

Relational Personhood

Jonathan Herring*

Abstract

This article discusses the basis on which it is determined that something or someone has moral personhood. It rejects mainstream approaches which rely on intellectual attributes or membership of the human species as the markers of personhood. An approach based on intellectual abilities leads to a denial of the moral status of those with cognitive impairments. The emphasis on membership of the human species struggles to explain why such membership in itself generates moral status. Instead this article promotes the view that moral values is found in caring relationships. It argues that this better captures what we regard as morally valuable and reflects the true nature of what it is to be human. This approach is potentially very significant for lawyers because the law tends to promote the rights and well-being of individuals, considered in isolation. Instead we should be designing our legal system around the promotion of caring relationships.

I. Introduction

Debates over personhood raise some fundamental questions for lawyers. Is a fetus a person and so deserving of a right to life? Is it appropriate to switch off the life support machine of someone in a persistent vegetative state? What should be the legal status of people with profound mental impairments? These questions are of even greater significance than they originally imply because they go to the heart of what makes human living good and valuable.

This article will start with a brief discussion of the nature of personhood.¹ It will then set out the two most prominent schools of thought on what a person is and concludes that neither of these is satisfactory. A relational perspective demonstrates why these approaches are misconceived and why seeking to find moral value in a person is doomed to fail. A relational approach shows us that our moral value is not found in individual characteristics, but rather in our relations between ourselves.

II. The Concept of Personhood

Personhood in the ethical literature refers to a moral claim: that a being who is a person is entitled to the highest moral status.² It is not to be confused with a biological question about who a human being is. Because the definition of personhood raises deep issues about what moral value is, it is not surprising that the debates over it have been fierce.

* Professor of Law and a Fellow in Law at Exeter College, Oxford University.

¹ This article draws on ideas earlier discussed in Jonathan Herring, *Caring and the Law* (Hart 2013); Jonathan Herring, *Vulnerable Adults and the Law* (OUP 2016); Jonathan Herring, *Law and The Vulnerable Self* (CUP 2019); and Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2018).

² Ruth Macklin, 'Personhood in the bioethics literature' (1983) 61, *The Milbank Memorial Fund Quarterly. Health and Society* 35.

It is generally assumed that the term personhood applies to all human beings, or at least most of them. This means that there are no entities, or at least none that we know of, who could be of higher moral status than human beings. So, if there was a fire in a building you should rescue a person before a non-person, a human being rather than a piece of furniture. It is not claimed that non-persons have no moral value, but rather they have less than a person. So, while a cat is not a person it does have some moral value and it should be rescued from the fire before a chair.³

For lawyers, a person is entitled the strongest legal protections, such as human rights, and these are seen as stronger legal claims than those that might apply to non-persons.⁴ If there was a case which required us to balance the interests of a person and a non-person the law should prefer those of the person. Hence, in many jurisdictions a fetus acquires personhood on birth and so is only entitled to human rights from that point. Prior to birth the fetus may (or may not) have some interests that are protected by the law, but will not have human rights that can trump the rights of the pregnant woman, reflecting the view the fetus is not a person.

Personhood is typically seen as being a threshold concept. This means that all those who cross the threshold for being a person are equally entitled to the claims that flow from the status of personhood.⁵ No distinction is drawn between the moral status (or human rights) of those who only just cross the threshold and those who undoubtedly cross it. This connects to the powerful intuition that all persons are morally equal.⁶ To return to the example of the burning building, it would be wrong to save the professor before the student; or the banker before the benefits recipient; on the basis of their status.⁷ If anyone were to claim that they are more morally valuable than other people, they would rightly be subject to, at least, scorn. The concept of equality is one reason why the concept of personhood has attracted such support. History has been plagued by examples where one group of people have been designated as non-persons: capable of being owned, or denied human rights, on the basis of their sex, race or sexuality, for example.

This all still leaves open the question of how we decide who are persons. There are two primary theories which will be considered next. First there are those which emphasise mental capabilities as the criterion of personhood. Second, there are those which claim that membership of the human species is sufficient to generate claims to personhood. Both take a similar approach in identifying the attribute of personhood and using that to determine whether a particular being does or does not have personhood. I will next explore these approaches and the difficulties with them, before promoting a third approach: relational personhood.

III. Mental Capabilities and Personhood

A popular school of thought is that the possession of various mental capabilities is the criterion of personhood. Jeff McMahan, a leading support of this view, explains that

³ Agnieszka Jaworska, 'Caring and Full Moral Standing Redux' in Eva Feder Kittay and Licia Carlson (eds), *Cognitive Disability and Its Challenge to Moral Philosophy* (Blackwell, 2010).

⁴ James Griffin, *On Human Rights* (Oxford University Press, 2010).

⁵ Kate Greasley, *Arguments About Abortion* (OUP, 2017).

⁶ Jeremy Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012); Catherine Dupré, *The Age of Dignity: Human Rights and Constitutionalism in Europe* (Hart, 2015).

⁷ Jeremy Waldron, *Dignity, Rank and Rights* (Oxford University Press, 2012). Of course, there may be practical reasons why one person may be chosen over another: fire makes it too dangerous to rescue the student, while the professor can be safely rescued and so forth.

to be a person means having “a mental life of a certain order of complexity and sophistication”.⁸ This typically includes abilities such as cognition; self-consciousness; practical rationality; self-awareness;⁹ a being who can value its own existence;¹⁰ or a being who can experience themselves as beings whose lives can go better or worse.¹¹ Michael Tooley is often quoted when suggesting:

An organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity.¹²

These capabilities are seen as important for several reasons. Only those with these capabilities can have preferences and goals and that is important for many ethical theories. For example, many forms of utilitarianism seek to fulfil the wishes and preferences of people and for supporters of such an approach it is not surprising that the ability to formulate such goals is seen as important. Similarly, much weight is placed in contemporary ethics on the importance of autonomy.¹³ But again autonomy is normally associated with the capacity to make decisions for oneself. This might fit in with the intuition that you cannot harm a table. You cannot wrong it because you cannot act against its wishes or set back what it understands to be its interests. Hence Oscar Horta¹⁴ claims that one cannot have an interest in living, unless you are able to formulate a desire to live nor have capacity for well-being without an ability to formulate preferences.

To Kantians it is autonomy which provides the reason for why persons can claim to have high moral value. Agnieszka Jaworska claims that for Kant it was important that

... persons are able to live their lives by their own lights: through the use of reason, they can set their own standards, their own values, and then lead their lives according to those self-imposed standards. Persons can live by laws they impose on themselves—they can be autonomous.¹⁵

Hence, Kantians claim that an act has moral value only if it is chosen by the individual. That is because a moral act is one where a person chooses to do the good and not to do the bad. Doing a “good thing” unthinkingly or as a result of a brute animal desire is not morally good. That mental capability to choose (autonomy) is what marks human out from other animals as entitled to moral responsibility, but also entitled to enhanced moral status.

One of the appeals of the mental capabilities approach is that such capabilities are inherent to the person. A person’s cognitive abilities are not dependent on social or political environments. The prisoner in solitary confinement and subjected to torture can claim personhood as they have self-awareness, understanding and autonomy. Supporters of the mental capabilities approach claim that if we do not rely on the

⁸ Jeff McMahan, *The Ethics of Killing* (Oxford University Press, 2002).

⁹ *Ibid*, 230.

¹⁰ John Harris, *The Value of Life* (Routledge 1985).

¹¹ Peter Singer, *Practical Ethics* (Cambridge University Press, 1993).

¹² Michael Tooley, *Abortion and Infanticide* (Clarendon Press, 1983), 44.

¹³ Charles Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (Hart 2009).

¹⁴ Oscar Horta, ‘Why the Concept of Moral Status Should be Abandoned’ (2017) 20 *Ethical Theory and Moral Practice* 899.

¹⁵ Agnieszka Jaworska, ‘Caring and. Full Moral Standing Redux’ in Eva Feder Kittay and Licia Carlson (ed.), *Cognitive Disability and Its Challenge to Moral Philosophy* (Blackwell 2010).

individual's innate abilities then their personhood status can be lost depending on the social environment they are in.

It should be noted that the mental capabilities approach is by no means closed to the idea that beings other than humans could have personhood. As James Rachels argues: "if we think it is wrong to treat a human in a certain way, because the human has certain characteristics, and a particular non-human animal also has those characteristics, then consistency requires that we also object to treating the non-human in that way."¹⁶ Some non-human animals might have the kind of capacities for independent thought, self-awareness and the like that are seen as the markers for personhood. Peter Singer has discussed a gorilla (Koko) who was able to understand over 1000 communications signs.¹⁷ In this respect, he notes, it has higher capabilities than some human beings. Plenty of other examples could, no doubt, be found.

The mental capabilities approach is very popular, but faces some serious challenges, which will be considered next.

IV. Problems with Mental Capabilities Approaches

1. The Problem of Equality

A major challenge to the mental capabilities approach is that it appears to undermine the principle of equality. Those humans with mental capability can claim a higher moral status to those without mental capabilities. Inevitably people have the kind of mental capacities mentioned to different degrees: higher states of self-awareness; greater rationality; more richly autonomous and so forth. If it is these characteristics that generate moral value, then it is hard to avoid the conclusion that those with higher capabilities are of higher moral value. There are, however, some possible responses that supporters could use.

The most common response will be familiar to lawyers. Law regularly has to respond to "scalar concepts", where there is no sharp line between categories. The law tends to deal with these by using an artificial "bright line". Age is commonly used in this way. The individual awaking with the most dreadful hangover on the morning of their eighteenth birthday is as much an adult for the purposes of the law as the person excitedly reading a telegram from the Queen congratulating them on their one hundredth birthday. All those over the age of 18 are treated equally as adults. In part this is because it is said to be too burdensome (and controversial) to assess the mental capabilities of each and every person. The "bright line" test can be justified on the basis that it is easily assessable and is roughly in the right place.¹⁸ We might then say that all those who have even a rudimentary level of the mental capacity are entitled to the legal and moral status of personhood, even if they have only just scraped through the test.

This response is, however, problematic. First, it still does not deal with those with profound mental impairments who do not have the mental capabilities even at a minimal boundary level. I will return to this issue shortly. Second, it is not clear that it meets the equality objection. The "bright line" approach used by lawyers is a legal fiction. All those who satisfy the test for capacity under the Mental Capacity Act 2005

¹⁶ James Rachels, *Created from Animals: The Moral Implications of Darwinism* (Oxford University Press 1990), 175.

¹⁷ Peter Singer, *Animal Liberation* (Harper Collins 1985).

¹⁸ Kate Greasley, *Thinking About Abortion* (OUP 2018), ch 3.

in law have mental capacity, even though we know in reality there are wildly differing degrees of capabilities. The law treats all those in the category in the same way, even though we know that is inaccurate. Now it may be that some people would be happy with a similar approach being taken about moral personhood and agree: “the truth is we are not all equally morally valuable and some of us have higher moral value than others, but it is difficult to tell who they are and so we will treat us as all equally morally valuable for the purposes of the law”. But that really does not seem to be the argument that made by those supporting human equality. The claim is that we are all morally equally, not just that we should pretend we are.¹⁹

2. The Mentally Impaired

The second, and perhaps most significant, difficulty with the mental capacity approach is that certain cognitively impaired human beings may lack the mental capabilities attributes and so not qualify as persons in the first place. Even the moral status of babies and young children might be questionable. With the latter there may be arguments in terms of the potential to develop the necessary attributes or that their childhood should be seen in the context of the expected whole human life.²⁰ There is much to discuss there, so for reasons of space I will focus on those with severe cogitative impairments who never had and never will have the required mental capabilities. I take it that for many if they are denied personhood under the mental capability theory, that will be sufficient to reject it, without needing to consider arguments about babies.

Many have found the possibilities that someone with a severe mental impairment will be found to lack moral personhood, to be of less moral value than others as so objectionable the theory must be rejected out of hand. To even suggest that a cognitively impaired person should be seen as having the same moral status as a dog is profoundly offensive. In a fascinating record of a conversation between Eva Feder Kittay and Peter Singer, Feder Kittay tries to respond to Singer’s argument her daughter, Sessa, should be regarded as having a similar moral status to a pig:

The first thing I have to do when you ask me that question, is I have to get over... a feeling of nausea. It’s not that I’m not able to answer it intellectually, it’s that I can’t even get to the point emotionally, where I can answer that question.²¹

Despite the strong intuitive reaction against it from many, there are some philosophers who are content with the conclusion that those with severe mental impairment lack personhood. Peter Singer argues that we should

[a]bandon the idea of the equal value of all humans, replacing that with a more graduated view in which moral status depends on some aspects of cognitive ability, and that graduated view is applied both to humans and nonhumans.²²

¹⁹ Rainer Ebert, ‘Mental-Threshold Egalitarianism: How Not to Ground Full Moral Status’ (2018) 44 *Social Theory and Practice* 75.

²⁰ Jeremy Waldron, *One Another’s Equals: The Basis of Human Equality* (Harvard University Press 2017).

²¹ Eva Feder Kittay, ‘The Personal Is Philosophical is Political: A Philosopher and Mother of A Cognitively Disabled Person Sends Notes From The Battlefield’ (2009) 40 *Metaphilosophy* 606.

²² Peter Singer, ‘Speciesism and Moral Status’ (2009) 40 *Metaphilosophy* 567, 575.

Helga Kuhse and Peter Singer have no difficulty in accepting that a child with Down's syndrome may be of less value than a "normal child". Discussing whether a Down's syndrome child should be given a live saving operation they write:

Even allowing for the more optimistic assessments of the potential of Down's syndrome children, this potential cannot be said to be equal to that of a normal child. The possible benefits of successful surgery in the case of a Down's syndrome child are, therefore,... less than the possible benefits of similar surgery in a normal child.²³

Similarly, Bernard Bard and Joseph Fletcher wrote that:

there is no reason to feel guilty about putting a Down's Syndrome baby away, whether it's "put away" in the sense of hidden in a sanatorium or in a more lethal sense. It is sad, yes. Dreadful. But it carries no guilt. True guilt arises only from the offence against a person, and a Down's is not a person. There is no cause for remorse, even though, certainly, there is for regret. Guilt over a decision to end an idiocy would be a false guilt, and probably unconsciously a form of psychic masochism.²⁴

The reasoning behind such claims is that those with severe intellectual impairments lack the mental capacities required for personhood. Hence, Jeff McMahan concludes (in language which would be found offensive to many) "allowing severely retarded human beings to die, and perhaps even killing them, are . . . less serious matters than we have believed."²⁵

Despite the eminence of these authors and the publicity attached to their views, it should be acknowledged that they are very much a minority in academic writing and perhaps even more so among the general public. But there is no denying the drive of their logic. Is there any way for a supporter of the mental capabilities approach to avoid those unpopular conclusions?

One response is that these views are based on a lack of understanding of the capacities of those with Down's Syndrome or other severe mental impairment. They assume these people lack the capacities they connect with personhood, but their capacities are far greater than are assumed. Those in close relationship with people with Down's syndrome and other impairments can perceive far greater levels of intellectual capabilities than outsiders can.²⁶

However, this is probably too easy a way out. Even if we accept that many of those labelled as suffering severe mental impairment do in fact have the required capabilities mentioned, it is doubtful that they all do. Unless the requirements for mental capacity are set very low indeed, it is likely some humans would fall outside its boundaries.

3. What is the moral value of mental capacity?

The third argument against the mental capabilities argument goes to the heart of the issue and challenges the assumption that the possession of mental capabilities is of

²³ Helga Kuhse and Peter Singer, *Should the Baby live? The Problem of Handicapped Infants* (Oxford University Press 1985) 143.

²⁴ Bernard Bard and Joseph Fletcher, 'The Right to Die' *The Atlantic Monthly* (April 1968, vol 221), 59.

²⁵ Jeff McMahan, *The Ethics of Killing* (Oxford University Press 2003), 230.

²⁶ Jonathan Herring, 'Re B. The Child must Live' in Jonathan Herring and Jesse Wall (eds) *Landmark Cases in Medical Law* (Hart 2017).

moral value. We saw earlier that supporters of the mental capabilities emphasise the importance of autonomy and being able to select values.²⁷ But Simo Vehmas²⁸ claims that supporters of such views are intelligentist. They discriminate against those with “less intelligence” than others without moral justification. That, he suggests, is as bad as treating people differently based on their race or physical abilities. He writes:

Intelligence is essentially a normative concept, reflecting the concept of what kind of being a human should be; how s/he should think and act, and in this sense it is more normative than a concept referring to a physical state.²⁹

He could make the same point about valuing life. He notes, for example, that for centuries very few people could read or write and those with learning difficulties would not therefore be identified as such because in a different society they could operate as well as most others. It is, in other words, social expectations and requirements that render some “intellectually disabled” and others not. This is, of course, a reflection of the broader social argument in relation to disability, that disadvantages from people’s different bodies (and minds) arise through social provision or lack of it and social expectation rather than any natural disadvantage resting in the body itself.³⁰

As Vehmas points out, defining personhood in terms of intelligence means making the intellectually disabled as “other” and judging them in terms of “our” experience; instead of valuing them in terms of their own experience. That argument may be supported with an acknowledgement of the lack of understanding of how the brain works and concerns over the measurement of intellect, which is widely acknowledged reflect racial and gender bias.³¹ Here it may be useful to acknowledge that the world of those with severe intellectual impairments is to some extent a mystery to those without those impairments. There are grave dangers in assuming there is only one model of a good life and it is true for everyone. As Alice Crary³² argues that, in deciding what is valuable about human beings, we need to determine what is valuable about all human beings, not just a selection of them. Otherwise there is a danger of one group imposing on another their way of perceiving the world. “Intelligence” may be a valuable part of life for some, but not all. Eva Feder Kittay argues in favour of:

... epistemic responsibility: know the subject that you are using to make a philosophical point; epistemic modesty: know what you don’t know; humility: resist the arrogant imposition of your own values on others; and accountability: pay attention to the consequences of your philosophizing.³³

Much of the writing in support of the mental capabilities approach assumes that moral value attaches to intellectual abilities. As mentioned earlier, Kant sees the choice to select the good over the bad as being at the core of virtue. However, Vehmas denies that virtue need be connected to intelligence:

²⁷ Sarah Chan and John Harris, ‘Human Animals and Non-Human Animals’ in Tom Beauchamp and Raymond Frey (ed.) *The Oxford Handbook of Animal Ethics* (Oxford University Press 2016), 307.

²⁸ Simo Vehmas, ‘Newborn Infants and the Moral Significance of Intellectual Disabilities’ (1999) 24 *Research and Practise with Persons with Severe Disabilities* 111.

²⁹ *Ibid.*

³⁰ Jonathan Herring, *Law and The Relational Self* (Cambridge University Press 2019).

³¹ Sophia Wong, ‘Duties of Justice to Citizens with Cognitive Disabilities’ in Eva Feder Kittay and Licia Carlson (eds) *Cognitive Disability and its Challenge to Moral Philosophy* (Wiley-Blackwell, 2010).

³² Alice Crary, *Inside Ethics* (Harvard University Press, 2016), 121.

³³ Eva Feder Kittay, ‘The Personal Is Philosophical is Political: A Philosopher and Mother of A Cognitively Disabled Person Sends Notes From The Battlefield’ (2009) 40 *Metaphilosophy* 606.

positive and virtuous traits of character are often characteristic of individuals with intellectual disabilities as well: honesty, courage, persistence, love, a lack of pretence and other similar virtues which individuals with intellectual disabilities are often more able to embrace than normal individuals due to the lack of intellectual reflection; we normal individuals often prevent our moral virtues from becoming actualised by the practice of our intellectual skills.³⁴

Those lacking sophisticated mental capacity can show considerable affection and love. As one parent states:

Those of us with a Down's Syndrome child (our son, Robert, is almost 24) often wish that all our children had this extraordinary syndrome which defeats anger and malice, replacing them with humor, thoughtfulness and devotion to friends and family.³⁵

Further it is often incorrectly assumed that those with "higher cognitive functioning" use this to make decisions. Many of our decisions are a result of emotional reactions, imbedded prejudice, and so forth, which have little to do with cognitive function.³⁶ The exhausted parent changing the nappy in the early morning, may be showing considerable love and care, even if "virtually on auto-pilot". The lifeboat team sacrificing their lives for a stranded sailor may be responding instinctively, rather than making a rational, "autonomous" decision to be brave. When making decisions we typically rely on very low levels of information, not least our capacity to foresee the future. It may be more accurate to acknowledge that humans all suffer from profound limitations in terms of knowledge and use of that knowledge. The claim that the only good acts are those rationally and intellectually chosen seems hard to justify.

V. *Membership of the Human Community and Personhood*

The primary view opposing the mental capabilities approach emphasises species membership. It claims that it is simply by virtue of being a human being that someone is entitled to personhood. Eva Feder Kittay argues "Being human is a sufficient condition for the stringent moral obligations we have to humans."³⁷ Bernard Williams writing in support of species preference imagines a scenario in which aliens conquer the planet and claim to be superior to humans and so entitled to dominate them.³⁸ Williams suggests that if any human accepted the argument of the aliens we would ask legitimately, 'Whose side are you on?' He claims we are entitled to say: 'We're humans here, we're the ones doing the judging; you can't really expect anything else but a bias or prejudice in favor of human beings.' As Scanlon asserts:

... the mere fact that a being is 'of human born' provides a strong reason for according it the same status as other humans. This has sometimes been characterized as prejudice, called speciesism. But it is not prejudice to hold that

³⁴ Simo Vehmas, 'Newborn Infants and the Moral Significance of Intellectual Disabilities' (1999) 24 *Research and Practise with Persons with Severe Disabilities*, 111.

³⁵ Quoted in Ann Bradley, 'Why Shouldn't Women Abort Disabled Fetuses?' (September 1995) *Living Marxism* 82.

³⁶ Jonathan Herring. 'Peter Skegg and the Question No-One Asks: Why Presume Capacity?' in Mark Heneghan and Jesse Wall (eds) *Law, Ethics, and Medicine: Essays in Honour of Peter Skegg* (The Law Foundation/Thomson Reuters 2016).

³⁷ Eva Feder Kittay, 'The Moral Significance of Being Human' (2017) *Proceedings and Addresses of the American Philosophical Association* 19.

³⁸ Bernard Williams, 'The Human Prejudice' in Bernard Williams (ed.) *Philosophy as a Humanistic Discipline* (Princeton University Press 2006).

our own relation to these beings gives us reason to accept the requirement that our actions be justifiable to them.³⁹

However, this approach too has its problems.

VI. Problems with the Membership of Human Community Approach

1. Why should membership of the species generate a claim to being of especial moral worth?

Jeff McMahan claims “that there is nothing in or invariably correlated with membership in the human species that can be the basis of our moral equality”.⁴⁰ Similarly, Peter Singer is quick to reject the Williams’s argument mentioned earlier based on the analogy with the aliens.⁴¹ He sees speciesism as the same as the racist saying that people of one race should agree with the claim that their race is superior. You need to point to some morally relevant characteristics, such as, he would say, mental capacity, as generating the claim.

Andrew McGee has rejected the analogy to racism.⁴² Racism he says is based on the product of a false belief or faulty reasoning. A person distinguishing between races on the basis of a true fact (e.g. that a particular race was more prone to a particular medical condition) would not be being racist. The preference for our own species, especially our own children is “primal” and based on “instinct”. Our care of our own species is “something we just cannot help but do”. This is not an entirely convincing reply. The racist might claim that their hatred of a different race is a primal instinct⁴³.

A different justification for the membership of the human community approach is that we should judge people by considering what is normal for humans. Stanley Benn claims that “we respect the interests of men and give them priority over dogs not insofar as they are rational, but because rationality is the human norm.”⁴⁴ He goes on to explain that “we do not see the irrationality of the dog as a deficiency or a handicap, but as normal for that species.”

Adopting a similar approach, John Finnis contends that “to be a person is to belong to a kind of being characterized by rational (self-conscious, intelligent) nature.”^{45 46} This criterion, he believes, provides a way for valuing all human beings, including those who have profound mental impairments.⁴⁷ He explains this by saying that there are two ways a human being can claim the status for all human beings even if they lack the

³⁹ Thomas Scanlon, *What we Owe Each Other* (Harvard University Press, 1998), 185.

⁴⁰ Jeff McMahan, ‘Challenges to Human Equality’ (2008) 12 *The Journal of Ethics* 81.

⁴¹ Peter Singer, *Practical Ethics* (Cambridge University Press, 1993).

⁴² Andrew McGee, ‘The Moral Status of Babies’ (2013) 39 *Journal of Medical Ethics* 345.

⁴³ Another potential counter could be that there must be some morally relevant characteristics one could point to and say this is why being part of this particular species means a higher moral status; otherwise, the alien species might have the same instinct and there is no way to resolve which is superior without some defining considerations.

⁴⁴ Stanley Benn, ‘Egalitarianism and the Equal Consideration of Interests’ in Roland Pennock and John Chapman (eds), *Nomos IX: Equality* Atherton Press 1967), 69–71.

⁴⁵ John Finnis, ‘The Fragile Case for Euthanasia: A Reply to John Harris’ in John Keown (ed), *Euthanasia Examined* (Cambridge University Press 1995), 48.

⁴⁶ See also Rahul Kumar, ‘Permissible Killing and the Irrelevance of Being Human’ (2008) 12 *Journal of Ethics* 57.

⁴⁷ Although Finnis appears to think only human have these attributes, it may be in the future robots could develop these characteristics and other animals may currently possess them.

criterion. First, if they have the capacity for it. So, if we accept rational self-governance generates a higher moral status, we should value a child who has the capacity for that and whomever we can expect to develop that capacity deserves the protection associated with personhood. Second, if a person is “internally directed toward the development of such capacity” they deserve value.⁴⁸ This indicates that even if a human being with profound impairments lacks the mental capacity or even the capacity to develop it, if their body and mind are directed to that capacity, they have moral status.

That argument can be put this way: we see in the case of a person with a mental impairment that “something has gone wrong”. That person is not as they should be and if we could correct the impairment we would. The nature for human beings is to have rational self-governance or higher mental capabilities. Jeremy Waldron makes this point well by pointing out that if an ape has an IQ of 60 we are impressed, if a person has an IQ of 60 we see that as a tragedy.⁴⁹ We can value them for what they would be had not the tragedy occurred. He writes:

All of us are subject to the contingencies of illness, dementia, genetic failure, and consequent, more or less profound disability. The possibility of these failures and disabilities is part of the human condition. Other species have their own equivalents—their vulnerabilities, their possible impairments. And so we should not think of the profoundly disabled human as belonging, ethically speaking, to a species that just happens to look like our own. Each one of them is one of us; like us they had potentials and, just as in our case, those potentials were fragile and vulnerable...

We may even use the language of tragedy: organically there was a prospect of flourishing, but like all prospects for human flourishing, it was fragile, and in fact it was overtaken by disease or genetic failure.⁵⁰

There are various responses to such arguments. The first is to question why the “internal directing” of the body is sufficient to generate moral worth. Assessment of moral worth should be based upon an individual’s own intrinsic nature and not on what other members of the species achieve.⁵¹ Few of us would care to be judged by how we might have lived our lives, but would rather be valued for what we are and what we have done.

Second, there is a concern that in arguments of this kind a disabled person is being valued not for what they are but rather for what they could be and doing so fails to recognize their inherent worth and undermines equality. One person is valued for their characteristics, but another is valued for what characteristics they might have had, had tragedy not struck. Is it possible to take such a view and still maintain that we value them equally? This view holds that we can imagine a person separate from their disability. If we tried to consider what a “Chinese Donald Trump” would be like we would come up against the problem that had Donald Trump been born and lived in

⁴⁸ Again, this argument might become significant as designed robots become more sophisticated and could have such an internal direction.

⁴⁹ Jeremy Waldron (2015) ‘Hard and Heart-Breaking Cases’ The Gifford Lectures, as <http://www.ed.ac.uk/schools-departments/humanities-soc-sci/news-events/lectures/gifford-lectures> visited 5 October 2019.

⁵⁰ Jeremy Waldron, *One Another’s Equals: The Basis of Human Equality* (Harvard University Press 2017), 243-5.

⁵¹ Peter Vallentyne ‘Of Mice and Men: Equality and Animals’ (2005) 9 *Journal of Ethics* 403.

China, he would be a very different person. Similarly comparing the Downs Syndrome child to the child they would have been had they not had Downs Syndrome, is to compare two utterly different, perhaps unimaginable beings.

With these arguments in mind, it may be more profitable to draw value of species membership not from what a typical human life is like, but rather the goods that the human community has produced: mathematics, music, architecture, medicine, care, and we could go on and on and claim that these goods are the product of all members of societies, contributing in different ways. All members of the human community contribute in different ways to it and so can claim credit for it. Eva Feder Kittay, for example, asserts that:

species membership is particularly important to human beings because it means that we partake of a form of life, that is, we share interests, activities, hopes, dreams, fears, forms of sensual and emotional experiences, and ways of knowing the world and other humans, all of which are species-specific, even if culturally differentiated.⁵²

Critics of this reasoning may reply in several ways. One response McMahon⁵³ develops is that those with cognitive impairments do not share in the common life, because their impairments mean they lack the abilities needed to.⁵⁴ Such views might be questioned. First, our human community certainly invests large amount of time and expense in caring for those with severe impairments. So, it seems the community as a whole does not share these low views of its members. Second, it is not difficult to find people with 'intellectual impairments' who have made magnificent contributions to human endeavours.⁵⁵

2. *The definition of being a member of a species.*

Another difficulty with the membership of species argument is that it requires a definition of what we mean by membership of the species. This is far from straightforward. We might be tempted to refer to certain shapes that human bodies take, but that is likely to work against the interests of those with physical disabilities. It would also mean that a robot shaped like a human would be a human being. So, we might be drawn to relying on human genetics and suggest that human DNA makes us a person. But that approach begs the question of why having a kind of DNA is significant. As John Harris has pointed out we share 50% of DNA with bananas.⁵⁶ Chimpanzee DNA is very similar to human DNA indeed. Even if we might identify human DNA as something that distinguishes humans from other animals that, per se, does not give us a reason for holding humans as more morally valuable than other animals. Certainly, I doubt many people would think that a single human cell is more morally valuable than a single non-human animal cell. So that takes us back to the argument that it is achievement of the human species that is generates value for the species and the DNA is simply evidence that a being belongs to the species of humans.

⁵² Eva Feder Kittay, 'The Personal is Philosophical is Political: A Philosopher and Mother of A Cognitively Disabled Person Sends Notes From The Battlefield' (2009) 40 *Metaphilosophy* 606.

⁵³ Jeff McMahan, 'Our Fellow Creatures' (2005) 9 *The Journal of Ethics* 353.

⁵⁴ James Rachels, *The End of Life: Euthanasia and Morality* (Oxford University Press 1986), 76-7.

⁵⁵ Gail Saltz, *The Power of Different: The Link Between Disorder and Genius* (Flatiron 2017).

⁵⁶ John Harris, '(ARTBs) Assisted Reproductive Technological Blunders' (2003) 29 *Journal of Medical Ethics* 205.

3. *Relationality*

At the heart of my objections to both the standard approaches to defining personhood is that both rest on a particular understanding of an “ideal” person. The standard approaches both take the able-bodied independent, rational human as the model around which the approach to personhood is based. Be that the possession of certain capabilities; the goods that communities of such people typically possess; or the potential or “natural instinct” towards those capabilities: that ideal is used to determine the value of personhood. But this “ideal” is seriously mistaken. It fails to accurately represent the nature of the human self. In what follows I will outline three key features of the self (the vulnerable self, the caring self and the relational self), which I argue will illustrate a new way of understanding how personhood might be conceived. There is an enormous amount to be said on each of these aspects, but only a brief outline can be offered here.⁵⁷

4. *The Vulnerable Self*

As Martha Fineman has argued, vulnerability is a “universal, inevitable, enduring aspect of the human condition.”⁵⁸ The body in its nature is constantly open to harms and hurts. We are literally breakable and woundable. But that is not just true of our bodies. Our emotional, psychological and social selves rely on others, and are at constant risk of distress.⁵⁹

We are all limited by our bodies in different ways by what we can and cannot do. These restrictions may be more apparent at some stages of life than others, but at all stages we are dependent on others. Even those in the ‘prime of health’ are reliant on others for services from public transport, to the supply of energy and food. The dependence which is a core aspect of humanity is often unacknowledged. As Simo Vehmas puts it:

non-disabled people tend to forget their own dependence on services, such as the provision of the water that comes out of the tap— an obvious obstacle to their independence. The concept of independence is clearly defined according to society’s expectations about what people normally do for themselves and how they do it.... It seems, therefore, reasonable to conclude that people are best described as interdependent since ‘people are sometimes autonomous, sometimes dependent, sometimes providing care for those who are dependent’.⁶⁰

The emphasis on vulnerability is key to human nature and is a desirable characteristic.⁶¹ It requires us to be welcome and open to our interconnection with others and the wider world. It warns us against puffing ourselves up or judging each other harshly. It encourages co-operation; a looking out for each other; a working together to find solutions to the problems we all face.

⁵⁷ Jonathan Herring, *Law and the Relational Self* (Cambridge University Press 2019).

⁵⁸ Martha Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1; Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press 2016).

⁵⁹ Charles Foster and Jonathan Herring, *Identity, Personhood and the Law* (Springer 2018).

⁶⁰ Simo Vehmas, ‘Discriminative Assumptions of Utilitarian Bioethics Regarding Individuals with Intellectual Disabilities’ (1999) 14 *Disability and Society* 37.

⁶¹ Daniel Bedford and Jonathan Herring (eds), *Embracing Vulnerability: The Implications and Challenges for Law* (Taylor and Francis 2020, forthcoming).

5. *The Caring Self*

Once it is understood that humans are universally vulnerable the importance of care becomes obvious. Caring relationships are essential to our survival; our understandings of ourselves; and to the things we value. As Eva Feder Kittay writes:

A world without care would not only be a dismal world, it would be a world in which great harm would be done. A world in which nobody cared about anyone else would be a world in which needs of those who could not attend to their own needs (and that is all of us at some point in our lives) would be neglected.⁶²

We reach then the position that our value lies not in ourselves as isolated egos but in our caring relationships. As Hans Reinders puts it:

Being loved by someone is what matters most in our lives. What we do not often think about, however, is the logic of this statement, and this logic is what I ask you to contemplate for a moment. If 'being loved' is the most important thing in our lives, then the most important thing is something we cannot do by ourselves or on our own. It's not a goal we can strive for, it is not something we can achieve. To be loved by someone implies that the most important thing in our lives is something we can only receive as a gift.⁶³

6. *The Relational Self*

Connecting the themes of our inherent vulnerability and the importance for care, is the claim that the human self is profoundly relational.⁶⁴ People are in their very nature interdependent and vulnerable.

It is through our relationships that our human selves are made.⁶⁵ As Annette Baier puts it:

[a] person, perhaps, is best seen as someone who was long enough dependent on other persons to acquire the essential arts of personhood. Persons are essentially second persons who grow up with other persons.⁶⁶

We define and understand ourselves in terms of our relationships. Whether as a supporter of Keele University Netball team; a born-again Christian; or member of the Nutella fan club, a person understands themselves in connection to others. It is our relationships that give our life meaning and constitute our identity. The story of our lives is told to, by and through those we interact with.⁶⁷ That is why bereavement and relationship breakdown are two of the greatest sadness's most people experience and have such an impact on the self. As Marilyn Strathern puts it:

The person is construed from the vantage points of the relations that constitute him or her; she or he objectifies and is thus revealed in those relations. The agent is construed as the one who acts because of those relationships and is

⁶² Eva Feder Kittay, *Learning from My Daughter: The Value and Care of Disabled Minds* (OUP 2019), 168.

⁶³ Hans Reinders, 'The Power of Inclusion and Friendship' (2011) 15 *Journal of Religion, Disability & Health* 431.

⁶⁴ Jennifer Nedelsky, *Law's Relations* (Oxford University Press 2014).

⁶⁵ Kenneth Gergen, *Relational Being* (Oxford University Press 2011).

⁶⁶ Annette Baier, 'Cartesian Persons' in Annette Baier (ed), *Postures of the Mind: Essays on Mind and Morals* (University of Minnesota Press 1985).

⁶⁷ Elizabeth Purcell, 'Disability, Narrative, and Moral Status' (2016) 36 *Disability Studies Quarterly* 1.

revealed in his or her actions. If a person is an agent seen from the point of view of her or his relations with others, the agent is the person who has taken action with those relations in view. In this the agent constitutes a 'self'.⁶⁸

Eva Feder Kittay's writing on this is particularly fascinating. She cares for her daughter, Sessa, who is severely disabled. She explains that intellectual capacity is not central to relationships because it is:

a place in a matrix of relationships embedded in social practices through which the relations acquire meanings. It is by virtue of the meanings that the relationships acquire in social practices that duties are delineated, ways we enter and exit relationships are determined, emotional responses are deemed appropriate, and so forth. A social relation in this sense need not be dependent on ongoing interpersonal relationships between conscious individuals. A parent who has died and with whom one can no longer have any interchange still stands in the social relation of parent to us, calling forth emotions and moral attitudes that are appropriate or inappropriate.⁶⁹

As this passage and other writing by Feder Kittay makes clear those with profound mental impairments can engage in social and human interaction. The power of the touch, the look, the smile can communicate profundity. Those most intense of human experiences are rarely intellectual in nature but in being lost in wonder at the sunset; the intimacy of sex; or the smile of a baby.

7. Relational Values

It flows from the fact that people are in their very nature vulnerable, caring and relational that the basic moral value of being human is not found in a person's individual capabilities nor in their membership of the species, but rather in their relationships. So, the question "is X a person?" is problematic because we can only conceive of X in the context of their relationships. We can say that X and Y are people if their relationship reveals the moral qualities that we look for in human relationships. But we cannot imagine an isolated person and assess their capabilities as such a person does not exist. It is their relationships, rather than any inherent characteristics, which have moral value and are deserving of especial moral status.

It flows then that when considering issues of core moral value, children and those lacking capacity are hardly "difficult marginal cases" but rather they would be paradigmatic parties to the kind of human relationships which are at the heart of humanity.⁷⁰ Eva Feder Kittay writes

...there is so much to being human. There's the touch, there's the feel, there's the hug, there's the smile,... there are so many ways of interacting... [T]his is why I just reject . . . [the] . . . idea that you [should] base moral standing on a list of cognitive capacities, or psychological capacities, or any kind of capacities.

⁶⁸ Marilyn Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (University of California Press 1988), 273.

⁶⁹ Eva Feder Kittay, 'The Personal is Philosophical is Political: A Philosopher and Mother of A Cognitively Disabled Person Sends Notes From The Battlefield' (2009) 40 *Metaphilosophy* 606.

⁷⁰ Licia Carlson, *The Faces of Intellectual Disability: Philosophical Reflections* (Indiana University Press 2010).

Because what it is to be human is not a bundle of capacities. It's a way that you are, a way you are in the world, a way you are with another.⁷¹

Eva and Sesha's relationship is marked by care, of a kind where they can respond to each other, meet each other's needs and respect each other. It is that kind of relationship which reflects the highest moral good.

I am not committed to a view that only humans can be persons. I do not know if other animals can have (for example) the interest in the emotional well-being of others; a keenness to respond to emotions of others; a degree of empathy; a spontaneous impulse to share with others; a responsiveness to touch of the kind key to being a party to a caring relationship. If other animals do show these abilities, then personhood could be granted to them. Amy Mullin thinks not and argues: "Other primates share with us the ability to understand others as animate and goal-directed, but humans have a species unique motivation to "share emotions, experiences, and activities with other persons."⁷² Human beings need care, but care from human beings. Animal sanctuaries attempt to release baby animals back to the wild to be raised by members of the same species if possible. The same is true for a human. Tarzan might have been raised by the wolves with a degree of success, but no one would suggest adoption agencies should consider wolves as adoptive parents. As Logi Gunnarson writes, "when a human holds an infant in his arms or talks to the infant, there often exists a relationship that the infant could have only to a human."⁷³ Severely disabled infants are dependent on such human caring and relationships for their well-being.

So, returning to the core question: what makes you a person? Some philosophers emphasise autonomy and rationality, but as we saw in the section on mental capacity, we greatly exaggerate our abilities to be rational and autonomous. Anyway, it is not clear that these are linked to moral goodness. The autonomous and the rational can do great evil. What generates moral value is our love and care with each other. So, our value is not found internally but in our relationships of care with others. But that demonstrates the problems in seeking to identify a characteristic of personhood as the standard approaches do. It is why the concept of personhood is doomed to fail as it seeks to identify within an individual moral value, when moral value is found in our caring relationships.

8. Problems with the Relational Approach

In this section I will address three criticisms that are made with the relational approach.

First, it might be thought by some that the relationship between people with profound intellectual impairments and their "carers" are not properly relationships because the relationship is all "one way". That is disproved by the literature on caring.⁷⁴ There are, in fact, profound ways in which children and those of impaired intellectual capacity

⁷¹ Eva Feder Kittay, 'The Personal is Philosophical is Political: A Philosopher and Mother of A Cognitively Disabled Person Sends Notes From The Battlefield' (2009) 40 *Metaphilosophy* 606.

⁷² Amy Mullin, 'Children and the Argument From 'Marginal' Cases' (2011) 14 *Ethical Theory and Moral Practice* 29.

⁷³ Logi Gunnarson, 'The Great Apes and the Severely Disabled: Moral Status and Thick Evaluative Concepts' (2008) 11 *Ethical Theory Moral Practice* 305.

⁷⁴ David Wasserman and Adrienne Asch, 'Understanding the Relationship between Disability and Well-Being' in Jerome Bickenbach, Franziska Felder, Barbara Schmitz (eds), *Disability and the Human Good Life* (Cambridge University Press 2013).

care for others.⁷⁵ That is why I talk in terms of promoting caring relationships, rather than care.⁷⁶ Only a very cerebral understanding of care would fail to appreciate the depth of interactions that a person lacking capacity is capable of. As Feder Kittay puts it:

We human beings are the sorts of beings we are because we are cared for by other human beings, and the human being's ontological status and corresponding moral status needs to be acknowledged by the larger society that makes possible the work of those who do the caring required to sustain us. That is what we each require if we are some mother's child, and we are all some mother's child.⁷⁷

I would not put the point quite as Feder Kittay does as it seems to image a passive understanding of personhood (that X is a person because they are cared for by Y⁷⁸), rather I claim it is the relationship, with its rich interactions and moral goodness, which deserves especial protection. The L'Arche community may be a helpful example. Patrick McKearney (and others) have written powerfully of this community in which people with a wide range of cognitive abilities live together. But the community draws no distinction between "carers" and "patients". Rather, everyone is encouraged to "attribute moral worth to others not as capable, reciprocating agents but as incapable, vulnerable dependents".⁷⁹ I would make a similar point in relation to suggestions there are people who cannot care. I expect that portrays a thin conception of what care is or fails to appreciate the capabilities of those with even profound impairments.

Secondly, there is a concern that some people may not have moral status under the relational approach. Harriet Harris argues that a person who is loved by no one may be seen as having no moral value.⁸⁰ This concern is partly met by the fact that the core moral value identified in this article is a relationship of care, not a relationship of love.⁸¹ While there may be people who are not loved by anyone, I do not think there is anyone (except in the most extraordinary situations) who is not in a caring relationship. Societal caring provision is extensive and it would be hard not to make use of societal care. You would have to live a life in which there was no use of piped water, sewerage, roads, food supplies. The prisoner in solitary confinements may still be cared for by their friends preparing and working for their release. The hermit may still have relatives who think of them and are ready to help if the need arises. Nevertheless, the critic may urge it is not impossible to imagine a person living in complete isolation with no human interaction: a Tarzan figure perhaps. The relational approach would suggest they would not have moral value.

⁷⁵ Jonathan Herring, 'The Disability Critique of Care' (2014) 8 *Elder Law Journal* 1.

⁷⁶ *Ibid.*

⁷⁷ Eva Feder Kittay, 'The Personal is Philosophical is Political: A Philosopher and Mother of A Cognitively Disabled Person Sends Notes From The Battlefield' (2009) 40 *Metaphilosophy* 606.

⁷⁸ Simo Vehmas and Benjamin Curtis, 'Profound Intellectual Disability and the Bestowment View of Moral Status' (2017) 26 *Cambridge Quarterly of Healthcare Ethics* 505; Simo Vehmas and Benjamin Curtis, 'Moral Worth and Severe Intellectual Disability – A Hybrid View' in Jerome Bickenbach; Franziska Felder, Barbara Schmitz (eds) *Disability and the Human Good Life* (Cambridge University Press 2013).

⁷⁹ Patrick McKearney, 'Receiving the Gift of Cognitive Disability Recognizing Agency in the Limits of the Rational Subject' (2018) 36 *Cambridge Journal of Anthropology* 40.

⁸⁰ Harriet Harris, 'Should We Say that Personhood Is Relational?' (1998) 51 *Scottish Journal of Theology* 214.

⁸¹ Of course, there are many different understandings of love and some may match care as I have outlined it. But to make it clear I am talking about just a "feeling" where I draw the distinction.

I would have three responses to this. One is that if they are indeed in complete isolation, they have no need of moral personhood or legal recognition of such as they will not be interacting with human institutions which rely on such concepts. The concern is therefore academic only. The second is that humanity does have concern even for those whose existence is unknown. We act on reports of a person seen stranded at sea, we check before destroying a building there is no one inside. There is care even for the unknown human. Third, even if not a person, a Tarzan figure will deserve considerable moral respect. So, it is not as if the suggestion is they have no moral value.

A final problem for the relational account is whether it was compatible with the principle of equality, mentioned earlier. Would not a person with many caring relationships be of greater moral value than a person with few? That, however, is to fail to grasp the significance of the proposed approach which is that we do not consider the moral value of persons in isolation, but rather the value of relationships. All caring relationships are of moral value and if so, there is no valuing of persons per se, because it is their relationships which generate value.

9. Conclusion

This article has explored the concept of personhood. It has rejected the view that either intellectual capabilities or members of the human species generate a claim to the highest moral status. Both of these approaches are based on the mistaken idea that we need to understand and assess people in terms of their isolated characteristics. It has been argued in this article that, rather, the importance of relationships demonstrates that our intellectual abilities or our human DNA are not key to personhood. Our relationships are not based on intellectual interaction (although they can be). The shared giggle, the gentle stroke, the uninhibited dancing together: these transcend words and intellectual capacity. It is understandable that an academic, considering what is valuable in life, will highlight academic and intellectual skills. But there is so much more to life than our minds.

And this is well known to those involved in relationships with people with mental impairments. Eva Kittay writes of her relationship with her daughter Sesha, who in traditional terms has very limited cognitive ability:

You know her humanity in every movement, every look, every response. You know it when you see her thrill to music, giggle at something she finds funny, or reach out her arms to embrace you; when she puts down her head shyly or beams when complimented. She has the feel and touch and smell of a human being. And above all, she is my daughter.⁸²

As that last sentence indicates it is through the human caring relationship that Eva and Sesha can claim personhood. Eva and Sesha's relationship is marked by care, of a kind where they can respond to each other, meet each other's needs and respect each other. It is personhood at its best.

If we are looking for moral value it is not found in intelligence, rationality or autonomy. Such things can be lined to great evil. It is caring together as vulnerable, relational beings that generates moral value. Discussions of moral value often appear to start with the ideal person: driven by self-awareness, logic and exceptional IQ. The ideal

⁸² E. Feder Kittay, 'The Moral Significance of Being Human' [2017] Proceedings and Addresses of the American Philosophical Association 19.

philosopher perhaps. But to start there is the wrong place. If we start with those with profound disabilities, we discover a richer account of humanity. One which highlights what it is that generates the highest moral status: relationships of care, interdependence and mutuality.⁸³ In isolation our lives have no great value and lack meaning. It is in our coming together and intertwining our lives that moral value is found.

⁸³ Daniel Goodley & Katherine Runswick-Cole 'Becoming Dishuman: Thinking about the Human through Disability' (2016) 37 *Discourse: Studies in the Cultural Politics of Education* 1.