

# At the Margins of Moral Personhood\*

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## INTRODUCTION

Sesha would never live a normal life. . . . The worst fear was that her handicap involved her intellectual faculties. . . . Yet . . . it never even occurred to me to . . . think of her in any other terms than my own beloved child. She was my daughter. I was her mother. That was fundamental. . . . We didn't yet realize how much she would teach us, but we already knew that we had learned something. That which we believed we valued, what we—I—thought was at the center of humanity, the capacity for thought, for reason, was not it, not it at all. (Eva Feder Kittay, *Love's Labor*, 150)

I cannot aspire, in one article, to convey the full force of the insight that came to me as I wrote the final sentences of the epigraph above.<sup>1</sup> Instead I hope to clear away some of the arguments that block the possibility of grasping it. I shall argue against the view that such intrinsic psychological capacities as rationality and autonomy are requisites for claims of justice, a good quality of life, and the moral consideration of personhood—that is, that these capacities are the principal qualifications for membership in a moral community of individuals deserving equal respect and dignity. In arguing thus, I recognize that I swim against the philosophical tide. But to argue otherwise is to exclude those with severe cognitive disabilities from the moral consideration of persons, and I believe this exclusion to be as morally repugnant as earlier exclusions based on sex, race, and physical ability have been.

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1. Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (New York: Routledge, 1999).

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## WHAT IS AT STAKE IN DEFINING MORAL PERSONHOOD?

People who wish to stake their claim in the moral universe appeal to a common humanity. But philosophers prefer to identify the concept of the “person” as the normative category, while designating “human being” as a merely empirical, descriptive one. Personhood holds open the possibility of moral parity to nonhuman beings: heavenly beings, extra-terrestrial rational creatures, our moral sisters and brothers in yet undiscovered universes. More recently, some writers have kept personhood as a possibility for nonhuman animals who possess very developed cognitive capacities.

Personhood in the past has also been used less capaciously to exclude specific humans: women, slaves, Jews, certain racial groups, the disabled—those who, for one reason or another, were believed unworthy or incapable of rationality and self-governance. As current disputes over the moral personhood of fetuses and very premature neonates attest, personhood has been, and continues to be, a contested category.

What endows these controversies with urgency are the real-life stakes, for personhood marks the moral threshold above which equal respect for the intrinsic value of an individual’s life is required and the requirements of justice are operative and below which only relative interest has moral weight. Jeff McMahan argues in “Cognitive Disability, Misfortune, and Justice” (henceforth CDMJ) that those with congenital severe cognitive impairments fall below that threshold and are not subject to the claims of justice.<sup>2</sup> In *The Ethics of Killing: Problems at the Margins of Life* (henceforth *EOK*),<sup>3</sup> McMahan argues further that neither the death nor the killing of those falling below the threshold carries the same moral significance as the death or killing of “us,” who are above the threshold. These strong conclusions, argued with an elegance and comprehensiveness that are dazzling, may have potentially serious consequences for those who are thought to be “congenitally severely cognitively impaired,” a term McMahan uses in CDMJ, or “congenitally severely mentally retarded” (henceforth CSMR), the term he prefers in *EOK*. While challenging such a well-argued and well-defended work is daunting, an anxiety about the danger posed by this position motivates me to open a dialogue with him and others who hold similar views.<sup>4</sup>

2. Jeff McMahan, “Cognitive Disability, Misfortune, and Justice,” *Philosophy & Public Affairs* 25 (1996): 3–35.

3. Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002).

4. To McMahan’s credit and to my gratification, I can report that dialogue has begun.

## WHO ARE "WE"? AND WHY IT MATTERS

In *EOK*, McMahan sets out to determine when and why killing is wrong. He is especially interested in cases where those concerned are ones "whose metaphysical or moral status . . . is uncertain or controversial." Among these, he includes "animals, human embryos and fetuses, newborn infants, anencephalic infants, congenitally severely retarded human beings, human beings who have suffered severe brain damage or dementia, and human beings who have become irreversibly comatose," all beings who, he says, are in some way "at the margins."<sup>5</sup> In contrast to "them," there is "us." But who are "we"? McMahan answers by determining what "we" are, when we come into existence, and when we cease to exist. That is, McMahan assumes paradigmatic instances of "us," as yet undefined, and sets out to discover what properties are important to identifying individuals "like you and me." The question first arises with respect to the morality of abortion. Do "we" begin at conception, sometime during pregnancy, at birth, or sometime thereafter? Are "we" the same as those beings that emerged at conception, evolved during pregnancy, and were born, or do we come into being only at some later point? Comparable questions can be asked of those in late stages of dementia or irreversible comatose states. There are also questions about how "we" differ from animals and how those differences have moral consequences concerning the permissibility of killing them.

The inclusion of the CSMR and the severely brain injured in the list above may be puzzling. For they are clearly human beings, not animals, and they are instances neither of life at its beginnings nor life at its end. Unlike most others on this list, they are not at the margins of human life. Later we will ask what role they occupy in McMahan's argument.

For now we will consider with McMahan the question of who or what "we" are. We can say that "we" are persons. Personhood, as McMahan will use the term, is the philosophical one found in Locke, a set of higher psychological capacities that include self-consciousness and rationality. As the traditional requirements for personhood which McMahan adopts are not properties that humans maintain throughout life, questions of personal identity, or who "we" are, may not be identical to questions of personhood. McMahan, in turn, eloquently disposes of alternative positions: that we are souls, that we are reducible to our bodies, that we are human organisms (i.e., animated material substances coded genetically to render human forms), and that we are bare psychological capacities.

When we think about what we are, about when we came into ex-

5. McMahan, *EOK*, vii.

istence and when we exit, we consider what it is that grounds our rational egoistic concerns for our future. Following Derek Parfit, McMahan says that what matters to us as we form desires and plans into the future (i.e., rational egoistic concerns) is not that we are identical to some individual who existed in the past or to the individual in the future who will benefit from our present actions and planning. What matters, rather, is that we have relations of psychological connectedness and continuity with such individuals, what McMahan speaks of as “prudential unity relations.” These prudential unity relations, then, ground our rational egoistic concerns, and, while even weak prudential unity relations may do so, the stronger these are, the more closely do they resemble relations of identity. As the prudential unity relations must be causally, or in some other fashion, related to that which has physical, functional, and organizational continuity over time, the most promising account of what we are identifies us as “embodied minds.”<sup>6</sup> The degree of rational egoistic concern about the future will vary with the physical, functional, and organizational continuity in those areas of the brain where consciousness is realized.<sup>7</sup>

These points will become important as we look at McMahan’s treatment of the CSMR. Recall that these individuals have brains that are injured or anomalous and that they have had the impairment since birth. At infancy, before the brain is well developed, the prudential unity relations will be weak. Only as the brain becomes more highly developed does the rational basis for egoistic concern increase. Furthermore, an anomaly in, or injury to, the portions of the brain that result in certain functional or organizational impairment will also weaken prudential unity relations. A clear implication is that when the cognitive impairment is both congenital and very significant, an affected individual will never develop strong prudential unity relations and is, for these metaphysical reasons alone, very different from the rest of us. Such a being cannot, on this account, be the subject of strong rational egoistic concern for its future.

But personhood is not the only basis for moral consideration. Interests are as well, and there is no reason to suppose that only persons have interests. Interests are among those things that we must satisfy if a life is to go well, and they are tied to our capacity to experience goods and harms.

6. *Ibid.*, 68.

7. McMahan writes, “I suggest that the basis for an individual’s egoistic concern about the future—that which is both necessary and sufficient for rational concern—is the physical and functional continuity of enough of those areas of the individual’s brain in which consciousness is realized to preserve the capacity to support consciousness or mental activity” (*ibid.*, 79).

McMahan distinguishes between “interests” simpliciter and “time-relative interests.” While “interests” concern a temporally extended being “given one’s life as a whole,”<sup>8</sup> time-relative interests are “what one has egoistic reason to care about *now*” (author’s emphasis).<sup>9</sup> The difference between “time-relative interests” and “interests” is that the former takes into account the strength of the prudential unity relations of the individual.<sup>10</sup> We discount time-relative interests if the prudential unity relations are weak. Therefore, argues McMahan, how others ought to treat us, or whether we are fortunate or not, can be addressed only in terms of time-relative interests, not interests as such, for while we can have egoistic concerns for a future self, these may in fact not be the time-relative interests of that future self. (For example, although I have an interest in completing a book, my future demented self is likely to have no interest in completing a book, much less the book my present self wishes to complete.)

Fortunately, however, “we” generally have very strong prudential relations to our future, and so it is rational to act as if our time-relative interests will also be the interests of our future selves. The relations to our immediate past get weaker as we go all the way back to conception, so that we are prudentially only weakly connected to the infant that we were. Our prudential connections to our infantile past are very weak because the organism that was that infant did not yet have the psychological capacities needed for a rational egoistic concern about its future. Accordingly, the time-relative interests of those weakly connected to their future are weaker, and, for reasons related to their lack of those capacities needed to reflect on their future, they have less good in their lives.<sup>11</sup> That incapacity in the infant and the young child means that the infant, at least, and perhaps the very young child as well, is not a person, nor does it have a strong prudential continuity with the person it is to become, nor does it have strong time-relative interests.

That those with weak prudential unity relations have only weak time-relative interests may be a welcome outcome in the case of human embryos and fetuses if one favors the right to abortion. The outcome, however, is considerably less welcome for the case of infants or very young children, those with severe brain injuries or dementia, and the CSMR.

As is clear, a CSMR individual who never goes on to develop the

8. *Ibid.*, 80.

9. *Ibid.*

10. Prudential unity relations at their maximum are equivalent to personal identity.

11. McMahan writes, “Overall, one might say that the degree of psychological unity within a life is a function of the richness, complexity, and coherence of the psychological architecture that is carried forward through time” (McMahan, *EOK*, 75).

requisite psychological capacities of a normal human infant and child will continue to have weak time-relative interests throughout its life. The time-relative interests of the CSMR (who, given these metaphysical considerations, have prudential unity relations significantly less strong than “our” own) must therefore be significantly discounted. That is, the value that their time-relative interests have for them is far less strong than it is for us since the individual whose interest is satisfied is not identical to, but only weakly connected and continuous with, the individual who has this time-relative interest now. The consequence of all this metaphysics is that it is much less problematic to frustrate the time-relative interests of the CSMR than those of any of “us,” as their time-relative interests are weaker.

These conclusions, furthermore, have implications for the status of personhood. Strong prudential unity relations and the psychological capacities that enable them also coincide with the definition of personhood, that is, the complex, sophisticated psychological capacities that include self-consciousness, rationality, and autonomy. “We,” then, are persons. Conversely, weak prudential unity relations arising from psychological functioning that falls short of these complex and sophisticated psychological capacities belong to those who are not persons. It would seem, then, that the CSMR are not persons on at least two counts. First, they fall outside the descriptive bounds of personhood as traditionally philosophically defined. Second, they fail to be persons on metaphysical grounds, which similarly require psychological capacities that they appear to lack.

The concept of the person plays a crucial role in the account of the wrongness of killing, and this role is what I have singled out with the term “moral personhood.” When McMahan applies the Time-Relative Interest Account to assess the wrongness of killing, it yields serious counterintuitive conclusions. That it may be less wrong to kill an animal than one of us is generally consonant with our intuitions and is well accounted for by the Time-Relative Interest Account. But, if it is the case, as McMahan asserts, that the CSMR have psychological capacities that are comparable to those of an animal, then the Time-Relative Interest Account not only justifies treating the CSMR less well than “us.” It also leads to the conclusion that we treat the CSMR as we treat animals, and this does not comport with common beliefs.

Even if we have to bite this bullet (and, with certain qualifications, McMahan thinks we do), the Time-Relative Interest Account would also have us evaluate the killing of some persons as more wrong or less wrong than the killing of other persons, for some persons will have stronger prudential unity relations and stronger time-relative interests than others. McMahan, for example, would need to worry that the Time-Relative Interest Account makes it less wrong to kill a ten-year-old child whose

prudential unity relations are not yet as strong as those of an eighty-year-old (assuming her mental capacities are still intact). After considering and rejecting a number of options, McMahan concludes that only a two-tiered moral theory will do. The Time-Relative Interest Account is adequate for nonpersons, but a morality of equal respect must prevail for all persons, making the killing of persons equally wrong and not dependent on gradations in prudential unity relations or time-relative interests.

#### IMPLICATIONS OF THE THEORY FOR THE CSMR

Just how bad are the implications of this theory for the CSMR? Pretty bad. First, because those with weak prudential unity relations have time-relative interests that are significantly discounted. Second, because the weak prudential unity relations also mean that the CSMR have a lower level of good. McMahan argues that if we cannot carry forward our experiences from one time in our life to another, we have less capacity for rich life experiences—we are reduced to mere momentary pleasures. One might think that having less good in one's life means one is more unfortunate than others and thus, at least on some theories of justice, one is owed some compensation for one's unfortunate state. But, in his article "Cognitive Disability, Misfortune, and Justice," McMahan disabuses us of the idea that the CSMR are owed anything at all according to any account of justice, because, he argues, they are not unfortunate. As counterintuitive as that claim may seem to many, McMahan argues in both the article and the book that there is no standard by which to assess the CSMR as unfortunate. (See below for the argument.)

Again, while the conclusions about the CSMR do not conform to common intuitions, McMahan believes that we are compelled to accept the following conclusions and revise our commonsense beliefs.

1. Based on morally relevant intrinsic properties, namely, certain psychological capacities that define who "we" are, the CSMR have no greater claims to having their time-relative interests satisfied and not frustrated than do animals—and this includes the interest not to be killed. This is so on two counts: first, because McMahan presumes that their lives contain and are capable of containing less good than those with strong prudential unity relations, and, second, because they fall below the threshold of respect that governs relations to persons.
2. Claims of justice based on the idea that the CSMR are unfortunate and should be compensated for their misfortune are mistaken, since the CSMR are not unfortunate.<sup>12</sup>

12. Unfortunately, I cannot take the space here to rehearse the argument in CDMJ.

McMahan is anxious to make it clear that this does not mean that we must treat the CSMR as poorly as we treat animals today. First, he wants us to treat animals better. Second, because CSMR are children and siblings of “persons,” the special relations that persons bear to the CSMR entitle the persons to exercise a degree of solicitude toward their relatives that might not be directed toward animals. We can, within certain constraints, treat the CSMR better than animals, but presumably these constraints would hold us back from treating them as well as we would want to treat persons. Furthermore, he insists, in CDMJ, that benevolence, of course, is not ruled out. Nothing in his arguments is intended to deny or render irrational the love we may feel for the CSMR. Still the consequences of this metaphysics are pretty bad and make the prospect of being, or being connected to, one of the CSMR rather dim.

We have thus far rehearsed the metaphysical arguments about the nature of personhood that ground McMahan’s claims of the moral status of the CSMR. These include the view that only intrinsic psychological capacities are relevant to moral personhood, that is, that relational properties are generally not relevant. In addition, McMahan depends on an argument that species membership is irrelevant for moral consideration and a contention that privileging species membership is equivalent to a virulent nationalism. (These will be discussed below.) In consequence, the CSMR are excluded from moral personhood, and their deaths are less significant as their killing is less wrong than those of persons.<sup>13</sup>

To throw doubt on McMahan’s conclusions about the moral status and wrongness of killing the CSMR, I will question the exclusive use of

13. It is the last two claims, along with the a set of arguments and claims summarized below, that are used to support this conclusion: (1) The argument that “we” are psychological capacities tethered to a bodily form, and thus it is our possession of these psychological properties that is important to what we are. (2) The claim that all sentient beings have time-relative interests and stronger or weaker prudential unity relations, which make their deaths more or less significant and make the killing of those beings more or less wrong. (3) The claim that the capacities which provide “us” with very strong prudential unity relations and very strong time-relative interests are intrinsic, nonrelational, and psychological in nature. (4) The claim that these psychological capacities are the same ones that have traditionally defined personhood, and these allow us a greater degree of good than that of animals and humans with psychological capacities comparable to animals. (5) A number of claims about the intrinsic properties of the CSMR leading to the conclusion that the CSMR have significantly lower levels of psychological capacities and relatively weak prudential unity relations, capacities that are comparable to animals and that place them beneath the threshold of personhood. (6) The position that moral status is directly related to the possession of two properties with moral significance, that these properties are psychological capacities, and that the presence or absence of these properties justifies the moral designation of an individual as a person or nonperson. (7) The argument that only intrinsic properties of beings, not relational properties, are appropriate to the moral status of personhood. (8) The claim that a two-tiered morality is justified and necessary to retain our moral intuitions about the wrongness of killing.

intrinsic properties in the metaphysics of personhood, the dismissal of the moral importance of species membership, and the example of virulent nationalism as an apt analogy. I will have a lot to say about McMahan's empirical assumptions about the CSMR.

#### THE IMPORTANCE OF THE CSMR FOR MCMAHAN'S THEORY

McMahan devotes around eighty pages in a five-hundred-page book to a discussion of CSMR, so we might wonder how important this group is to his arguments about the morality of killing at the two genuine margins of life—the period from conception to birth and those states leading immanently to death. And yet these pages are located in the central chapter and occupy the center of the book. We could say that, to the extent that the placement of text mirrors the development of the argument, the discussion of the CSMR is located at the very core of McMahan's concerns. They are not a mere afterthought.

McMahan, I believe, considers the CSMR for at least two reasons, one methodological and the other substantive. The methodological motivation, I venture, arises because of the metaphysical and ethical problems in using hypothetical examples to test our intuitions about identity, continuity, and personhood: the replication of an individual, teletransportation, brain transplantation, the fusion of cerebral hemispheres, rational Martians, and Superchimps, among others. Hypothetical cases have acknowledged limitations since our intuitions are unreliable when we consider cases we have never encountered or which our imaginations grasp only haltingly. Like the hypothetical cases McMahan and philosophers often employ, the CSMR are intended to test our intuitions about personhood, but unlike these, they are real—not hypothetical—cases of human beings about whom we presumably have more reliable intuitions. The CSMR are the perfect example of human beings who appear to lack some of the features philosophers deem crucial to personhood and to a life worth living, and so they are useful, first, to test intuitions concerning when a human life is the life of a person and, second, to offer a challenge for a moral theory to meet.

As McMahan wants his account of the wrong of killing to apply to life across species, the substantive gain of examples using the CSMR is ultimately to loosen the grip a preference for our own species has on our moral intuitions and so turn our attention to and recalibrate our sense of the wrongness of killing animals. McMahan hopes to adjust our moral intuitions even as we allow for special moral protections for "us" (i.e., those who have the relevant psychological capacities). Assessing the moral status of CSMR is critical to this enterprise. The example of the CSMR is used to pry the category of the human loose from that of moral personhood and, in so doing, to undermine the importance of species membership for moral considerations. There are two crucial

passages that we will examine. The first involves the case of the Superchimp, and the second analogizes privileging species membership to a pernicious form of nationalism.

#### SPECIES MEMBERSHIP AND THE CONSTITUTIVE ROLE OF SOCIAL RELATIONS

In *EOK*, McMahan explores the relevant standard by which to compare the well-being of individuals. McMahan asks us to consider “a congenitally severely retarded human being having cognitive capacities comparable to those of a dog.” He contests the commonsense view that “this human being has a terribly unfortunate life—even, perhaps, if the life is characterized by a steady dull contentment, without significant suffering or unhappiness.”<sup>14</sup> (Note the characterization of the CSMR here. This is a characterization I will challenge below.) The severely retarded human being’s life is not an unfortunate life any more than is that of the dog, McMahan contends, because what he calls the Species Norm Account of what constitutes a standard for an individual’s well-being (and so for whether or not an individual is fortunate) is wrong. McMahan offers two counterexamples, the anencephalic infant and the Superchimp, to defeat the idea that an individual’s species norm is the correct standard by which to judge its good or ill fortune. I explore each proposed counterexample in turn.

In the case of the anencephalic infant, McMahan avers, it makes little sense to say that this life is bad for a human being. As a being with no capacity for consciousness, it has essentially no capacity for well-being: “It makes no more sense to claim that an anencephalic is unfortunate, or badly off, than it does to make this claim about a plant.”<sup>15</sup>

Although beings who lack self-consciousness will not be able to assess their conscious experiences as contributing to their well-being, McMahan allows that such beings may still have interests. If we follow Stephen Darwall’s account of care, which is that care involves concern for the well-being of the cared for—for his or her own sake—then when we care for someone for the individual’s own sake we do so because we presume that the individual has a sake for which to care. That is, we attribute to that individual an egoistic concern, even if the individual herself or himself fails to be conscious of, or is unable to articulate, such a concern.<sup>16</sup>

Why then can a third party not have the requisite concern for an anencephalic infant for *its own sake*, which would serve as a surrogate

14. McMahan, *EOK*, 146.

15. *Ibid.*, 147.

16. Stephen Darwall, *Welfare and Rational Care* (Princeton, NJ: Princeton University Press, 2002).

for the infant's egoistic concern?<sup>17</sup> McMahan would respond that a being who cannot have any experiences (in any way that resembles our own) really lacks any sake which is its own. And yet, this assessment is strangely out of tune with reports from people who have had an anencephalic child born into their families, for a sense of tragedy surrounds the birth of such a child.<sup>18</sup> McMahan would certainly allow that the parents may feel a terrible sense of loss, but he would deny that one could feel badly for this child. But McMahan is wrong. When an anencephalic child is born, that child is identified as the one who was growing within the mother's womb, the one for whom she made the sacrifices an expectant mother makes and for whose well-being she labored, for that individual's own sake.

One may reply that the phenomenology of the parents is not reliable epistemically, that the mother may have the same thoughts even where a purported pregnancy turned out to be a giant tumor. But such a reply is equally wrong. The response of grief and the sense of loss in the two cases are very different. In the case of the tumor, the response would be a sense of loss for only oneself. The grief is the outcome of the mother's frustrated desire to have a child. But such is only part of the response to the birth of an anencephalic. That sorrow is also for an infant who was born only to die, to be incapable of living the life characteristic of other human infants. In the case of a tumor, the tumor in itself is nothing to mourn. A tumor never might have been anything but a tumor. The anencephalic infant, by contrast, might have been that very same individual but with an intact brain.<sup>19</sup> While the anencephalic is itself incapable of consciousness, that infant, in a possible world very close to our own, would have been born with all the capacities for consciousness. It is the loss of this rigidly designated individual that is mourned.

Moreover, what makes such mourning rational, even in the case of an anencephalic infant, I want to argue now, is the role of social relations in the constitution of identity. By 'social relations' I do not mean the sort of ad hoc interpersonal relationships which are often voluntarily

17. McMahan entertains such a notion in his discussion of prenatal injury to a fetus that has an impact on the later time-relative interests of the individual that the fetus will become. See *EOK*, 280–88.

18. A close example is found in Hilde Nelson's moving account of her family's experience with the birth of a hydrocephalic infant. The hydrocephalic infant, however, unlike a truly anencephalic child, can look at you and be aware of you. See Hilde Lindemann Nelson, "What Child Is This?" *Hastings Center Report* 32 (2002): 29–39.

19. Note that I am not asserting the hypothetical that this would be the identical person. To do so would be to beg the question, ignoring MacMahan's definition of personhood as a body tethered to certain psychological capacities. I am only asserting here that this infant may have been the same individual.

entered into and easily exited, those the character of which is determined only by the individuals in question. Clearly these sorts of interpersonal relationships require two fully conscious individuals, each of whom plays a part in forming the relationship.

By a 'social relation' I mean 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.

Identities that we acquire are ones in which social relations play a constitutive role, conferring moral status and moral duties. These identities are part and parcel of a social matrix of practices, roles, and understandings, which are themselves enmeshed in a moral world. Doubtless the social relationships of parenthood supervene on natural relationships, but biological relationships are neither necessary nor sufficient to define a social role. For that we need social practices. In the case of parenthood, the biological relation is a default assumption, not the final arbiter of parenthood. There exist socially recognized practices by which the mother, for example, can delegate to another the duties that fall to her by virtue of her social (and not merely natural) relationship to the child. Such moral duties and moral status are not arbitrary and, while they are alterable, they are intertwined in the fabric of our lives and our broader moral understandings.<sup>20</sup>

Returning to McMahan's invocation of the anencephalic infant, I would say that this infant is someone's child, and with that social relationship comes a series of appropriate emotional and moral responses—ones that differentiate this birth from either a tumor or a plant. It is morally (and emotionally) appropriate to care for one's child for the child's own sake. It is the practices that define parenthood, and not simply the intrinsic properties of the product of the pregnancy, that account for the epistemic reliability of a parent's grief at the birth of

20. Such a position has emerged in some sectors of feminist ethics (e.g., Sara Ruddick, Margaret Walker, and Hilde Nelson). Similar positions have roots in Hegel, Wittgenstein, and communitarianism and have been propounded by Peter Winch, Alasdair MacIntyre, Cora Diamond, among others. This is not the place to elaborate a complex view such as this one. Although I cannot elaborate here on this complex view (if it is simply one), I invoke it to give content to the notion of "social relationship," because it is crucial in articulating the difference between our obligations to a child or adult, no matter how cognitively impaired, and nonhuman animals, no matter how cognitively able.

an anencephalic infant and deny it in case such grief were to be displayed for a tumor masquerading as a “pregnancy.”

But if intrinsic properties alone do not determine the moral status of a being and if social relations have a constitutive role in its identity, then we do, in fact, appropriately compare the fate of this infant with other human infants. In other words, the Species Norm Account correctly allows us to conclude that this individual is indeed most unfortunate.

#### THE CASE OF SUPERCHIMP

We still have to address McMahan’s argument against the Species Norm Account using the hypothetical case of Superchimp. Superchimp is a chimp who has been genetically enhanced at birth to enable it to develop in adulthood the cognitive capacities of an eleven-year-old human child and who then loses these enhanced capacities and reverts to an ordinary chimp. McMahan claims that Superchimp would be most unfortunate to lose the good these enhanced capacities provide. But if the Species Norm Account were correct, we could not speak of Superchimp as unfortunate, for this chimp simply reverts to its species norm. Nor can we assimilate the chimp’s loss to cases such as the instant millionaire who loses the million he had unexpectedly acquired and is returned to his previous state. The chimp was never an ordinary chimp with ordinary capacities. Instead, his is a genuine loss. Indeed, it is one equivalent to the loss of the same degree of cognitive capacity a human might suffer, which humans would count as a real misfortune.<sup>21</sup> Why, he asks, “suppose that the mere difference in species” could make the fate of one individual a misfortune, yet count as no misfortune for the other?<sup>22</sup> Hence, he contends, the misfortune of Superchimp provides a counterexample to the Species Norm Account.

The problem with this argument is that McMahan begs the question. The Species Norm Account maintains that species membership provides the norm for whether a condition or loss is a misfortune. The Superchimp account provides a cross-species comparison based on the supposition that species membership makes no difference. Yet this is precisely what is in contention. The implicit stipulation in the Superchimp case is that what was lost in each case was the same thing—supposing that one can speak of capacities across species as the same thing—and that the meaning of that loss is invariant across species. But the Species Norm Account denies at least one if not both of these

21. It is a loss of cognitive capacities that McMahan supposes would bring the human to the condition of a moderately severely mentally retarded person—although we are not informed whence comes this assessment.

22. McMahan, *EOK*, 148.

suppositions. So what we have is an assertion (the Species Norm Account—that species matters to the evaluation of the loss because the species provides the norm for good or ill fortune) and a counterassertion under the guise of an implicit stipulation (that a given property is and means the same across species; thus that norms are not species specific). Neither position is proved or disproved. The Superchimp is not a counterexample; it just embodies an assertion that is the contrary claim.

Consider instead that we imagine a human who at birth was given a drug whose effect was to allow her to run as fast as a cougar by adulthood. This might be thought to be a great boon to her, except that, while she most loves to run and wants to be a racer, she is prohibited from competitive racing because she is so far beyond anyone's capacity. Imagine that, a few years into her adulthood, the drug loses most of its efficacy so that she can achieve only the high end of normal human running speeds. This loss would, in fact, be a great good, because now she could join races. Imagine also that a cougar were given a drug that would reduce his running speed to that of a swift human. The magnitude of the loss of speed would be the same as that of the human. To the cougar, however, this would be a tragic loss, for the cougar could no longer hunt and would starve if left out in the wild. In this example, the same loss of speed, which is measurable across species, has a vastly different impact by virtue of the importance of that capacity in the life of each species. In this case it is apparent that species membership and species norms are not arbitrary in assessing well-being. Why should we assume that species membership is arbitrary in the area of cognitive capacities and not in the area of mobility? That does surely seem arbitrary.<sup>23</sup> McMahan later assumes the viability of cross-species comparisons in assessing the wrongness of killing. But such cross-species comparisons are based on the defeat of the Species Norm Account, a result the Superchimp case has failed to secure.

The arguments above also do not necessarily secure the Species Norm Account as the right account of well-being.<sup>24</sup> They do lend weight to the claim that species membership is not arbitrary in considering an individual's well-being, though not necessarily because it provides a norm against which to measure well-being. There are many ways species membership can be important assessing conditions conducive to well-

23. One could retort that cognitive capacities are what make us who we are. Yet, given the crucial role of running speed in the survival of cougars, we imagine a cougar philosopher who would consider it absurd not to take speed and mobility as capacities constitutive of what we are.

24. Nor do I want to argue for it as an account of well-being, for taking the species norm as a measure of well-being may lead us astray in assessing the well-being of people with disabilities.

being.<sup>25</sup> In this context we might speculate a bit about poor Superchimp. I should think Superchimp quite unfortunate prior to his reversion back to ordinary chimhood unless, that is, he is provided with other superchimps. For no matter how super the chimp is, he has little place in the community of humans, which is the only community in which he could function. Chimps, as we know, are social, and the loss of all possibility of socializing with other chimp adults, of all sexual relationships and rearing of young and so forth, could scarcely make for a very satisfied chimp, even if it could master human language. Well-being is a multifaceted concept for human and other animals—as Martha Nussbaum’s rich list of capabilities, by which she means to embrace animals, reminds us.<sup>26</sup>

Let us return now to the question of how McMahan utilizes the CSMR in his example. We see that they compare favorably to the anencephalic child (whom he characterizes as “an utterly failed human”) and unfavorably to the genetically enhanced Superchimp, even after Superchimp reverts back to ordinary chimp capacities. While McMahan sets the capacities of the moderately retarded as being on par with ordinary chimps, the CSMR are comparable not even to a primate, but to a dog. We will need to ask where such an assessment comes from and what it is doing in this moral theory. An exploration of a second passage using the case of the CSMR may help us to find the answer.

#### SOLICITUDE TO THE COGNITIVELY IMPAIRED AND SLAUGHTER IN YUGOSLAVIA

In evaluating the Time-Relative Interest Account of the wrongness of killing, McMahan worries that however we draw the line in determining personhood, there will be some humans who fall as far below that line as animals. This creates a problem for the notion of moral equality among humans. The most problematic case is the case of the CSMR, as they never have possessed and never will possess these capacities, unlike fetuses and infants, who can be expected to possess them in the future and brain-injured and demented individuals, who have had them in the past. McMahan maintains that this is a problem not only for the Time-Relative Interest Account but for any moral theory of killing. He lays out four options to deal with such a thorny problem. For brevity,

25. Social relationships invoked here need be confined only to humans. Consider the relationship of pet owner and pet. But we don’t thereby transform pet ownership to parenthood. The T-shirt that says “You mean my grandchild is a dog?” invokes a sweet sort of humor, not the tragedy of the birth of an anencephalic infant.

26. See Martha Nussbaum, *Beyond the Social Contract: Toward Global Justice* (Cambridge, MA: Harvard University Press, 2005).

here I will discuss the only two he thinks are serious contenders: Anthropomorphism and Convergent Assimilation.

Anthropomorphism, which McMahan takes to follow common sense, asserts that “neither animals nor cognitively impaired human beings can be morally assimilated to the other because there are factors, in addition to an individual’s psychological capacities and potential, that are major determinants of that individual’s moral status. Animals and the CSMR differ with respect to some of these factors.”<sup>27</sup> He characterizes this position as permitting us “to treat animals less well than a proper concern for their time-relative interests requires” at the same time that it requires better treatment, “greater solicitude,” of the CSMR than that required by the Time-Relative Interest Account.<sup>28</sup>

Convergent Assimilation, in contrast, holds that “we might accept that animals and the severely retarded share roughly the same moral status, though the moral status of neither is quite what it has traditionally and popularly been supposed to be.”<sup>29</sup> McMahan dismisses attempts to grant the CSMR moral parity by positing intrinsic properties such as the possession of a soul or the sacredness of human life (as the proposal is formulated by Ronald Dworkin).<sup>30</sup> He finds it more promising to give up searching for intrinsic properties shared by the CSMR and ourselves and to limit the defense of Anthropomorphism to the shared relational property of belonging to the human species, a view shared by Robert Nozick and Thomas Scanlon.<sup>31</sup> McMahan’s proposal has recourse to an analogy with nationalism.

As McMahan denies intrinsic value to the relation of species membership, such membership can have for him only instrumental value. But if it has instrumental value, then we can compare the utility of giving all humans moral parity with the utility of assimilating the moral status of CSMR to animals. It is in this context that he puts forward the analogy between the pernicious nationalism of former Yugoslavians and a sense of kinship to all humans. The analogy is played out in the following passage, which I quote nearly in full (I abbreviate for brevity’s sake but quote extensively certain portions of the text to retain the sense and flavor of the remarks):

It is arguable, however, that a further effect of our partiality for

27. McMahan, *EOK*, 206.

28. *Ibid.*, 209.

29. *Ibid.*, 206.

30. Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993).

31. Robert Nozick, “About Mammals and People,” *New York Times Book Review*, November 27, 1983; Thomas Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, Belknap, 1998).

members of our own species is a tendency to decreased sensitivity to lives and well-being of those sentient beings that are not members of our species.

One can discern an analogous phenomenon in the case of nationalism . . . [where] the sense of solidarity among members . . . motivates them. . . . But the powerful sense of collective identity within a nation is often achieved by contrasting an idealized conception of the national character with caricatures of other nations, whose members are regarded as less important or worthy or, in many cases, are dehumanized and despised as inferior or even odious. . . . In places such as Yugoslavia and its former provinces—the result is often brutality and atrocity on an enormous scale. . . .

I believe our treatment of the severely retarded and our treatment of animals follows a similar pattern. While our sense of kinship with the severely retarded moves us to treat them with great solicitude, our perception of animals as radically “other” numbs our sensitivity to them. . . . We are not . . . aggressively hostile, . . . we are simply indifferent. But indifference . . . when conjoined with motives of self-interest . . . involve[s] both killing and the infliction of suffering on a truly massive scale. . . . When one compares the relatively small number of severely retarded human beings who benefit from our solicitude with the vast number of animals who suffer at our hands, *it is impossible to avoid the conclusion* that the good effects of our species-based partiality are greatly outweighed by the bad.<sup>32</sup>

I must confess that this passage takes my breath away. Granted that McMahan is not saying that the great care that I have been putting into raising my severely cognitively impaired daughter has contributed to such great misery, for when we place this passage in the context of the text, it is clear that I as a parent am exempt from these charges, since my personal relations of love, not beliefs about preferential treatment to humans, are sufficient to justify my actions. But others are not so excused, those who are “solicitous” of her well-being (and on whom we parents have to rely to meet her needs and allow her to thrive). That is, if they are solicitous of her because she is human despite her subpar cognitive capacities, then they are complicitous in a great instrumental harm. Simply by virtue of this solicitude toward a human with such low cognitive functioning (a solicitude which presumably moves us all to be indifferent to the fate of nonhumans with comparative cognitive capacities), the caretakers and therapists, no less than taxpayers and those sharing our medical insurance, find themselves complicit in the misery of millions and millions of animals. Now I, for one, was inclined to think

32. McMahan, *EOK*, 221–22 (emphasis is mine).

that it was general greed and insensitivity that was responsible for the massive abuse of animals, the same greed and insensitivity that refused funds to educate and treat with decency the mentally retarded individuals who wind up in the Willowbrooks of the world; the same insensitivity and greed in profit-run group homes where incompetent and uncaring personnel allow mentally retarded adults to languish and die from neglect in the heart of our nation's capital!<sup>33</sup> How could I miss a conclusion "so impossible to avoid"?

But while McMahan's passage is infused with a great deal of heat and indignation for the suffering of vast numbers of animals and for the pampering of subpar humans merely because they are human and bear the relation of same-species membership to "us," his analogies are inapt and his own portrayals of the severely congenitally mentally retarded are mere "caricatures" of the "other," viewed "as less important or worthy," "dehumanized," and—if not "*despised* as inferior"—regarded as inferior. That is, I believe that McMahan's argument fails on two grounds: first, because the analogy is inapt, and, second, because the characterization of the CSMR is seriously mistaken.

#### SPECIESISM IS SPECIOUS

It is a mark of the shallowness of these discussions . . . that the only tool used in them to explain what differences in treatment are justified is the appeal to the capacities of the beings in question. (Cora Diamond, "Eating Meat and Eating People," 322)<sup>34</sup>

I start with the claim that McMahan's analogy is inapt. Unlike the nationalists responsible for "ethnic cleansing," the CSMR (like the fetuses whose interests McMahan is careful not to dismiss too easily) "are not parties to the debate";<sup>35</sup> nor, effectively, are the families of the CSMR. Furthermore, the "solicitude" to the CSMR resulting from a misguided preference to humans is not, in my experience, very solicitous. Our family has had to bear the lion's share of the care, education, and medical costs of my daughter. We have had to look far and wide for a situation that we deemed suitable as a place for her to live out the rest of her days. The days of Willowbrooks are not in the

33. Katherine Boo, "Invisible Deaths: The Fatal Neglect of D.C.'s Retarded," *Washington Post*, December 5, 1999.

34. Cora Diamond, "Eating Meat and Eating People," in her *The Realistic Spirit: Wittgenstein, Philosophy and the Mind* (Cambridge, MA: MIT Press, 1991), 319–34.

35. McMahan, *EOK*, viii.

distant past.<sup>36</sup> Such political, educational, and social advances as have been enacted have been hard fought, mostly by the disabled community and relatives. Still today, both physically and mentally disabled people are apt to be far poorer and have worse life prospects, less because of their inherent limitations than because of widespread prejudice, constraints, and lack of resources. When “solicitude” is in fact not much extended to anyone with even moderate or mild disabilities, we can be certain it fails to extend to those with severe cognitive disabilities.<sup>37</sup>

I do not wish to belabor the question of whether great solicitude is extended to the CSMR, because I would argue that, even if it were, McMahan’s position would be unwarranted. McMahan’s analogy is based, on the one hand, on the internal beneficial effects of nationalistic solidarity and its destructive consequences for other nations and, on the other hand, on the benefits to the CSMR of human solidarity and its putative destructive consequences for animals. Weighing the instrumental value of each does appear to result in the conclusion that such solidarity is, on balance, not a good thing. But the analogy is faulty because McMahan misidentifies the source of the perniciousness in nationalism and racism.

In one’s preference for one’s race and nation, what is it that turns destructive? It seems evident that when a black person and a white person each apply for a job, the relevant and appropriate criteria lie not in their racial characteristics but in the properties each, as an individual, possesses to do the job well. Similarly, when McMahan is considering either the assessment of well-being or the wrongness of killing an individual, he asks for the relevant properties for moral significance. It is the relevant property possessed by the individual, not by the group to which the individual belongs, that ought to determine the appropriate treatment. Here is what appears so definitive about McMahan’s comparison of the Superchimp as he reverts back to a normal chimp to the

36. Willowbrook was a New York State institution for the mentally retarded and was the notorious site in which horrific and extensive abuse of residents of such institutions was uncovered in the 1970s. McMahan provides no empirical evidence that better treatment of the mentally retarded today has corresponded to an increase in the abuse and mistreatment of animals. Instead, some, swayed by moral arguments, have significantly improved farming practices, even as conditions for the cognitively disabled have improved.

37. Even in the philosophical community the solicitude is in little evidence. Reviews of *EOK* in the whole fail to object to McMahan’s views on the CSMR (one exception is found in a review by Nicholas Agar in *Australasian Journal of Philosophy* 81 [2003]: 445–47). *Philosophy & Public Affairs*, a premier philosophical journal, gave pride of place to an article arguing that nothing in the way of justice is due to the CSMR (see Jeff McMahan, “Cognitive Disability, Misfortune, and Justice,” *Philosophy & Public Affairs* 25 [1996]: 335). Only Robert Nozick focuses his review of Tom Regan on the problematic of assimilating the mentally retarded to animals (see Nozick, “About Mammals and People,” 8).

child of ten who becomes a moderately mentally retarded person. The cognitive property appears to be the same, and the loss of this property the same; hence, the assessment should be the same—or so impartialist moral principles would demand. The appeal to the transgenic spectrum, which asks us to imagine a member of one species implanted with the gene of another, is a contribution that McMahan makes to the discussion on speciesism. Another way to put this is to say that group membership (a relational concept) is the wrong sortal for moral consideration,<sup>38</sup> whereas the intrinsic properties of an individual, such as certain psychological capacities, are the right sortals. I will refer to the first type of sortal as “group membership” and to the second as simply “properties.”

Many philosophers have subscribed to this argument. But I wish to suggest a radical departure from this position. The idea that giving moral properties to humans is analogous to pernicious nationalism or to racism is erroneous in that it assumes that the evils of nationalism (or racism) are based solely on the principle of giving priority to one’s own group—or that their signature is the sortal “group membership,” and it is this that has the undesirable moral consequences, in the absence of any compelling moral reasons to give priority to “one’s own.” I want to suggest instead that what makes racism and pernicious nationalism moral evils is the special way they depend on “property” sortals.

Note that McMahan points out that pernicious nationalism makes “the other” into a caricature. What is usually missed is that embedded in such caricatures is the assumption that the undesirable properties are absent in the privileged group, while the desirable properties are exclusive to the privileged group.<sup>39</sup> Whites in slave-owning states, including such enlightened figures as Thomas Jefferson, speak of the inferior mental capabilities of blacks, of the superior sensibility of whites, of the unattractiveness of the African physique, and of the artistic merits present in whites but absent in blacks.<sup>40</sup> This racism is based not merely on group membership but also on the possession of certain properties by one group, whites, and their absence or their antithesis in the other group, blacks. In Toni Morrison’s *Beloved*, one of the most wrenching

38. McMahan makes an exception of the case of special relations. I will address these later.

39. McMahan makes scant reference to racism in his work. In “The Limits of National Partiality” (in *The Morality of Nationalism*, ed. Robert McKim and Jeff McMahan [New York: Oxford University Press, 1997], 107–38), McMahan’s vision, ironically, of the evil in nationalism gone wrong is very close to my own. Yet what he fails to see is how his use of properties in the case against the moral personhood of the CSMR replicates the pernicious use of groupings in evil forms of nationalism and all forms of racism.

40. Thomas Jefferson, *Notes on the State of Virginia*, Literary Classics of the United States (1782; repr., New York: Library of America, 1984).

scenes occurs when Sethe's schoolteacher measures her skull in an effort to validate the correlation between race, skull size, and cognitive capacities.<sup>41</sup> Her status as slave, she learns, is not to be justified merely by the fact that she belongs to a different race. Sethe sees herself reduced to measurable intrinsic properties, sorted by these properties the way animals are, and she feels shamed and humiliated in a special way. If sortal group membership were sufficient to account for the evil of racism, why would this specification and (pseudo-) verification of undesirable properties always accompany racism? Why would science be called upon to substantiate the absence of desirable features or properties in the despised other?

In racism and pernicious nationalism, the exclusive appropriation of desirable properties is usually tied to restrictions on reproduction. Racism in this country had a legal holdout into the late 1960s in the form of miscegenation laws—laws that remained in place after *Brown vs. the Board of Education*, after the Civil Rights Act, after all other legal forms of racism were abolished. Why miscegenation? Miscegenation is the way prized and devalued properties can migrate across groups, thereby loosening the identification of group membership with distinctive properties. Obsessions of racial purity go hand in hand with racism because as long as we can guarantee racial purity we can be sure that group membership is coincident with the property sortals that have been deemed definitive.

Nowhere was this made more evident than in Nazism, where pernicious nationalism mingled with racism in the most deadly fashion. Germans were deemed to be Aryans by an elaborate enumeration of the special properties possessed by Aryans. The elimination of those Germans who lacked those properties, and the assurance through sterilization that Germans would in the future not have the unwanted properties, were paramount to the Nazis. On January 30, 1933, the very first day that Hitler was appointed the Reich Chancellor of Germany, the Sterilization (of Inferiors) Laws were enacted, and they were implemented a short three weeks later, followed by the Law for the Prevention of Progeny of Hereditary Disease, mandating the sterilization of patients with presumably hereditary diseases such as “feeble-mindedness,” epilepsy, and schizophrenia. Subsequent laws and decrees mandated the neglect of institutionalized and disabled Germans and the “mercy” killing of German “mental incompetents” (the mentally retarded and mentally ill) in the T4 project, as well as additional sterilizations.<sup>42</sup>

41. Toni Morrison, *Beloved* (New York: Knopf, 1987).

42. See Telford Taylor, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, October 1946–April 1949. The entire text is available at <http://www.humanitas-international.org/holocaust/drtrial4.htm>.

Cleansing Germany and the German bloodline of the “undesirables” thus was not limited to those in other identifiable racial and ethnic groups. It included those children of Germans who failed to manifest the Aryan properties and who threatened to weaken the present and future tie between being German and the possession of those desirable properties. Exclusive ownership of those properties requires ruthlessness and constant vigilance. Mere group membership is not what racism or pernicious nationalism is about.

But one may object that there are no simple relations of group membership that cannot be characterized by some intrinsic properties—it is always possible to find similarities between entities that are grouped together. Are not these properties, which I claim act as sortals, in fact an afterthought? If, as some have argued, the category of “the other” is ineliminable in human life,<sup>43</sup> would not group membership precede the valorization of properties prevalent in a group, offering a way to bolster pride and enhance solidarity?

In response, I will agree that most likely, first, the “us,” the group, is identified without resort to properties. But the identification of the group with the exclusive possession of desirable properties results in a rationale by which possession of these properties becomes the justification for its privileged standing. What is pernicious, and what has the most destructive consequences, occurs when a group defines itself as the sole possessor of a set of properties, properties which, in turn, define it and which give members of the group, as the possessors of those properties, the authority to appropriate goods, power, and other privileges.

If this is correct, it has several important consequences for a moral theory such as McMahan’s (and not only McMahan’s). He starts with an “us,” a “you and me,” so that he does not beg the question of supposing what you and I are by beginning with a defining property which will serve as the requisite sortal. But then he commences the search for the intrinsic properties which sort individuals into those who belong among the “us” and those who do not. And to make the category of person break sharply from that of nonperson, he designates some properties which are “ours” exclusively and on the basis of which we claim the privileges of personhood, the moral status that brings about duties on the part of others not to kill “us.” Yet separating “them” from “us” based on these desirable characteristics (characteristics that make “our” lives more worthwhile, indeed more worthy) sounds closer to racism and pernicious nationalism than does the privileging of bare species membership, the view that McMahan analogizes to virulent nationalism.

43. Simone de Beauvoir, following Hegel and utilizing Levinas’s concept of the “Other,” asserts that we form a sense of self in opposition to an “other” (Simone de Beauvoir, *The Second Sex*, trans. H. M. Parshley [New York: Knopf, 1952]).

Two obvious objections to this attack on McMahan's position present themselves. The view of McMahan, Peter Singer, and others is not the imposition of exclusionary properties on a preexisting group as racism or nationalism may be. Rather McMahan and such others use properties as sortals for the definition of the moral status of "persons." Any individual who possesses these properties can join the class of persons. In contrast, blacks cannot join a group that defines itself as white, and non-Aryans cannot join the Germans as the privileged class even if they show that they have some of the properties attributed to Aryans. "Persons" in this sense form an open group, somewhat like a meritocracy. It is open to all with the relevant qualifications. Those groups defined by race or nationality are not open—perhaps one can be kicked out, but no one not connected to the group by special ties can enter. This objection is granted and saves the view of McMahan (and others holding similar positions) from being identified with racism and pernicious nationalism. However membership into the group of persons is not open the way a meritocracy is, where the requisite properties for membership can be earned or achieved. It is only partially open in that it will admit any individuals who turn out to have the requisite properties even if they are not otherwise like the humans we ordinarily take to be persons.

Still, and this is the second objection, while the intrinsic properties for personhood cannot be acquired by an individual's own efforts, the properties invoked by McMahan, unlike those of racists, are not arbitrarily, but rather directly, related to the moral status they confer. For the intrinsic properties that McMahan and others require for personhood (rationality and the capacity to determine one's own good) are directly relevant to the capacity to act morally. Possessing Caucasian features is not directly or indirectly relevant to the powers and privileges whites have appropriated to themselves.

I grant that rationality and the capacity to determine one's own good are, at the very least, useful to being a part of a moral community. But I am not sure if either is necessary, and I am still less certain why lacking them disqualifies one from moral parity. Philosophers have made much of the importance of rational capacities for the exercise of moral judgments and moral actions but (except for some agent-based virtue theorists) have understated the critical role other capacities play in our moral life, capacities that we would want to encourage in the members of a moral community, such as giving care and responding appropriately to care, empathy, and fellow feeling; a sense of what is harmonious and loving; and a capacity for kindness and an appreciation for those who are kind.

If we need members of a moral community to keep from harming us, we also want members of our moral community to increase the good in our world. The Nazi doctor murderers of whom we spoke earlier

employed rationality of a highly developed sort and appeared to demonstrate a capacity to determine their own good (their actions were freely undertaken and advanced their careers), yet the contributions of these capacities to sound moral agency were nil, since the acts they enabled caused harm and surely did nothing to increase the good in the world.

Contrast these with an individual whose rational capacities are difficult to determine because she lacks speech but who has the capacity to enjoy life, to share her joy through her smiles and laughter, to embrace those who show her love and care, and to bring joy to all whose lives she touches—an individual who, through her warmth, her serene and harmonious spirit, and her infectious love of life enriches the lives of others and who has never acted maliciously or tried to harm anyone. Whether or not she would know what it means to determine her own good may be in doubt, but the good she brings into the world is not. Such a person, congenitally severely mentally retarded as she is, fails to demonstrate the psychological capacities deemed requisite for philosophical conceptions of personhood. If we can imagine such an individual, can we not doubt the significance of the capacities of rationality and autonomy for the moral status of personhood, with all the protections such a status confers? At the very least, I would maintain, between our Nazi doctors whose crimes are unspeakable and our cognitively impaired person who brings joy into the world, we can see that having the capacities of rationality and autonomy are neither necessary nor sufficient for avoiding harms or for bringing good into the world.

So while the psychological capacities deemed relevant for personhood are not as arbitrary as is white skin for effectively doing a higher status job, there is an element of the arbitrary in the choice of those properties thought most important for moral personhood. Furthermore, we should note that white skin is itself never cited as the property to be invoked. Choosing the white over the black for a job is instead justified in terms of the superior properties that the white person is presumed to have.

That I have lauded qualities that contrast with rationality as qualities important to morality should not be understood to mean that I advocate dispensing altogether with rationality and autonomy. My intent instead has been to show that whether or not an individual possesses any one set of intrinsic properties is not sufficient to determine whether or not this individual can have a moral life and be part of a moral community and it is not the basis on which to assign him or her a moral status.<sup>44</sup>

I can well imagine a reader growing impatient and asking, “Have

44. See Diamond, “Eating Meat and Eating People,” for an argument showing the moral shallowness of the properties-based view.

you not just undermined the possibility of arriving at any principled way of sorting among beings, so that some are deserving of a special place without analogizing that position to racism?" Not having such a principled way of sorting does not cohere with our intuitions. If the invocation of properties gets us in trouble, it is also not evident that there are any simple relations of group membership that could have the moral significance that would justify belonging to the group as reason for privileged moral status.

I believe that there is such a simple relation (and it is a group that McMahan discusses all too briefly and uses as a disanalogy), namely, the family. Family membership is conditional on birth lines, marriage, and (under particular conditions) adoption, not on having certain intrinsic properties. But except where it is misused, as in nepotism in employment where intrinsic properties do matter, family membership is not a pernicious relationship. Families (or adequate substitutes) are critical when we are dependent, as in early childhood, during acute or chronic illness, with serious chronic conditions including disability, and in frail old age. At these times, we are generally best served by close personal ties. Families are called on in times of moral crisis for the support of family love and loyalty. Similarly, I propose that membership in a group of moral peers based solely on species membership has as its appropriate moral analogue family membership, not racism and not pernicious nationalism. As humans we are indeed a family.<sup>45</sup>

McMahan considers and mostly rejects this very analogy.<sup>46</sup> He discounts the importance of species membership for both identity and moral considerations. I have tried to suggest the ways in which he is wrong, or at least the ways in which some of my own intuitions conflict with his on this score. If we are simply setting one set of intuitions against another, we lack an argument not only for but also against the idea that species membership has no moral significance. I cannot here make a case for the moral significance of species membership that is

45. For an argument that families are precisely not groupings identified by a set of intrinsic properties and how pernicious intermingling such a property-based view is when applied to families, see Eva Kittay, with Leo Kittay, "On the Expressivity and Ethics of Selective Abortion for Disability: Conversations with my Son," in *The Ethics of Prenatal Testing and Selective Abortion: A Report from the Hastings Center*, ed. Adrienne Asch and Eric Parens (Philadelphia: Temple University Press, 2000), 196–214. Leo Kittay argues that what is problematic about selective abortion for disability is that it makes inclusion in the family contingent on having certain desirable, and not certain undesirable, traits. He argues that this transforms family membership into something akin to club membership and so undermines the child's ability to feel the unconditional love she needs to thrive.

46. Although it is this very analogy that McMahan utilizes in a vision of what a nonpernicious nationalism can look like in "The Limits of National Partiality."

more systematic than I have so far, but I hope that I have at least reopened the door that McMahan assumed he closed.

There are still two arguments, however, that need to be addressed, if briefly. First, McMahan says that, even if we grant that species membership is a special relation for us humans and that it demands that we need to give moral priority to the CSMR over animals, this would not commit others who qualify as moral persons (say, moral and sensitive Martians) to give CSMR such consideration—and these Martians could then presumably provide us with an impartial view of our duties. I find this unconvincing because I do not know what moral and sensitive Martians might think. They may be much more likely to admit the moral parity of the cognitively impaired human being I described earlier than those who, while cognitively intact, act in reprehensible ways. Their moral priorities may be quite different, yet recognizable to us as moral.

Second, McMahan claims that if what we owe the CSMR is the consequence of special relations we bear to humans, these sorts of relations normally do not permit us to treat those with whom we do not have such relations less badly than an impartial account would permit. So the special relations view would not justify how much worse we treat animals than the CSMR. I grant this. But there is a view that McMahan does not consider, which is that we should treat the CSMR as we treat other persons, and also that we should treat animals better—most likely much better—than we do now. This seems to me to be the right position to take, and it is compatible with the arguments I have put forward.

The moral dangers of drawing lines among human beings, even in the worthy cause of advancing the well-being of animals, are not hypothetical. As Nozick warned in his review of Reagan's *Animal Rights*, it is less likely to bring about better treatment of animals than much worse treatment of humans. Furthermore, cultivating moral sensitivity to the suffering of animals is no guarantee that the same sensitivity will extend to the nonperson humans.

Telford Taylor, the prosecuting attorney at the “Doctors Trial” at Nuremberg, pointed to the law for the protection of animals passed by the Nazis on November 24, 1933. It was a law “designed to prevent cruelty and indifference of man towards animals and to awaken and develop sympathy and understanding for animals as one of the highest moral values of a people.” Appealing to the moral aspects of the “soul of the German people,” the law called on Germans to not regard animals in terms of mere utility. Instead any experimentation involving animals was to avoid causing them pain, injury, or infection, except in very special circumstances, and special authorization was required for the use of animals for experimental or medical purposes.<sup>47</sup> Having rendered cer-

47. Telford Taylor, “Opening Statement of the ‘Doctor’s Trials’ (December 9, 1946

tain humans as beyond moral protection, these same doctors, with their noble moral sentiments toward animals, could experiment without restrictions on humans and neglect these precautions in the human case. Sensitivity to the suffering of nonhuman animals did nothing to encourage sensitivity to the suffering of human nonpersons. In the hands of people less moral than McMahan, Reagan, and other ethicists who hold similar views, the recalibration of the moral worth of some humans and the moral worth of animals could turn out to be at least as pernicious as the nationalism with which McMahan compares the solicitude toward the CSMR.

#### CHARACTERIZING THE "CONGENITALLY SEVERELY MENTALLY RETARDED"

This discussion has so far not challenged the characterization of the CSMR. Even were McMahan's assessment of the cognitive capacity of the CSMR correct, his conclusions would be unacceptable. But is it correct? And is it important that it be correct?

In CDMJ McMahan defines the severely mentally retarded (in a note he excludes the mildly and moderately retarded and those with subsequent brain injury) as human beings "who not only lack self-consciousness but are almost entirely unresponsive to their environment and to other people."<sup>48</sup> He also says, "The profoundly cognitively impaired are incapable . . . of deep personal and social relations, creativity and achievement, the attainment of the highest forms of knowledge, aesthetic pleasures, and so on."<sup>49</sup> This is seriously misinformed. Most severely retarded people can speak at least a few words and can be and are involved in activities and relationships. Even profoundly mentally retarded individuals are far from being unresponsive to their environment and to other people. My daughter was diagnosed as severely to profoundly retarded. She is enormously responsive, forming deep personal relationships with her family and her long-standing caregivers and friendly relations with her therapists and teachers, more distant relatives, and our friends. Although she will tend to be shy with strangers, certain strangers are quite able to engage her. (She has a special fondness for good-looking men!)

Sesha now lives in a group home with five other severely to profoundly mentally and multiply disabled individuals. Not one can even remotely be described as "entirely unresponsive to their environment or other people." I am greeted by smiles and acknowledgments of some sort when I arrive, and my daughter's passionate kisses exhaust both

to August 20, 1947)." The full text is available at <http://www.humanitas-international.org/holocaust/drtrial4.htm>.

48. McMahan, CDMJ, 5.

49. *Ibid.*, 9.

me and my spouse. All her roommates share her real appreciation of music: one, Billie, will “dance” in his wheelchair to rock music. Two others, Matt and Heather, love to sing along, and although they are incapable of speaking, they vocalize in just the right pitch. Tony will thrill to some music, while other music makes him weep, and he asks for his own mother when I come to visit. Nora is entranced by watching ballet and is a serious participant in the music therapy program.

When treated to a concert of classical music, an audience of severely multiply disabled adults and children, many with severe to profound retardation, was more respectful and appreciative than many I have encountered in concert halls. Although not one will read Spinoza, the claim that these folks are incapable of deep personal relationships or deep aesthetic pleasures could not be further from the truth. For my own Sesha, “severely-profoundly” mentally retarded though she is, music is her life and Beethoven her best friend. At our home, listening to the *Emperor’s Concerto*, she gazes out the window enthralled, occasionally turning to us with a twinkle in her eye when she anticipates some really good parts.

McMahan has other characterizations of the CSMR. As we saw in a previous excerpt, he maintains that they have psychological capacities equivalent to that of a dog. Note that this fails to comport with McMahan’s description of the CSMR as unresponsive—dogs are, of course, quite responsive. So perhaps the depiction in CDMJ was not well considered, and the equivalency with the dog’s psychological capacities is what McMahan really means. Sesha has no measurable IQ, and a dog, I presume, has no measurable IQ. Perhaps this is what justifies McMahan’s assessment. Sesha has no measurable IQ because IQ tests depend on capabilities to express cognitive capacities and Sesha lacks these expressive capabilities.

Does she necessarily lack the cognitive capacities? I simply do not know, nor do others. Every so often, I am shocked to find out that Sesha has understood something or is capable of something I did not expect. She is now a young woman. She has not been locked up in a cellar but instead has been exposed to teachers and therapists of various sorts, and still the surprises keep coming. And they can only keep coming when her treatment is based not on the limitations we know she has but on the fact that our knowledge of her capabilities is limited.

Given that trainers have worked with dog breeds for many generations, I suppose that the limits and extent of canine cognitive skills are better understood. So a comparison of the two populations seems epistemically presumptuous.

I am not going to rehearse the things that Sesha can or cannot do and what a dog can or cannot do. Such comparisons are otiose and odious as well as senseless. What Sesha can do she does as a human

would do them, though frequently imperfectly, but it is humanly imperfect, not canine perfect. However, even with all that Sesha cannot do and seems not to be able to comprehend, her response to music and her sensitivity to people is remarkably intact. Perhaps her responsiveness to music is more than remarkably intact; it is quite simply remarkable. What a discordant set of abilities and disabilities she exhibits! This unevenness is a feature of many severely and profoundly retarded persons. (I will now stop calling them “individuals” and begin to speak of those with severe cognitive impairments as the persons I believe they are.) Such unevenness is not a feature of the animals with whom McMahan equates them.

Yet what can we say of time-relative interests and prudential unity relations? How do people such as my daughter fare in comparison to animals such as dogs? McMahan repeatedly makes the claim that animals, by virtue of their more limited psychological capacities and especially their lower cognitive capacities, have a lesser capacity to experience good. And because they lack self-consciousness, and thus have a weak connection to their future selves, whatever good they do experience in the moment cannot be brought forward into the future and thus cannot be employed in anticipation, in recollection, and in the narrative structure self-conscious persons provide for their lives. He claims, therefore, that an animal’s life contains less good.

Once again, I don’t know if Sesha has formed a narrative of her life. That she has memories I doubt not at all. That she remembers people, places, music—even music she has not heard for years—and that she anticipates experiences that she loves, I also cannot doubt. But I do not know if this takes on a narrative structure, and I do agree that these narrative structures give our life a richness. I think it is possible that Sesha’s life lacks this richness. Sesha’s life lacks many things that make my life rich—including reading and writing philosophy. But does this mean that her time-relative interests are less strong than my own? Or that she lacks strong prudential unity relations? Or that she lacks a strong egoistic concern for her future?

I don’t know how to answer these questions, not only because my daughter does not speak but also because I am not sure I truly understand what these concepts mean or what their significance ultimately is. I do know that I myself have a strong concern for her future that can serve as a surrogate for her own egoistic concern—that is, I serve as a third party who can think about her future and discern her time-relative interests and their connection to her future. Today, it is I, and when I am no longer alive, the role will pass to those many who have helped care for her over the years and who share in her joys and work for her well-being. Insofar as McMahan allows third parties to act as surrogates for the individual in question when that individual cannot

form egoistic concerns about their own future, Sesha has strong time-relative interests grounded in a third-party concern for her future. Similarly, to the extent that I can stand in for Sesha's egoistic concerns about her future, she has strong prudential unity relations. But does she have these relations to her past and future selves from the "inside," from within her own experiences? They may well be weaker than my own, but Sesha has a strong and clear sense of herself. I cannot see that she experiences herself in any more of a discontinuous fashion than I experience myself.

But this is not a conversation I can have with her. Does this mean that her life contains less good in it than yours or mine? Again, it is not a question I can answer. I feel quite certain that it is a life that contains a great deal of good in it—possibly more good than other individuals who qualify as persons worthy of a high degree of moral respect, persons such as cognitively normal ahedonic individuals, individuals who are incapable of joy; than people who live in misery, in abject poverty, and in war-torn lands; than people whose lives are devastated by addiction or emotionally painful afflictions. Sesha is capable of great joy and great love. Her life contains an immeasurable amount of good. And she further contributes to the creation of good in this world by her interactions with others. To walk into her home is to get an infusion of joy and energy, a possibility that is too rare in our sad world.

The reader may object that I have responded to McMahan's descriptions of the CSMR as if they were meant as empirically accurate descriptions of all people with certain mental impairments, and I have pointed out that on many counts he is wrong and on others there is little epistemic evidence to support or to deny his claims. But what McMahan may in fact be doing is setting out the conceptual parameters for certain cognitive impairments that disqualify one from personhood. If he has used the label "severe mental retardation" inaccurately, then it is only a matter of mislabeling. The misuse of the label does not vitiate the conceptual points. Surely, I cannot gainsay him this.

Surely I can. For the case of the CSMR is not a hypothetical, purely conceptual case. If the methodological reason for utilizing this group is to have a real-life example against which to test and recalibrate our intuitions, then we must use a group who we know exists to serve the methodological purpose. The label "congenitally severely mentally retarded" does pick out such a group, but seemingly not the one he intended. The difficulty is that term is a diagnostic one, routinely used to pick out certain people. One cannot use such a term in a stipulative fashion without danger of being misunderstood and without the danger of real peril, especially if one advocates a view that says that killing such individuals is morally less serious than killing one of "us."

Yet even if we set aside the problematic use of the label, and even

if there really are people out there who fit the characteristics he incorrectly ascribes to the congenitally severely mentally retarded, we cannot necessarily know if these individuals are the way they are because of the limited extent of their capacities. The history of mental retardation is the history of ever-opening horizons. People who were locked up and taken to be “vegetables” have, under more enlightened programs, learned to read and are today viewed as moderately or mildly retarded, well within the parameters of personhood that McMahan sets.<sup>50</sup>

I do not believe that the history of mental retardation supports any reason to presume that there are people about whom we can unequivocally say that they meet the criteria McMahan gives for the congenitally severely mentally retarded. Perhaps it is implausible to think that there are no humans who fall into a category between someone without mentation (such as the anencephalic) and the folks in my daughter’s home. But the parameters are so unclear. Are there humans with the cognition of a nonhuman animal? Again, I do not know what that means.

The nonhuman-animal/human-animal comparison is easiest to comprehend in the case of primates, for they are so like us. Surely gorillas and some smart chimpanzees can do many things that my daughter cannot. Perhaps some can appreciate Beethoven the way she can. I do not know if I could determine this. When we speak of comparing the CSMR to dogs, I am truly lost. I simply cannot know enough about what it is like to be a dog, to think like a dog, to sense the world like a dog, to know how to compare my own, my daughter’s, or any human being’s intelligence to that of a dog. I know, however, that no gorilla and no dog, however attached I may become to it, can be my daughter—with all the emotional, social, and moral resonance that has.

If there are no individuals about whom one can say with any certainty that they are both human and have the cognitive capacities of an animal, then there is no basis for the conclusion McMahan wants us to reach, namely, that Convergent Assimilation, in which we raise the moral status of animals while we lower that of certain humans (in particular the CSMR), is the correct view. Given that it is incoherent to jointly maintain his criterion of personhood, accept the analogy of speciesism and pernicious nationalism, and privilege human species membership to include those he designates as congenitally severely mentally retarded, he urges that we drop the last of the three beliefs, even as it appears counterintuitive. He urges this step to avoid the massive suffering and

50. Contrasting his experience in the early 1970s as a teacher in a progressive program mainstreaming children with retardation in a Massachusetts high school, Tom Hehir recounts teaching Downs Syndrome kids, some of whom were reading, with Downs Syndrome kids in a state institution ten miles away, many of whom could not even talk (“Legacy of *Brown v. Board: Disabled Children*,” *NPR’s Weekend Edition*, April 25, 2004).

abuse of animals. Instead I have urged that his depiction of the severely mentally retarded is far from what the facts support, that the analogy between speciesism and pernicious nationalism is faulty, and that creating a category of moral status extended to certain human beings (along with unspecified, hypothetical others) based on intrinsic valued properties but denied to other human beings is dangerously close to the harmful exclusions of racism and pernicious nationalism. To the extent that *EOK* depends on the arguments favoring this diminished status for people who are born with or develop severe cognitive impairments at birth, it is deeply flawed.

Had I time enough and space, there are many other passages in *EOK* that I would want to challenge. But I have taxed my readers enough, and I hope that I have provided enough of a counterargument and counternarrative so that the reader can extrapolate onto other passages the sort of response I might give.