "weak" definition of freedom, would go hand-in-hand with a right not to be put into needless pain) - e.g., one could not (prima facie) keep an idiot or "higher" animal alive and bind it in such a way that it suffers without reasons that would benefit the idiot or animal in the long run.

As has been well described by Peter Singer, among others[34], the practices of "factory farming", animal experimentation, and confinement in zoos, often seems to cause suffering in a way that violates rights that I have claimed are properly ascribable to organisms that have a

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[34] Peter Singer, Animal Liberation (New York: Avon Discus Books 1975) Chapter 3. Also, Stanley Godlovitch, "Utilities," Animals, Men and Morals ed. Stanley Godlovitch and Roslind Godlovitch (New York: Taplinger Publishing Co., 1972).

conscious level at least equivalent to that of Organism D that I have described or "constructed" above (pp. 145-146.).

One may argue that it is questionable whether the animal really suffers in such situations. However, it is often the case that, in experimental psychology at least, the success and relevance of the experiment is based on a supposition that the animal can suffer in ways directly analagous to ways in which adult humans can suffer. In these cases, if the analogy failed, the experiment itself would be purposeless.

Thus, for an example, we have an article by Thompson, "Influence of Prenatal Maternal Anxiety on Emotionality in Young Rats":[35]

> The purpose of the observations reported in this article was to test the hypothesis that emotional trauma [emphasis mine] undergone by female rats can affect the emotional characteristics of the offspring.[36]

And, later in the same article: "The assumption was that strong, free-floating anxiety would be generated in the pregnant females . . ."[37]

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[35] William R. Thompson, "Influence of Prenatal Maternal Anxiety on Emotionality in Young Rats," Readings in Animal Behavior, ed. Thomas E. McGill (New York: Holt, Rinehart and Winston, 1965).

[36] Ibid., p. 222.

[37] Ibid., p. 234.

A study by Davis and Miller, "Fear and Pain; Their Effect on Self-Injection of Amobarbital Sodium in Rats,"[38] purports to show and conclude:

> . . . if amobarbital does reduce fear, rats maintained in a fear-evoking environment should learn a response which is immediately followed by a painless, quick-acting dose of amobarbital. Such learning would . . . be relevant to the problem of drug addiction. [emphasis mine.][39]

Singer on a study done by psychologists Harlow and Suomi on monkeys:

> In a 1972 paper Harlow and Suomi say that because depression in humans has been characterized as embodying a state of "helplessness and hopelessness, sunken in a well of despair," they designed a device . . . to reproduce such a "well" both physically and psychologically.
>
> . . . The confinement produced "severe and persistant psychopathological behavior of a depressive nature." [emphasis mine.][40]

In the case of "factory farming", unless one is willing to hold to Descartes' early position that animals are intricate, insensate automata, there seems to be little doubt that the behavior of poultry, cattle, and

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[38] John D. Davis and Neal E. Miller, "Fear and Pain: Their Effect on Self-Injection of Amobarbital Sodium in Rats," Readings in Animal Behavior, ed. McGill.

[39] Ibid., p. 222.

[40] Peter Singer, Animal Liberation, p. 43.

swine, indicate that they suffer greatly (even if only from frustrated instincts) from the methods by which they are raised and used.[42]

As far as factory-farmed animals are concerned, there may be a fairly simple method of preventing their suffering which raises some interesting questions and has interesting ramifications for our treatment of humans - we may simply take food-animals and breed out of them the instinctual responses that cause them to suffer from the confinement and cruelty of factory-farming methods. Or, if the suffering is learned rather than instinctual, we may breed "retarded" animals that are incapable of learning and suffering.

Such solutions would not do for many of the uses animals are put to in the psychology laboratories. If the experiments are based on analogies that are thought can be drawn to human mental processes, it would be self-defeating to, for example, breed a monkey that is incapable of "behavior of a depressive nature" if one is doing research on depression using monkeys.

E. The Senile. I will not say much about the rights of senile human beings, not knowing much about their psychopathology. I will say this, though: many writers, especially when writing about abortion,

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[42] Ibid., Chapter 2.

tend to use the term 'senile' in a rather free manner, assuming that senile human beings are simply "old infants." That does not seem to be the case. There are various sorts of senility[43] and though in some of these sorts, the victim tends to confuse past with present, childhood happenings with presently occurring events, it does not seem to be the case that the senile lose a sense of self - on the contrary, they appear to be very ego-centered - and not ego-centered in a way that one may describe an infant as being, but ego-centered in the sense of having a strong conception of what they want and a conceptual disregard for the wants of others. (That is, not like the infant who has instinctual self-satisfying desires, but, probably, no conception of "I want.")

We then can further specify what sort of 'caring' about states-of-affairs protectable by rights a candidate must be capable of; It must be capable of suffering if the state-of-affairs protected by that right is denied, or is in danger of being denied.

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[43] c.f., Arthur Noyes and Lawrence C. Kolb, Clinical Psychiatry Philadelphia: W. B. Saunders Co., 1963) pp. 244-250.

CHAPTER V

SOME FURTHER REMARKS ABOUT ABORTION, INFANTICIDE, AND A FEW COMMENTS ABOUT THE RIGHTS OF FUTURE GENERATIONS

1. Introductory Remarks.

The subjects of abortion and infanticide are apt to call up strong emotional responses in even the coolest of philosophical minds. Taking a stance that permits infanticide might not have required a certain reticence or a feeling that one is required to add defensive, mitigating stipulations in ancient Sparta; but somehow that reticence or set of stipulations seems necessary in the 20th Century Western World.

The intuitions of a strong anti-abortionist differ from those of a determined pro-abortionist. As Wertheimer points out[1], even the pro-abortionist's intuitions might be subject to change if wombs were transparent. But the transparency or opaqueness of a womb, or the cuteness of an infant are not sufficient to establish the basis for ascribing or withholding rights. I myself have used intuitions in this thesis to cast doubt on certain positions, but I hope that I have been successful in basing my final arguments on reasons rather than intuitions.

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[1] Roger Wertheimer, "Understanding the Abortion-Argument," Problem of Abortion, ed. Feinberg, p. 49.

One may ask: "How can one possibly believe that it is not prima facie wrong to kill an infant?" But, as I have said, above, and as Hare points out,[2] intuitions differ. And although intuitions are often indicative of the presence of an unformed defensible argument, they still require that argument to support them.

All that I have concluded so far compels me to look at my cat with a cool philosophical eye and say that there would be nothing prima facie wrong with my painlessly killing it for no reason. The fact that I could not bring myself to do so is not, for me, sufficient reason to claim that it would be wrong to do so, no matter how strong my feelings to the contrary.

Abortion and Infanticide.

This thesis is about prima facie moral rights of entities. I have throughout taken a prima facie right as something that is opposed to consequentialism of certain sorts. That is, to say that "A" has a right to x" is to say that A has a degree of immunity to consequentialist arguments that would deny x to A. The immunity I speak of does not necessarily include an over-riding duty of paternalism in certain cases in which the consequences of honoring A's right to x would go against A's own goals, or A's own good. That

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[2] R. M. Hare, "Abortion and the Golden Rule," Philosophy and Public Affairs 3 (Spring, 1975). Hereafter referred to simply as "Hare."

is, if A has a right to x, there are at least some cases in which we cannot or should not force A to take advantage of his right.

The state, parents, the public interest, future generations may each and all have reasons to condone or not condone abortion and/or infanticide, and the killing or use of certain animals in various ways. The reasons may or may not be justified, but I am concerned with none of that here.

What I am concerned with is whether certain entities that do not have the capability of meeting the requirements I think are necessary for having a moral right to life, but have the potential to have that capability can be said, on that ground, to have a moral right to life.

Going back to the categories of entities I distinguished in Chapter I, the following seem to be the strict implications about their status in regard to rights according to my conclusions so far:

1. Zygotes, Fetuses, Infants. On the assumption that they lack the requisite conceptual capabilities to have a conception of death, or to hold death in disvalue, they have no right to life. However, they may have rights in two other ways:

> (a) They may, depending on the degree of consciousness they have developed, have rights not to have needless pain or suffering inflicted upon them - including the mental pain that may accompany the frustration of instinctual drives. For example, if it is true that infants have an instinctive "fear" of precipices, it, ceteris paribus, would be a violation of a right of an infant to push it towards a precipice and thus cause it to suffer.

(b) Althoygh they have no right to life according to the strict implications of my claims, a decision may be made to bring them to the point at which they will have a right to life. If that is the case, then they may have other rights in those "forward-looking" senses I have described in Chapter I.

2. Minimal I.Q. Idiots. On the assumption that they haven't the capability (or even the potential capability) to conceive of or disvalue death, they have no right to life. However, as long as they are kept alive, they may have other rights depending on their capacity for mental and physical suffering.

3. Imbeciles. Imbeciles probably do have the requisite capabilities required to have a right to life. (c.f. criteria used to define 'imbecile' according to 2a)

4. Insane Adult Humans of Normal Intelligence. Since they have the conceptual capability required, they do have a prima facie right to life.

5. Animals. Most animals apparently do not have the requisite conceptual capabilities for possession of a right to life though, depending on the degree of consciousness the animal possesses, as long as it is kept alive it may have other rights - including a right to (weak) freedom. I must add a stipulation here: The recent research into "higher" primate behavior may present us with a problem analogous to that of abortion and infanticide of normal humans. It may be the case that some of these primates, while they, in a state of nature, lack the requisite capability to have a right to life, have the potential to acquire the appropriate concepts and values or disvalues.

2. Some Stipulated Definitions.

Since certain terms such as 'capable' and 'potential have taken on importance in my discussion, and in discussions on abortion in general, let me stipulate how I shall use some of these rather fuzzy terms:

Capable: Having the present capacity or competence to do or think something. For example, Gustave Leonhardt is capable of sight-reading and playing a musical score that he has never seen before. He is already an accomplished musician.

I, however, am not capable of performing the same task - I can neither sight-read scores nor play the harpsichord. Potential and potential capability: However, I may be potentially capable of performing the same task. I have the proper number of fingers, perhaps the same sort of cerebral structure and, given enough training, practice, and study, I may acquire the capability.

On the other hand, my cat is neither capable or - in any real sense - potentially capable of performing the same task. My cat is incapable of doing so now and it, by nature of its physical structure and cerebral structure, neither has the mental nor physical potential to do so. Degrees of potential capability: There can be degrees of potential capability, but only if there exists a potential in the first place. That is, for example, my cat hasn't the potential to play the harpsichord and cannot ever achieve even a degree of capability or a degree of potentiality. However, I, having the potential may be able to increase my potential with practice and study, until my potential merges with my capability. At what point my potential capability be-

comes an actual capability can only be decided, I think, with a test of that capability. That is, present me with a score and a harpsichord and see what I can do.

Of course there are, in certain areas, degrees of capability: Sight reading a score and playing a harpsichord is one such area. There may be people who are more capable of sight-reading and playing than others. In other areas, it seems to be true that either one has or has not a capability (perhaps the term 'ability' fits these situations better) and there is no question of degree of capability: For example, one is either capable or incapable of doing multiplication of numbers up to 12 x 12. There seem to be situations in which, unlike musicianship, the task in question is a closed task, and so do not admit of degrees of capability.

3. Natural Development and Abortion and Infanticide.

Some have advanced the claim that normal zygotes, fetuses, and infants will normally or naturally develop into persons (i.e., will either develop into moral agents, or develop into entities that meet the requirements I have set for possession of a moral right to life.) Thus, for example, Hare writes: "There is the fact that the fetus has a very good chance of turning into a normal adult if allowed to develop [emphasis mine] . . ."[3]

And Tooley, in setting up an argument against the right of a potential person to have that potential actualized, seems to accept that

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[3] Ibid., p. 214.

the fetus" . . . will come to have that property ["actual personhood"] in the normal course of its development."[4]

Some have tried to conclude, on the basis of the claim about "normal" or "natural" development, that the zygote, fetus, and infant have a right to life. Arguments based on such an initial claim seem flawed in many respects: The argument is, of course, a version of the "Humanness as a sufficient condition" argument I have discussed in Chapter I (c.f., pp. 19-22 above) and, as I have stated there, cannot work for all zygotes and fetuses. The fallacy, perhaps coming from Aquinas, might be given in syllogistic form:

Human Beings are Rational by Nature.
A (Zygote, Fetus, Infant) is a Human Being.
Therefore A is, or will be, rational.

There is that equivocation on 'human being' discussed in Chapter I: Not every member of the species Homo sapiens has the potential to be rational - e.g., congenital minimal I. Q., idiots.

Then too, as I have discussed in Chapter I, if one is to adhere to a strict moral agent theory of rights possession (c.f., pp. 27, above), one must present a full-fledged argument to support the claim that potential moral agents have the same moral rights.

Finally - and most important, I believe a statement like that of Hare's, about "allowing" a fetus to develop, or any similar claim that

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[4] Michael Tooley, "Abortion and Infanticide", Problem of Abortion, P. 79.

even a normal zygote or fetus or infant will normally or naturally develop into an entity that has the conceptual capabilities requisite for possession of a right to life, is, at the least, debatable.

The development of human beings is not like the development of amoebas. When amoebas reproduce through fission, the immediate result are two full-fledged amoebas. On the other hand, the human zygote must go through a long and complex developmental process before it becomes a moral agent, or an entity capable of meeting the criteria I have set for possession of a right to life. That process of development will not just "naturally" happen, or simply take place if the fetus is, in Hare's words, "allowed to develop." Even if we allow that the normal zygote or fetus will "naturally" develop into a viable infant if "left to develop" in the womb, the born infant will not "naturally" develop into (to use Hare's words again) "a normal adult."

A baby left to its own devices, left unattended or on a doorstep will simply not turn into a "normal adult." Unless someone picks it up, cares for it, and feeds it, it will "naturally" die. While this discussion is moving towards questions of acts of commission and acts of omission, which I would prefer to avoid, it seems clear that very active intervention is needed - not to kill the infant, but to keep it alive. More active intervention is required to turn the viable fetus or the infant into a sane adult. An infant kept in isolation and simply fed with its physical needs attended to, will not turn into a "normal adult." There is a need to socialize and educate it before it can have its potential for personhood realized.

4. Harm to the Unborn.

There have been arguments presented, perhaps most noteworthy that of Hare's[5] that attempt to show that abortion is a *prima facie* harm, or deprivation, to the unborn.

Hare's argument is framed in talk of duties rather than in terms of rights, but since I have taken a partial right-duty correlativity position (That is, that a duty to A not to cause A harm or suffering does entail a corresponding right of A not to be harmed or caused suffering), I think I may deal with his argument without serious distortion of either his or my positions.

Summarily, Hare's argument is a clever version of an application of the Golden Rule. Hare's claim is simply that justice and fairness require that "we do unto others what we are glad was done unto us." From this initial claim, he derives the following argument:

1. Most people are glad that they were made or "allowed to become to become" persons.

2. Therefore (following from the Golden Rule and (1), there is a duty to "allow" normal zygotes, at least, fetuses, and infants, to become persons.

3. Moreover, not to do so would be to deprive or harm the unborn, since we are depriving "them" (shock quotes mine) of what we ourselves enjoy about life.

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[5] Hare.

In Section VIII of his paper[6], Hare presents some possible logical objections to his claims and it is those sorts of objections that I would like to comment about. The general objection that Hare himself gives is that ". . . a logician might object that these potential persons do not exist, and cannot be identified or individuated and therefore cannot be the objects of duties. If I had put my own view in terms of rights or interests, the same objection could be expressed by saying that only actual people can have these."[7]

In reply, Hare writes in part:

> This is obviously a very perplexing matter, and needs much more discussion. All I can hope to do here is to cast doubt on the assumption that some people accept without question, viz. that one cannot harm a person by preventing him from coming into existence. True, he does not exist to be harmed; and he is not deprived of existence, in the sense of having it taken away from him, though he is denied it. But if it would have been a good for him to exist (because this made possible the goods that, once he existed, he was able to enjoy), surely it was a harm to him not to exist, and so not be able to enjoy those goods. He did not suffer, but there was enjoyment that he could have had and did not.[8]

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6 Ibid., p. 219.

7 Ibid.

8 Ibid., p. 221.

There is an old joke, which may have more to it than I quote here, but what I quote here is the cogent part: Conversation: A (to B): "Do you have a brother?"; B: "No." A: "Well if you had a brother would he like cheese?"

Having received a large supply of good Brie I may, while eating it, lament the fact that I haven't five cheese-loving brothers in existence to enjoy the cheese, but how could I say that five imaginary brothers are being deprived, or suffering, or harmed, or missing anything? It perhaps would be a good thing if there were five brothers around to enjoy the cheese but, given that there are not, I am not depriving them, harming them, or causing them suffering by not sharing my existent cheese with them.

Hare himself points out the possible objection that a person must be an actual person in order to be harmed, deprived, and so on; but then attempts to answer the objection with, what to me, seems a circular argument:

> Is it then nonactuality? Certainly not present nonactuality. We can do harm to and wrong future generations by using up the world's resources . . .[9]

We can harm future generations if there will be future generations, but to say that we can harm them by refusing to bring them into existence

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9 Ibid., p. 220.

simply repeats (as Hare does later in the same paragraph) what Hare wants to conclude. Hare seems to simply divide actions (or nonactions) into two sorts - (1) Those that benefit. (2) Those that harm. and allows for no action or nonaction that might be morally neutral.

Perhaps the underlying difficulty with Hare's argument is a hidden utilitarianism. Thus, he speaks of, for example, "it would have been a good for him to exist" (see quotation on p. 169 above.) [emphasis mine], and from that, concludes that therefore "surely it was a harm to [emphasis mine] him not to exist, and so not be able to enjoy those goods."

The argument seems to begin with a (utilitarian) claim that we have a duty to produce enjoyment, or enjoyment of goods, in the world - not the enjoyment of goods of any particular person, but just "enjoyment." [Implicit in Hare's claim is that the capability of enjoyment of the goods of life belongs only to humans.] If that is the case, then Hare cannot justifiably go on to say (c.f. my comments about utilitarianism in Chapter I, p. 40) that "surely it was a harm to him . . ." since, to repeat, the utilitarian duty is not directed to individuals, but to the production of "good" itself, or the lessening of "evil" itself.

5. However, perhaps we can frame Hare's argument in rights-language. Hare could, perhaps, be taken as saying that although the fetus, zygote, or infant has no right to life, if we somehow plug rights into utilitarianism we can claim that, as a potential person, the fetus has a welfare right to be turned into a person with a right to life. That is, within the context of what I have so far claimed in the body of this dissertation - not requiring moral agenthood or any similar capacity for the possession of any right, perhaps the entity has a welfare right to

have its potential capability to have the requisite concepts for a right to life, actualized.

Two rights may be in question here: (1) There may be a welfare right to bring the entity to a condition in which it has the conceptual capacity to value life and disvalue death and/or, (2) There may be a welfare right that the entity possesses to bring it further - to a point where it not only has the requisite capacity to disvalue death, but to a point at which it actually does disvalue death.

To (1) - that the zygote, fetus, infant may have a welfare right to have its potential developed to a point at which it has the conceptual capacity to value life and disvalue death: First, it is important to note that if there were such a right of the entity, it would have to be a welfare right - a right that benefits the possessor with or without its consent, and imposes some duty on others to ensure that the entity gets the benefit of that right, whether or not the entity is capable of requesting that benefit. Second - really a clarification of the preceding, the question is whether there is a direct duty to the zygote, fetus, or infant to bring it to that condition (i.e., in which it will have the appropriate conceptual capacities).

The answer is revealed in my objections to Hare's argument and my previous arguments (see Chapter I, 23-25.) about "forward-looking rights." If the entity is allowed to live, then it might benefit by having those conceptual capacities developed and - perhaps - will suffer if the capacities are not developed. (As would the fetus who, after a decision is made to "allow" him to become an adult will probably suffer as an adult if his eyes were to be removed or not tended to during his fetal and infant stages of life.).

However, if the zygote, fetus, infant, or - perhaps, young chimpanzee, is killed, then there will be no entity in existence that will suffer or benefit from the presence of, or lack of, the requisite capacities. And there seems to be no such prima facie duty not to kill such entities, or let them die, in the earlier stages of their existence.

To (2) - that the zygote, fetus, infant (or, again perhaps chimpanzee) may have a welfare right to be taught or convinced that death is of disvalue, there is not much of note that I can say. We should notice that this right, if there is one, is also a welfare right, and is parasitic on presumptive welfare right (1). Most persons will, in the natural course of their lives, come to value life and disvalue death. If, however, a person has the capacity to weigh the value of life against the disvalue of death and can rationally and voluntarily decide for an Epicurean position, or a suicidal position then there seems to be no compelling arguments to support a position of "brainwashing" him into fearing or disvaluing death. (See Chapter III, pp. 94-98 above). Though , as I have indicated (Chapter III, pp. 96-97), there are usually compelling reasons not to take the chance that his position is rational and/or steadfast, and "aid" him in his death.

APPENDIX

Harm to the Unborn and to Future Generations - Some Objections to "Person-Affecting" Theories and Replies to Those Objections

I will only sketch out a few further remarks about the rights of, and harm to, the unborn and to future generations; First, to give some hint of some of the nuances and intricacies about the taking on of obligations that follow from the claims made in this thesis and, second, to answer some objections raised by Parfit[1] and others to the sort of theory I have embraced in this thesis.

Future generations of rights possessors are composed of individual rights possessors and (from what I have concluded) those individuals do not, in fact, have rights against me if I do not choose to countenence their coming into being and if I am consistent in that choice in both word and action.

However, there are subtle ways by which one can pick up such obligations - subtle ways by which I could countenence the production of future generations of individuals and thus give them 'forward-looking' rights (see pp. 24-26 and p. 155 above) against me, although such individuals do not now in fact exist. Suppose, for example, I am 30 years old, expect to live to 70 and expect not only the probability of war in my lifetime, but also expect and desire that there will exist a

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[1] See, for example, Glover, op. cit., pp. 66-68.

generation of 18 year-olds willing, or at least able, to give their lives or energy to protect me in my near-dotage. Or suppose that I expect and desire that there will be a generation of non-senile doctors to care for me in my old age. It would seem that I have - if I make a claim that those desires and expectations will be satisfied - countenenced the production of future generations and members of that generation have 'future-looking' rights against me although they do not now in fact exist.

That is, the situation of persons not yet in existence is parallel to that of the zygote, fetus, or infant now in existence in regard to their rights-status: I may choose to bring them into personhood and, in doing so, pick up obligations towards them but (see pp. 172-173 above.) I may change my mind before they have reached the point at which they have started to acquire rights and, in refusing to continue the process of bringing them into personhood, dissolve my obligations towards them.

This approach partially cuts through the sort of objection raised by Parfit and thought of by Glover[2] as a conclusive argument against any "Person-Affecting" theory[3] (which would included mine[4]). Thus Glover

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[2] Ibid., pp. 67-68.

[3] Ibid.

[4] That is, a theory that claims that every duty implies a corresponding right 'residing' in an individual. My claim is a bit weaker than that; i.e. every duty of <u>forbearance</u> implies a correlative right, etc. But to avoid issues of omission and commission, I will not quibble here.

offers a version of Parfit's objection:

> Suppose there are two medical programmes between which a health authority with limited funds must choose. In the first programme, millions of women would be tested during pregnancy and those found to have an illness which would handicap their children would be cured. In the second programme, millions of women would be tested before becoming pregnant and those found to have an illness which would handicap their children would be warned to postpone conception.[5]

The Glover-Parfit claim is that, under a "Person-Affecting" theory, there would be nothing wrong with failing to adopt the second program - anyone born handicapped if the second program is not adopted cannot claim they had been wronged by failure to adopt the program, for if it had been adopted, they would not have been born. Yet, claims Glover, "Those of us who think there is as strong a case for adoption of the second program as there is for adopting the first have to abandon the person-affecting restriction."[6]

The case as presented seems unduly complicated, so I shall simplify it in a way that, I think, retains the essense of the Glover-Parfit claim: Let us assume the second program has been adopted. A, a woman of sound mind but having the handicapping illness, is warned to postpone her pregnancy, but refuses to do so. (Under my claims she has

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[5] Glover, op. cit., pp. 67-68.

[6] Ibid., p. 68.

already picked up possible obligations.) A child, "B", is born to her. B is handicapped and B wants to hold A culpable. Under the Glover-Parfit claims about Person-Affecting theories, in the context of such theories, B has no just cause to blame A nor can A be held blameworthy since, if she had heeded the warning and postponed her pregnancy, B would not have been born. That result - that B has no claim against A - seems counter-intuitive and yet seems to be a necessary entailment of person-affecting theories.

But it appears to me that my version of a person-affecting theory - one that includes the possibility of 'future-looking' rights - can, in fact, handle that difficulty: If A undertook the obligation of bringing a person into being then, in undertaking the obligation and in carrying through with the intention of bringing a person into being, A has incurred certain obligations and that person has, in fact, some future-looking rights against A. Thus A has, in fact, brought harm upon B.

However, Parfit may reply that that solution will not work: In a rights-framework, in order to say that a right has been violated and (in the case of violation of a negative right, at least,) harm has been inflicted , there must be an alternate state-of-affairs in which the same person would have existed and could have been better off (i.e., not harmed) in order to say that person had been harmed. In this sort of situation, where the alternative to "harm" would have been non-existence, the rights-theorist cannot even speak of harm having been inflicted since there could not have been an alternate state-of-affairs in which that person would exist and would be better off.

Although I believe there are underlying metaphysical difficulties with Parfit's claim, I think that even ignoring these issues, Parfit's

objections can be dealt with within a rights-framework.

The imaginary case he presents very much parallels some actual cases that have been brought to the courts - the so-called 'actions for wrongful life'.[7] The particular case that most closely resembles an instance in which the second imaginary medical program (see quotation, p. 2 above) failed to be adopted is Gleitman v. Cosgrove.[8] The situation was the following: A pregnant woman who had contracted rubella had consulted a doctor. The doctor assured her (wrongly) that there was no danger to the fetus and further, neglected to recommend a therapeutic abortion. The child was born with severe handicaps and sued the physician.

The court ruled against the plaintiff on grounds resembling Parfit's - that given that the only alternative would have been the plaintiff's non-existence and that, in the court's opinion, it would have been impossible to ascertain the value of non-existence, as opposed to existence with handicaps, no damages could be determined.

As a commentary in the Minnesota Law Review[9] points out, it seems intuitively clear that harm was inflicted and that, if the court was correct in its reasoning, serious difficulties are posed for tort law.

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[7] See Minnesota Law Review, Vol. 55, No. 1 (1970), "A Cause of Action for 'Wrongful Life': A Suggested Analysis," in Problem of Abortion, Feinberg, ed.

[8] Ibid., pp. 170-171.

[9] Ibid.

In regard to a more general moral rights - framework, this conclusion poses serious difficulties for a person-affecting theory.)

However, as the commentary argues, it is not clear that the court was correct in its conclusion that damages could not be ascertained and that recompense could not be determined. There seem to be two possible solutions within the context of rights-theory: The first poses some difficult empirical problems but seems, nevertheless, a viable solution: Instead of trying to weigh the value of non-existence against the value of a handicapped existence, the court could weigh the value of what would have been a normal, non-handicapped existence against the negative value of a handicapped existence. As the commentary says: "The problem is then similar to determining the value of a whole arm as compared with the value of an amputated arm or the problem of determing what amount of pain and suffering an individual has endured and to what extent he should be compensated."[10] and "Such a standard might involve a comparison between the child's defects and the life of a non-defective child of like socioeconomic background."[11] While, as I have said, such an approach may present formidable empirical difficulties,[12] the approach still seems viable and would appear to meet the objections raised by Parfit

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[10] Ibid., p. 172.

[11] Ibid., pp. 176-177.

[12] There are obvious parallels here to determining damages and compensation in "affirmative action" cases.

to person-affecting theories

A second solution within the framework of a person-affecting theory is that the victim may, in fact, have the right to be killed as compensation for the handicap. This solution raises another set of problems, tying in to the problem of suicide and the right to life. If the victim does meet the criteria I have set for having a right to life (see pp. 149 (above), then the victim may decide whether in fact his handicap is so severe that he prefers his own death rather than continued existence in his handicapped state.[13] If the victim does not meet the criteria I have set for a right to life, then that decision can be made for him and he may be put to death in order to right the wrong (see pp. 140-142 above.).

Professor Douglas Lackey has presented me with some interesting problems about harm to future generations and to the unborn which run somewhat along the lines of the Parfit-Glover examples and which, I believe, can be dealt with along lines similar to the arguments presented above.

First, there is what might be called "The Second Commandment Problem." (Here again I shall simplify the problem somewhat in a way that, I believe, retains the essence of the problem; Lackey phrased the problem in a way that refers to "the present generation" and "future generations," I shall phrase it in a way that substitutes individuals for groups or aggregates. Thus, I shall substitute "I" for "The present

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[13] See the discussion of suicide in Chapter III, pp. 93-98 above.

generation" and substitute "individuals of future generations" for "future generations."):

Let us assume that I have the power to do whatever I wish with the world's resources. Suppose that what I do is deplete the world's resources in such a way that individuals of the next generation will not suffer from the depletion, but that individuals of the following (third) generation will suffer. Let us assume also that individuals of the next (second) generation do all they can to conserve resources for the generation that follows them. Lackey's intuition is that the individuals of the third generation have cause to blame me for their suffering and that, entailed by that, I have (a) done harm to non-existing persons and (b) done harm to individuals who would not have existed if I had acted otherwise (If I had conserved resources, I would have changed the world in such a way that those wuffering individuals would not have come into existence.). While utilitarianism with its concern for states-of-affairs can account for my blameworthiness, Lackey claims that a rights-formula that implies that harm can only be done to specifiable individuals and to individuals for which an alternative, better state-of-affairs could have existed, seems unable to account for the intuition that I am blameworthy.

Here again, however, it appears to me that the positions I have argued for can take care of such a case. Suppose, for example, that along with my intentional depletion of resources I had clearly and consistently preached a policy of absolute birth control. That is, that I in no way countenced or agreed to there being a third generation. Under those conditions, on the face of it, it seems to me that I can - if others

ignore my preaching - take a Pontius Pilate position and remain blameless. [Of course the situation in regard to my obligations may be far more complex than that. For example, I may have duties or incurred obligations to others of my generation or the next generation who have countenenced or wished for future generations and so, perhaps. have violated some of their rights by depleting the resources.] Further, if I, say by remaining silent, had not preached a policy of zero population, I may be culpable, in a rights framework, for negligence. That is, if I leave my main-street sidewalk icy I have not caused harm to any specifiable individual until a case arises in which some person - any person - does walk by and slips on the ice. That person has, at that point, had a right violated by me. I cannot plead that I had no intention of harming anyone (specifiable or non-specifiable), because it would have been reasonable to assume that someone might very well pass by and slip.

To the claim that if I had acted otherwise and not depleted the world's resources those particular individuals would not have existed and so there would not have been an alternate state-of-affairs in which they existed and would have been better off, I could reply that the case could be dealt with in the same way that the wrongful life cases could be dealt with - a determination could be made of what their situation would have been like if the resources had not been depleted, and culpability and damages could be decided using that standard.

As for a case in which I intentionally deplete the world's resources while at the same time preaching a policy of "Be fruitful and multiply," then it seems clear that I have violated the rights of individuals of

that third generation in the forward-looking ways that I have described, and that my liability or guilt can be determined by considering what the individuals have lost compared to what they would have had if I had not depleted the resources.

The other problem or problems presented to me by Lackey, and derived from problems posed by Parfit and others, concern abortion: Let us assume that A is pregnant, and wants neither the child nor wants to carry the child to term. B, however, who is incapable of bearing children, desires that A have the child so that B can adopt it. B bases her claim on utilitarian grounds, claiming (let us assume correctly) that her happiness added to the future happiness of the child (if it were brought to term and she were allwoed to adopt and raise it) would outweigh the unhappiness that A would experience as a result of her having to carry and bear the child. It would seem that the utilitarian would have to argue that B is correct, and that A should be forced to carry and bear the child. However, that result seems counter-intuitive - A should not be forced to be a breeding ground for the production of happiness and, we might say, has a right not to be forced to do so.

However, Lackey has presented a less traditional, more forceful version of the problem: Let us suppose that A is the last fertile female human on earth and is pregnant with twins, male and female.[14]

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[14] I have ignored any problem about incest in order to simplify the example. If that offends, we could postulate two last, unrelated fertile females, one carrying a male, the other a female fetus

We suppose further tat if there were future generations of humans they would, in fact, be happy and that A, being aware of that fact, wants to abort nevertheless. If A does abort it would mean, of course, that there would be no future generations of humans. Now what follows from my argument is that A does have the right to abort, which seems by some to be counter-intuitive, For, as Glover claims, in discussing a similar example having to do with total sterilization of all humans:

> Would it be wrong for everyone now alive to take it [a drug that would render us infertile], ensuring that we would be the last generation? Would it have mattered if the human race had become sterile thousands of years ago? Some people are indifferent to either of these possibilities, and I have no argument to convince them. But other people, including me, think that to end the human race would be about the worst thing it would be possible to do. This is because of the belief in the intrinsic value of there existing in the future at least some people with worth-while lives.[15]

To these last two problems there may be more than one reply that could be made: First, I have nowhere claimed that rights are absolute and may not be over-ridden if the stakes are high enough. Of course, that brings us back to the problem of what sort of stakes are high enough to justify over-riding a prima facie right. Second, one <u>may</u> take the tack of being "indifferent to either possibility" which, although it may seem counter-intuitive, throws the burden of proof back to the utilitarian to show why one ought <u>not</u> to be indifferent. Third,

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[15] Glover, op. cit., pp. 69-70.

I am not quite sure whether Glover's intuition or a similar intuition does really rest upon a utilitarian base, rather than upon a disguised base of speciesism. Suppose, for example, that there existed a civilization-let us say extra-terrestrial, with a culture and technology far more advanced than our human culture. Suppose too that their civilization had the promise of becoming even richer, but that the continuation of their civilization and species depended on the destruction of our own civilization and species. The utilitarian would, I think, have to be committed to the destruction of our own species and civilization under those conditions. I wonder if the utilitarian base of Glover's feeling could withstand that entailment.

If the utilitarian is willing to accept that entailment then, perhaps, his general position does, in fact, pose problems for rights-theorists.

However, it seems to me that 'person-affecting' theories can withstand the Parfit-type arguments offered against them, and can, in fact deal with them in ways at least as satisfactory as utilitarianism while at the same time retaining the important moral thrust that institutions of rights afford us.

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