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**Master of Arts in Philosophy**



# Rawls, the Severely Cognitively Disabled and the Person Life View

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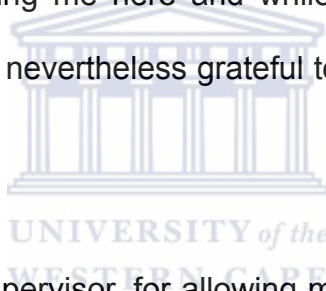
**October 2015**



## ACKNOWLEDGEMENTS

*Ad majorem Dei gloriam inque hominum salutem*, this thesis is a step on a journey started on level 10 in the Main Library of UWC late in 2006 when I read, for the first time, Pope Benedict XVI's lecture entitled *Faith, Reason and the University - Memories and Reflections*. It was on this occasion that I was first introduced to the *Logos*, and it is that introduction that changed the course of my life, resulting in the eventual abandonment of commerce studies in favour of the study of philosophy.

While I have laboured over these pages, I feel that my own has been the smallest contribution towards the success of this project. There have been hundreds of people who have played a role in getting me here and while my mortality forces me to limit myself to mentioning three, I am nevertheless grateful to each and every one of them for what they have done.



I thank Prof. Simon Beck, my supervisor, for allowing me to wonder down rabbit holes. I wonder if he ever thought he'd supervise a thesis that rejects psychological continuity theory in favour of Aristotle's soul? He is a professional and a gentleman.

To my girl, Kim Smith, who made the first move in 2007 while I was reading Plato's *Republic*. I bask and bloom in your strength, and your love. You create the space for me to be. I owe you so much. Thank you.

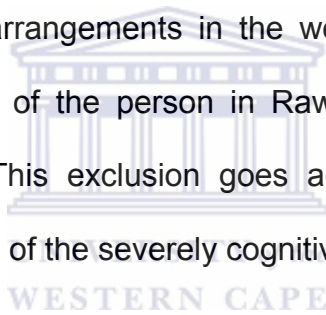
To my dad, Mark Seale, who always encouraged my siblings and me to study. He always refers to his father, a shoe-maker, and how hard he worked to educate his children. I am the product of your labour daddy, and I dedicate this dissertation to you.



## ABSTRACT

A political arrangement is an arrangement for persons. Political arrangements are assessed in terms of the extent to which they manage the affairs of persons, which includes protecting their interests and entitlements. Political arrangements which are unable to protect the interests of its citizens, or a group of citizens, are deemed unacceptable, and where appropriate, alternative arrangements which do protect the interests and entitlements of its citizens are sought.

In this thesis I argue that the political arrangement of John Rawls is unable to protect the interests and entitlements of the severely cognitively disabled who are regarded as full citizens by advanced political arrangements in the world today. I argue that it is the contract nature and conception of the person in Rawls's system which excludes the severely cognitively disabled. This exclusion goes against our widely-held intuitions about the rights and entitlements of the severely cognitively disabled.



I look to the Person Life View of Marya Schechtman, a conception of the person that includes the severely cognitively disabled, to see if a conception of the person that includes the severely cognitively disabled is able to solve the gap in Rawls's system. I argue that it is not able to do so.

I then propose a new way of approaching questions of personhood and appeal to the Aristotelian conception of the soul as the basis, arguing that membership of a type of organism typically considered a person is enough to be a complete member of that type and therefore a person.



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**WADE SEALE (2559411)**

28 SEPTEMBER 2015







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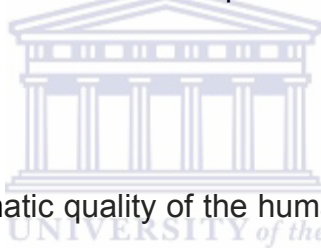
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## Introduction:

### Am I a Human or am I a Person?

#### i Introduction

The African philosophers Kwasi Wiredu and Kwame Gyekye engage in an interesting discussion on the nature of the concept *person* in Akan thought. A significant point of discussion is Wiredu's view that the Akan recognise the notion of degrees of personhood, such that it is possible for one individual to be more of a person than another. Where seeing someone as a person therefore denotes respect or any other such social recognition, certain individuals possess more personhood than others. Wiredu (1992: 104, cited by Wingo, 2006) refers to former Zambian president Kenneth Kaunda's explanation that



Personhood is not an automatic quality of the human individual; it is something to be achieved, the higher the achievement, the higher the credit.

The human individual, then, may or may not be a person, according to this view. There is a clear distinction between *human*, which is the biological animal, and *person*, which carries the implication of a status that is achieved. Wingo (2006) comments that in Wiredu's view the person is specifically "an entity with special moral and metaphysical qualities", and while *human* status is a necessary condition for personhood, it is not sufficient for personhood.

This account of the person in Akan thought is contrasted with the view of Gyekye who argues that Wiredu's "graduated conception of person" is "inconsistent with the natural or innate moral equality of persons" (Wingo, 2006). The moral equality, Gyekye argues,

derives from the common humanity of persons. From the moral point of view, it is the fact that we are *human* persons before being anything else that matters, and all human beings, by virtue of their capacity for reason, are persons.

## ii The Focus of this Project

This dispute around *person* so characterised introduces nothing novel to the various debates in the philosophy of personhood since the time of John Locke's (1690) influential discussion on the subject in the seventeenth century. Locke himself thought that the relationship between person and man needed investigation<sup>1</sup>, and the question as to how the relationship should be understood has formed the basis of much discussion since then. But what Wiredu and Gyekye's dispute does do is provide a starting point for the discussion in this project, which attempts to approach and consider the relationship between *animal* and *person* in a novel way. This project will take its cue from the Person Life View (PLV) as set out by Marya Schechtman in her recent book *Staying Alive: Personal Identity, Practical Concerns, and the Unity of a Life* (2014).

In *Staying Alive*, Schechtman approaches the question of personhood in a way that departs from the established analytic tradition. Schechtman's approach is to look at the practical issues related to the concept *person*, and then to offer a conception of the person that is rooted in these practical considerations. The practical considerations associated with *person* provide insight into how lay people who are not professional philosophers both view and appropriate the concept. The advantage of this approach is that it enables us to make sense of the intuitions that ordinary people have about personhood. This approach is carried forward in this project. In this project I look to make a case for the person from

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<sup>1</sup> I will discuss Locke's view in greater depth later on in this project.

the perspective of non-professional philosophers, and I call this conception of the person *the common sense conception*.

This common sense conception of the person is the one used today in the ideal kind of political arrangement. Gyekye speaks above about *the moral equality of persons*, meaning persons are equal in terms of their moral value. This is most apparent in political arrangements today, where it is held in such documents as the Universal Declaration of Human Rights that everybody is equal and entitled to equal rights. Political arrangements based on the Universal Declaration are favoured in this project. This conception of the person, however, is at odds with the dominant conceptions of the person in mainstream professional philosophy. In a commentary on Gyekye, Wingo (2006) describes how Gyekye links the Akan conception of the person to the Kantian conception of the person, which is based on the premise that human beings have the capacity for reason. The view that *the person has the capacity for reason* is a dominant view, and both Gyekye and Wiredu accept this dominant view.

For Immanuel Kant, the capacity to reason is precisely what separates persons from non-persons. Whether or not a creature has the capacity to reason would determine whether or not the creature is a person. And for Kant, too, personhood brought with it special moral and political value. For instance, the second formulation of the categorical imperative requires that persons never be treated as only a means to an end, but always as an end in themselves. In other words, there is a right way and a wrong way to treat persons, purely by virtue of the fact that they are persons. And it is this very thinking to which some jurists (Ackerman, 2012) trace the human rights culture of the present day: a culture based on inalienable human dignity. Human dignity, which all human beings possess, Ackerman says, is little more than Kant's second formulation of the categorical imperative; and

Ackerman spells out at length the way in which human dignity is the basis for equality, in the modern political arrangement.

Inalienable human dignity, though, insofar as it is applied outside of the confines of professional philosophy, does not only apply to human beings with the capacity for reason. Inalienable human dignity applies to all human beings, including the severely cognitively disabled. When the Constitution of the Republic of South Africa says “everybody has inherent human dignity”<sup>2</sup>, *everybody* signals not only those human beings with the capacity for reason, it signals *all* human beings. And this depicts no small disparity, for while the impressive body of literature in the philosophy of personhood has led us to the dominant theories which say persons have the capacity for reason, people outside of professional philosophy say moral and political person-value applies to all human beings, even those who lack the capacity for reason. That “everybody” in the Constitution refers to all human beings is a position most favoured in the political arrangements of the present day, and it is therefore imperative for professional philosophers to go back to the drawing board. This project is an attempt to do just that.

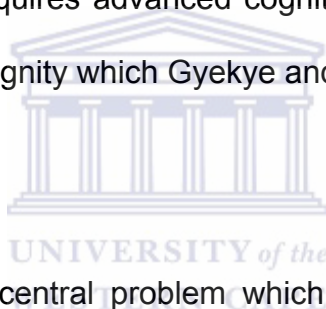
### **iii “Severe Cognitive Disability” Explained**

Before describing the intended task of each of the chapters in the project, I will say something about what I mean by the term ‘severe cognitive disability’ – a term which I will use continuously. I take this label to refer to those human beings who endure the most extreme forms of mental dysfunction. There are a number of mental disorders that fall into this category including such disorders as myotonic muscular dystrophy, schizophrenia and dementia in extreme forms. Individuals who suffer these conditions are unable to perform the most basic functions; in many cases unable to perform even functions which usually

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<sup>2</sup> Section 12, Act 108 of 1996

are natural and require no assistance such as chewing food or control of the excretory systems. These individuals are unable to perform basic problem-solving; unable to do simple manual tasks such as folding up their clothes; and unable to process any information from their environment around them. The term 'severe cognitive disability' is used here as an abstraction. There is no clear point on a continuum from cognitively advanced on the one end to cognitively absent on the other at which we can say cognitive disability starts; but these individuals are at the (abstract) point closest to cognitive absence on this continuum. In that sense, there is no ambiguity in their cognitive capacity, but it is precisely these individuals who I offer for reflection. It is precisely these individuals who pose the greatest problem to philosophical systems like that of Rawls which use a conception of the person that requires advanced cognitive capacity, for these individuals are entitled to the equal human dignity which Gyekye and Ackerman speak of above.



#### **iv Overview of the Chapters**

In the first chapter I detail the central problem which this project seeks to address. I describe the nature of metaphysics, and specifically the philosophy of personhood, and the role it will play in this project in relation to what I call 'common-sense'. I then also seek to substantiate the notion of *common-sense*, as it is employed in this project.

The central problem in this project is one located in developments in political philosophy, which took place over the course of the last century or so. As the most prominent of recent political philosophers, I focus John Rawls and his hugely influential theory of justice. Rawls seeks to offer a theoretical substantiation for political liberalism by placing the individual at the centre of his system, and the product of his labour is a masterpiece that will be read for centuries to come. He revived social contract theory which had generally gone into hibernation since the time of Modernity. But I aim to show that at the heart of his system,

and social contract theory in general, sits a conception of the person that is incompatible with the developments of politics and law over the last century. All of this is the focus of the second chapter.

Having shown that the conception of the person in Rawls's system and the social contract tradition is inconsistent with developments in political arrangements, Chapter Three expounds the problem. I spell out the problem with Rawls's polity, which is his use of the Kantian person, with reference to another prominent theorist in political philosophy and jurisprudence, Martha Nussbaum. While I endorse Nussbaum's criticism of Rawls, I actually use Nussbaum's capabilities approach to show that her conception of the person is just as problematic as Rawls's; and that *this* – the conception of the person – is the problem with both Rawls and Nussbaum. To argue this I look to her list of capabilities in her capabilities approach and argue that if these are to afford entitlements which serve and respect the inalienable dignity of human beings, then they need to be entitlements which apply to all human beings equally, not only cognitively normal ones.

After Chapter Three, the groundwork to this project should be laid. The general approach in the project of assessing a metaphysical theory of the person in terms of a common-sense conception of the person, which is established with reference to the developments in politics and law in the twentieth century, should be clear. Why the common-sense conception of the person should be the preferred one and that there is an unanswered metaphysical question should also be clear. In Chapter Four I consider a conception of the person that accommodates the severely cognitively disabled. This conception is found in the work of Schechtman in her recent book, *Staying Alive*. I look at her theory of the *person*, with special attention being paid to how the severely cognitively disabled are



included. I look to this text to see if Schechtman's Person Life View (PLV), as it is known in the book, is able to save Rawls's system. I argue that it cannot do this.

Having said why Schechtman's PLV cannot save John Rawls's political system, and why it cannot form the basis of an acceptable political arrangement, I take from Schechtman to offer a conception of the person that I believe could satisfy the requirements of an acceptable political arrangement. This conception of the person appeals to the metaphysics of Aristotle. I hope to offer a theory of the person that can accommodate the severely cognitively disabled, but in doing so, I will have to say something about the issue of moral responsibility and persons, which is what has made *person* an interesting concept to study.

The final chapter is dedicated to drawing some concluding remarks, in addition to noting issues which may need further development.



## Chapter 1: From Common Sense to Metaphysics

### 1.1 Introduction

While the notion 'ivory tower' is used pejoratively against academics, and philosophers in particular, I attempt to use it here to my advantage. The term generally paints a picture of a group of philosophers sitting in an ivory tower and discussing matters that are intellectually and practically removed from the concerns of those people outside of the ivory tower who have to work the fields and sustain society. In other words, the crux of the ivory tower metaphor is that the intellectual activity is so detached from 'real life' so as to render it practically useless, if not pointless. In a sense, the central theme of this project is that some metaphysicians who have participated in the personhood and personal identity debates are guilty of the ivory tower charge in positing a conception of the person that is so detached from 'real life' that the fruits of the debates are not really useful to anybody outside of the ivory tower. In other words, the debates in metaphysics have influenced other sectors of philosophy, such as the predominating political philosophy debates for instance, but these have given rise to inconsistencies in political arrangements which are materially detached from every day, common-sense uses and understandings of the same concepts.

The purpose of this short chapter is to expound this claim. It will identify briefly the specific area of metaphysics, i.e. personhood, with attention being paid to the influence of John Locke on the predominating view in the philosophy of personhood, viz. the Psychological Continuity View (PCV), and the conception of person employed in it. Locke showed that the kind of entity concerned will determine persistence conditions, and so there is much to be drawn from personal identity debates as well. Secondly, it will be claimed that the

principles of justice of the modern society are in fact closer to a common-sense notion of the person than to the notion employed in the predominating PCV. But *common sense* will have to have specific content and meaning in this project, and if this is to be so, it needs to be spelt out. In developing a concept of *the common-sense notion of the person* in the political arrangement to be used in this project, much will be drawn from constitutional jurisprudence of post-1994 Republic of South Africa, influenced heavily by the constitutional jurisprudence of post-war Germany (Ackerman:2012) and to a lesser extent other world cultures with a strong proclivity towards human rights; particularly with reference to ways in which this has influenced the South African Law of Persons. It will be noted that the latter view of the person has far greater appeal to it, tending to our intuitions about who should be included into the category *persons*.

What will emerge is an inconsistency between a metaphysical problem in a particular conception of the person on the one hand, and the conception of the person as used in everyday life, as espoused by the South African Law of Persons, i.e. what I will refer to as *the common-sense notion of the person*, on the other.

## **1.2 The Psychological Continuity View**

Personhood, in terms of predominant metaphysical conceptions, has been strongly linked to the capacity to reason and related psychological attributes. In short, severely cognitively disabled human beings have not been considered persons. Such individuals, being incapable of reason, are inappropriate targets of moral responsibility. It is this capacity for moral responsibility which is seen as separating persons from non-persons.

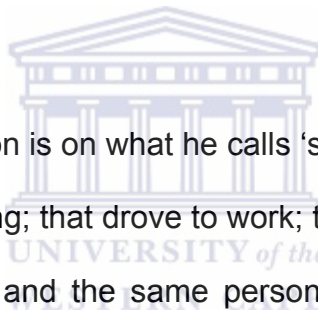
The architect of this view is, as mentioned, John Locke, who is usually understood as proposing a memory theory: the continued existence of a person is not located in the

persistence of any substance, but rather in memory across time. Locke starts by making the point that with living things there is something else that constitutes the principle of individuation. He says that

the identity of living creatures depends not on a mass of the same particles but on something else. For in them the variation of large amounts of matter doesn't alter the identity. An oak growing from a sapling to a great tree, and then lopped, is still the same oak; and a colt grown up to be a horse, sometimes fat, sometimes lean, is the same horse throughout all this. In neither case is there the same mass of matter, though there truly is the same oak, or horse (2007:113).

He thus distinguishes between a mere clump of matter and an oak by pointing out that the way in which the particles are organised contributes to a particular life, and so even though some particles may come and others may go, what constitutes the oak is the continuing life which these particles of matter contribute to. This description of the unity of a life as the principle of individuation is then applied to man and he shows that if you try to attach individuation to sameness of matter you will reach absurd conclusions: either an individual can never start out as an embryo and develop into an adult human; or, in attaching sameness of soul to sameness of man, I could well be the same man as Socrates as we may have the same soul. He thus uses a number of different thought experiments to show that locating personhood in substance (material or immaterial) leads to unacceptable results. One such thought experiment involves a creature that cannot engage in rational discourse, even though it has the shape of a man, demonstrating that, in the commentary by Uzgalis "...rational discourse is neither a necessary nor sufficient condition for being a man." (2012)

Having established that man and rational capacity can come apart, Locke proceeds to say that it is precisely the capacity for rational discourse that constitutes the criterion for personhood. Personal identity is not a matter of the continued existence of a substance, and the thought experiment involving the prince and the cobbler is another thought experiment used to show that persons can survive the transfer from one substance to another. In this thought experiment, Locke requires us to imagine that the soul of a prince enters the body of a cobbler after the cobbler's soul deserts him, such that the knowledge, memory and personalities of the prince is now in the body of the cobbler. Locke says that the intuition to hold the cobbler's body with prince's soul responsible for the prince's past actions is proof that personhood is not a matter of continued existence of material substance.



Much of the focus of his discussion is on what he calls 'same person': what is it that makes the person that awoke this morning; that drove to work; that bought a sandwich; and that is now typing these words all one and the same person? This is Locke's question, but it should however be seen that this question is very different from (though related to) the question as to what makes something a *person*. That question is dealt with by Locke in the following few lines:

To find what personal identity consists in, we must consider what 'person' stands for. I think it is a thinking intelligent being, that has reason and reflection, and can consider itself as itself, that same thinking thing at different times and places (2007:115).

He says that 'person' is also

a forensic term, having to do with actions and their merits; and so it applies only to active thinking beings that are capable of a law, and of happiness and misery. (2007:120).

Locke gives us his definition as such:

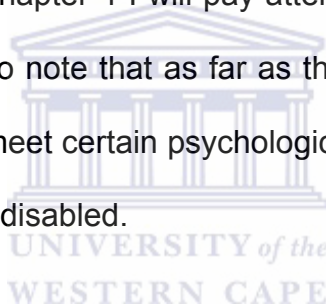
...in this alone consists personal identity, i.e. the sameness of a rational being; and as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person (2007:115);

It should therefore be clear that there is sufficient evidence to suggest that Locke's view of the person is a psychological one, requiring a certain sophisticated psychological capacity. Locke's seeds are watered and go through a number of growth issues before reaching their current maturity: the PCV. The current thinking in the PCV is captured in the work of Derek Parfit (1984:206-207), who gives us the following definition of personal identity in terms of the PCV:

(1) There is *psychological continuity* if and only if there are overlapping chains of strong connectedness. X today is one and the same person Y at some past time if and only if (2) X is psychologically continuous with Y, (3) this continuity has the right kind of cause, and (4) there does not exist a different person who is also psychologically continuous with Y. (5) Personal identity over time just consists in the holding of facts like (2) to (4).

Again, the important distinction, as well as the important connection, between personhood and personal identity is noted. Personhood is established by having the right kind of

psychology, whereas personal identity over time consists in points (2) to (4) – the persistence of that psychology - as Parfit says. Much of the personhood debate has been about points (2) to (4), i.e. about what constitutes the survival of a person from time<sub>1</sub> to time<sub>2</sub>. The issue of having the right kind of psychology, however, was not much cause for discussion as it was shared by all central competing views – Williams’s bodily criterion, Olson (1997) and Snowdon’s (2014) animalism, Schechtman’s Narrative Self-Constitution view (1996), as well as the PCV. In *Staying Alive* (2014) Schechtman takes issue with this. The reason for her having to deal with this approach to the debates thus far is because, as she ultimately goes on to argue, there are practical considerations relevant to the personhood debate which have been neglected as a result of the presumption of having the right kind of psychology. In Chapter 4 I will pay attention to Schechtman’s complaints. For now, however, it will suffice to note that as far as the analytic debate is concerned, a person is considered to have to meet certain psychological conditions, where the definition excludes the severely cognitively disabled.



### **1.3 Common Sense**

When we climb down from the ivory tower and speak to lay people, there is a certain complexity when it comes to whether or not the severely cognitively disabled are considered persons. While it is true that we do not hold severely cognitively disabled individuals morally responsible for their actions, it is not true that we see these individuals as being equal in moral worth or status to non-human animals. These individuals enjoy more moral and political rights than animals; they enjoy equal moral and political status to cognitively normal individuals, even though, as it will be expounded upon later, the conventional view in the ivory tower when it comes to personhood is that they are not persons because they, quite simply, lack the right kind of psychology. It will now be argued that the common sense view of the person includes the severely cognitively disabled, and

I will use the positive law of post-1994 Republic of South Africa to argue this. The positive law is, after all, an important means of implementing the political arrangement. The positive law, in many ways, is the highest form of social reasoning because the positive law applies to everybody in governing social and political institutions. The positive law, in South Africa, informs a significant portion of public debate, and often an appeal to a Constitutional principle is an appeal to a valid and very high authority. In the simplest sense, the positive law governs the way we live our lives so we are required to conform to its canons. Even if I, therefore, think women are sub-persons: the positive law at the very least governs the way in which I deal with women. How, therefore, does the positive law view personhood?

In terms of a general principle of the positive law, the Constitution requires the courts to develop the common law to reflect the values and purports of the Constitution and the Bill of Rights in particular. This narrows and aids our discussion immensely in that it means that instead of having to consult with the various branches of the law, we are able to gather what we need for this project from the Law of Persons against the backdrop of the Constitution.

According to the Law of Persons<sup>3</sup>, legal subjectivity formally commences at birth and ceases at death. There are however cases in which legal rights are recognised in human beings prior to birth, as in the case of the application of the *nasciturus fiction*. '*Nasicturus*' literally means 'one who is to be born', and the application of the principle is to hold the rights of the unborn in suspense until such time as the unborn is born. This is a complex facility available to the courts to use in cases where the rights afforded to a baby brought to term and delivered are treated as activated at a time during the pregnancy, i.e.

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<sup>3</sup> We focus in this project on natural persons, as opposed to juristic persons.



technically before legal subjectivity commences, where it is to the advantage of the unborn foetus. This gives rise to the rights of an unborn foetus in the law of succession as applied in Christiaan<sup>4</sup> and in the law of delict in Pinchim<sup>5</sup>. It is, however, a complex operation of application because the *nasciturus fiction* does not protect the rights of the foetus when these are weighed against the rights of the pregnant woman to have an abortion. For the purposes of this project, it is not necessary to go into greater detail about the complexities of the *nasciturus fiction*. It will suffice to note that the court recognises legal subjectivity, i.e. personhood, in humans at the point of birth; and in certain cases, and in at least a certain sense, even prior to birth.

The law of persons is also that part of the private law that examines factors influencing legal subjectivity. These include such issues related to the capacity to act or the capacity to be held accountable for actions. For instance, children below the age of seven years cannot be held accountable for crimes, so their responsibility is limited by a factor influencing their legal subjectivity, i.e. age. On the other hand, another factor influencing legal subjectivity is being sequestered, in which case the rights of individuals to conclude commercial contracts for instance are limited. The core values of the Constitution<sup>6</sup> apply to legal subjects equally, and where rights are limited these are done according to strict rules and in line with the Constitution. In short, there is nothing in the law of persons that renders severely cognitively disabled individuals lesser legal subjects than cognitively normal individuals, even though there are reasonable limitations on their capacity to act.

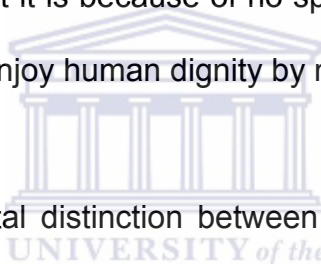
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<sup>4</sup> v Eastrand Propriety Mines (CITATION) in which the rights of an unborn child of a deceased miner were protected by the courts.

<sup>5</sup> v Santam, in which the court held that an unborn foetus has a claim for damages against the negligent party.

<sup>6</sup> of the Republic of South Africa Act 108 of 1996

The use of the word “everybody” in the various rights as espoused by the Bill of Rights<sup>7</sup> includes the severely cognitively disabled. But the most telling clue about how the political arrangement of post-1994 South Africa sees the legal status of the severely cognitively disabled is in the dignity jurisprudence of the Constitutional Court. Retired Justice of the Constitutional Court Laurie Ackerman (2013) penned an extensive study of the concept of human dignity and the way it has been employed in post-1994 South Africa. Firstly, Ackerman is at pains to argue for the role that human dignity plays in establishing equality among all citizens. Then, he is also clear that in conceptualising human dignity for the new South Africa, the framers of the Constitution intended for it to apply to all members of the human species, specifically to guard against discrimination. Former Chief Justice Arthur Chaskalson (2000) has noted that it is because of no special feature which human beings enjoy, but rather, human beings enjoy human dignity by mere virtue of life.



There is therefore no fundamental distinction between the severely cognitively disabled and the cognitively normal when it comes to recognising legal status in South Africa. Yes, cognitive disability does affect the legal capacity to act, and limits the responsibility that can be placed on cognitively disabled individuals. But cognitive disability does not in any way attenuate the citizenship or legal worth of the severely cognitively disabled. As far as the positive law is concerned, the severely cognitively disabled are persons.

#### **1.4 Conclusion**

As we have just seen, the positive law in South Africa, drawing from the very progressive German Constitution and other human rights culture constitutions, views severely cognitively disabled human beings as equal and complete citizens, possessing of human dignity and deserving of due respect. In fact, the law of persons sees all members of the

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<sup>7</sup> Chapter 2 of the Constitution

human species as having equal legal subjectivity: as persons, to whom certain rights are due. Responsibilities and certain capacities to act, on the other hand, vary according different factors which influence legal subjectivity, but these do not affect the fundamental equality in citizenship, subjectivity and personhood. Just as a sequestered individual's capacity to act is limited without there being any attenuation to his personhood, so too other factors like severe cognitive disability have influences on an individual's capacity to act without attenuating that individual's personhood.

But this is at odds with the predominant views in the philosophy of personhood that requires normal, rational psychology. And since it is the predominant metaphysical view of the person that is employed in Rawls's political philosophy, an examination of this disparity between the two conceptions of the person should serve as an interesting assessment of Rawls's political philosophy. If it is the case that Rawls's political system is not able to accommodate the severely cognitively disabled, or any group of the human species for that matter, then Rawls's system may be seen as severely lacking. This would be a metaphysical point, and it is for this project to move from our common sense intuitions to metaphysical truths.

## Chapter 2: Rawls and the Social Contract

### 2.1 Introduction

The Aristotelian view that humans are political by nature (Muller, 2011) stands in opposition to social contract theory which uses as its starting point a state of nature: a lawless, pre-political phase in human existence where there is no formal social cooperation. Social contract theorists argue that political arrangements are established in order to overcome the unfavourable, insecure conditions of the state of nature which are a product of lawlessness. In differing with the Aristotelian view in this way, social contract theory, then, has seen its fair share of criticism. Samuel Clarke, for instance, famously complained that there can be nothing *in* the social contract that requires me to uphold that contract (Korsgaard, 2003:102). The theories of those thinkers who left this question as to why we should be obliged to observe the social contract open, such as Hobbes, were thought to be seriously defective. The criticism had developed to the extent that the social contract would fall out of favour in mainstream intellectual debates after its surge in popularity during Modernity; and it would only be in the middle of the twentieth century that Rawls would resuscitate social contract theory. But, in speaking to some of the problems faced by the social contract tradition, Rawls compounds his commitment to a position and conception of the person that excludes the severely cognitively disabled.

In this chapter there are three aims. Firstly, I describe Rawls's system in general to the point where I have demonstrated the importance of a conception of the person that has the capacity for reason to his system. Secondly, a description of the social contract tradition is set out, laying the ground work for the specific and respected contribution that Rawls would make to the social contract tradition. The purpose of this description of the

social contract is to show the employment, in principle, of a conception of the person that excludes the severely cognitively disabled. As Nussbaum (2006: 89) puts it,

social contract theories insist that the whole point of getting together to form political principles is mutual advantage, where that good is understood in a way that separates it analytically from the constraints of justice and reciprocity the parties agree to respect.

There is the understanding that advantage obtained through the social contract will never be one-sided: it will be mutual. Any contract with a severely cognitively disabled individual is however specifically not mutually advantageous because the severely cognitively disabled are unable to reciprocate. Having sketched the picture of the person employed in social contract theory then, the social contract nature of Rawls's political philosophy is also unpacked and it is said just why and how the contract nature of Rawls's political system commits him to a position that excludes the severely cognitively disabled from his political arrangement. Finally, while it is acknowledged that the social contract provides a principled exclusion of the severely cognitively disabled, I say why the exclusion is nevertheless unacceptable.

## **2.2 The Foundation of Rawlsian Justice**

The hallmark of answering the question '*what must I do?*' for Kant is the categorical imperative, which appears here in its first formulation:

Act as though the maxim of your action were to become, through your will, a universal law of nature (Kant, 2008: 24).

*'How must I live in society?'* could be seen as a translation of the question *'what must I do?'*, and the categorical imperative would be equally applicable, as far as Kant is concerned. Rawls adopts the Kantian approach and develops it in and for his project. Rawls employs what he calls the Original Position, a thought-experiment that is based on the categorical imperative (Rawls, 1999a; 2001; Freeman, 2014). In this section I examine how Rawls, taking a cue from Kant, develops his theory of justice.

I begin with the Original Position and then move on to discuss the conditions which Rawls sets up in the Original Position towards choosing principles of justice. This is not a very detailed discussion of *A Theory of Justice* (1999b) then; rather, it is focused on the procedure for arriving at the principles of justice which Rawls argues for. Then, having discussed how Rawls arrives at his principles of justice, I introduce the central argument of this project, namely, that this thought experiment which Rawls uses to build his theory of justice on is based on an account of the person that is inconsistent with the way in which the concept *person* is used to arrange polities today, as stated earlier.

### **2.2.1 The Original Position**

Imagine that you are required to step out of society for a moment to choose the principles of justice. This is the Original Position. In the Original Position you are required to choose or assess principles of justice. In order that you do not make any biased choices favouring you and those closest to you, or favouring anybody for that matter, when you step into the Original Position you are required to stand behind a Veil of Ignorance, which means that you will not know anything about your or any particular identity in society. You have general knowledge about society, science, art and different schools of thought in disciplines such as political philosophy and theories of justice of bygone eras (Rawls, 1999b: 199), but you have no particular knowledge of who or what you are, and this

general knowledge thus plays no role in coaxing you into going one way and not another. According to Rawls, the principles chosen by the individual in that position are the principles of justice.

Falling within the category of general facts which the individual in the Original Position knows are what Rawls calls “the circumstances of justice”, which he says are the “objective circumstances which make human cooperation is both possible and necessary” (Rawls, 1999b:109). These circumstances of justice perform the function of communicating to the individual in the Original Position the need for justice. The circumstances of justice are divided into two general categories, namely, objective and subjective circumstances. In both instances, but operating at different levels, the need for justice in society is substantiated. At the objective level, the individual in the Original Position is aware of such facts about society as that of moderate, as opposed to extreme scarcity: that needs and wants far outweigh resources. At the objective level also are the general facts about the differences and averages enjoyed by human beings as a species. These will include such differences as that of physical and mental faculties, but also the averages of these faculties enjoyed by human beings. Similarly, but at the subjective level, individuals in the Original Position will also be aware that there are differences between the various members of society. The individual in the Original Position is aware that “free and equal persons have their own plans of life with special commitments to others, as well as different philosophical and religious beliefs and moral doctrines” (Freeman, 2014). This is how Rawls also accommodates reasonable pluralism of doctrines, and according to Freeman (2014),

it is reasonable pluralism of doctrines [which] lends significant support to Rawls's arguments for the first principle of justice, especially to equal basic liberties of conscience, expression, and association.

Rawls is going to argue that there are two very specific principles of justice chosen by anybody who enters the Original Position. He is only able to achieve this by asserting certain constraints on choice for the individual in the Original Position. If the individual in the Original Position is not given constraints he would have too many options and the Original Position would not be a very useful thought experiment.

Before moving to the constraints on choice in the Original Position, it is important to note, for the purposes of this project, that the structure of the Rawlsian system is such that it is inclusive. In the Original Position, because nobody is aware of their specific features in society, everybody is equal. And the equality of citizens in the Rawlsian polity is an attractive feature. But equally important to note is that when Rawls speaks of everybody, he is referring to those individuals who are able to participate in the Original Position; he is talking of those individuals who have the capacity for reason. In section 25 of *A Theory of Justice* (1999b) he spells out the importance of the rationality of the parties in the Original Position. This has serious implications for the severely cognitively disabled in society, an issue we will return to later.

### **2.2.2 Formal Constraints on Choice**

Rawls provides the formal constraints of choice, of which there are five, namely, generality, universality in application, publicity, ordering in conflicting claims and finality (1999b: 112-118).



Principles should be formulated in general and there should be no reference to “what would be intuitively recognised as proper names or rigged definite descriptions” (Rawls, 1999b:113). Rawls explains that since the parties have no knowledge of their particular positions in society it would be impossible for parties to choose principles that would help them in any way, and it would therefore not be reasonable for parties to choose principles that are particular. Rawls (1999b:113) thus notes that

Even if a person could get others to agree, he does not know how to tailor principles to his advantage.

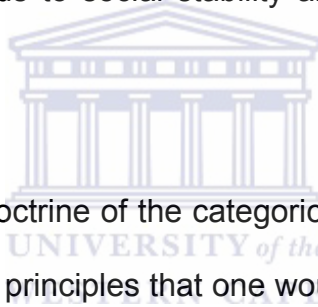
Rawls also explains that the principles of justice “must be capable of serving as a public charter of a well-ordered society in perpetuity” (Rawls, 1999b:114), and as such, they are “unconditional”, they should “always hold (under the circumstances of justice), and the knowledge of them must open to individuals in any generation”, thus requiring no “knowledge of contingent particulars” (Rawls, 1999b:114). Principles chosen thus should be general.

The second constraint is that principles should be “universal in application” (Rawls, 1999b: 114). Rawls says that the principles of justice “must hold for everyone in virtue of their being moral persons” (Rawls, 1999b:114). It is in this principle that Kantian themes feature strongly, for Rawls goes on to say that he “assume[s] that each can understand these principles and use them in his deliberations” (Rawls, 1999b:114). He also points out that “a principle is ruled out if it would be self-contradictory, or self-defeating, for everyone to act upon it” (Rawls, 1999b:114). Perhaps the formulation of this constraint with the most striking resemblance of the Kantian categorical imperative is that

Principles are to be chosen in view of the consequences of everyone's complying with them (Rawls, 1999b:114).

By now it should be clear that the individual standing in the Original Position is choosing a maxim which he/she can will into a principle of justice, and in this constraint Rawls says that the constraint also has to be universally applicable without contradiction.

The next constraint Rawls calls publicity, and this condition requires that the individual supposes that everybody would know about the principles if the principles are accepted in terms of the agreement. In this way, everybody in society will know about the principles, and it is this knowledge that leads to social stability and social cooperation. Rawls also notes that this condition



is clearly implicit in Kant's doctrine of the categorical imperative insofar as it requires us to act in accordance with principles that one would be willing as a rational being to enact as law for a kingdom of ends (Rawls, 1999b:115).

Social co-operation, thus, for both Kant and Rawls, arises out of the mutual agreement on the principles guiding society which are arrived at through rational deliberation in the Original Position. The importance of the ability to reason is thus highlighted.

It is crucially important to understand how this mutual agreement comes about in the Rawlsian picture. This mutual agreement takes place in the Original Position, but as we have already said, the Original Position consists in an individual behind a Veil of Ignorance, not two or more individuals which is required in order to make mutual agreement. This mutual agreement is possible because the rationality of the parties in the

Original Position is an express requirement in the Rawlsian picture (Rawls, 1999b: 123-120). In specifically dealing with how mutual agreement is possible at all, and how it is that the principles chosen in the Original Position are not the product of guesswork or egoistic (Rawls, 1999b: 127), Rawls appeals to rationality: that the principles of justice will be equally applicable to all when they are chosen rationally, subject to the constraints as discussed here.

The second to last constraint is that an ordering of conflicting claims must be asserted. This ordering is to be employed in those cases of conflicting claims. Rawls states that any conception of justice should “aspire to completeness” by resolving “conflicting claims and [ordering] their priority” (Freeman, 2014).

The final constraint is that of finality. In simple terms, the “parties are to assess the system of principles as the final court of appeal in practical reasoning” (Rawls, 1999b: 116). Rawls requires that there should be “no higher standards to which arguments in support of claims can be addressed” and that “reasoning successfully from these principles is conclusive”.

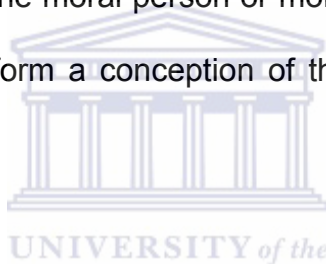
And so Rawls (1999b: 117) states that if taken together, the conception of right comes to

a set of principles, general in form and universal in application, that is to be publicly recognised as a final court of appeal for ordering the conflicting claims of moral persons.

Standing in the Original Position behind the Veil of Ignorance, and asked to choose principles of justice subject to the conception of right as mentioned above, Rawls says that all individuals will choose the two Principles of Justice set out below.

### 2.2.3 The Two Principles of Justice

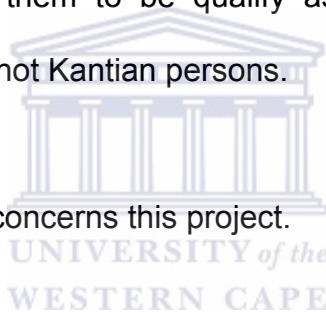
Under these circumstances then, the individual in the Original Position will be motivated “only by their own rational interests” (Freeman, 2014), and this will incline them towards being interested in “each acquiring an adequate share of primary social goods” (Freeman, 2014). Individuals would choose those principles of justice which guarantee “background social conditions enabling them to effectively pursue their conception of the good and realise their higher-order interests in developing and exercising their moral powers”. As such, the aim of the Rawlsian political arrangement, based on the Kantian conception of morality where the moral is defined in terms of the reasonable will of the autonomous individual, is to provide enough freedom for the individual to pursue his own conception of the good. In fact, Rawls defines the moral person or moral personality as consisting in the two capacities of being able to form a conception of the good and having the sense of justice (1999b:442 & 491).



In the Original Position, then, Rawls (1999b:53) says individuals will choose two principles of justice:

- i) Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;
- ii) Social and economic inequalities are to satisfy two conditions:
  - a. They are to be attached to offices and positions open to all under conditions of fair equality of opportunity;
  - b. They are to be to the greatest benefit of the least-advantaged members of society (the difference principle);

These are the two principles which form the basis of the just society says Rawls. For the purposes of this project, discussion of Rawls's theory will stop here as the objection which the project raises is concerned with the foundation of his theory of justice. It will suffice to note thus that individuals enter the Original Position as having special moral value by virtue of their status as moral persons, and on this basis entitlements and responsibilities arise out of the deliberation which takes place in the Original Position, subject to the constraints as discussed above. In order to establish any political value, individuals must be able to engage with the constraints and the general information available to them, including the possibility and need for justice and such goals as pluralism. In order to do this though, individuals must possess a specific cognitive capacity; must possess a cognitive capacity that enables them to be qualify as Kantian persons. In short, the severely cognitively disabled are not Kantian persons.



We now turn to the problem that concerns this project.

#### **2.2.4 Rawls and the Severely Cognitively Disabled**

Imagine the state sponsored the purchase of a big ship filled with dynamite which could be detonated remotely. Imagine, further, that all the severely cognitively disabled human beings in South Africa (this is a big ship) were collected and put on this dynamite-filled ship which was then led out to sea until it reached a safe distance from shore. The one steering the ship is then airlifted by helicopter and taken back to shore, leaving the severely cognitively disabled human beings on this ship which is then detonated from a safe distance, on shore, resulting in the demise of all on board.

It is widely intuitive that such a program of exterminating the severely cognitively disabled would not be deemed just in the present-day modern-state, even though such a program

of extermination would assist a great deal in distributing limited resources to unlimited needs and desires. But another step needs to be taken, for if all dogs in a state were substituted with the severely cognitively disabled in the story above, there would likewise be an objection based on widely-held intuitions. There is a need therefore to distinguish the severely cognitively disabled from other animals.

Imagine a wheat-farmer somewhere in the Eastern Cape made use of severely mentally disabled human beings to pull ploughs on their backs for hours a day. At a certain time every day the farmer loosens the ploughs from around the necks of the severely cognitively disabled human beings and leads them to a shed where they are to eat scraps and left-overs and sleep on the ground like cattle do on other farms. This would surely be considered unjust in the present-day free-state.

The two stories above highlight two important points about the present-day free-state. Firstly, as far as the present-day free-state is concerned, it is not possible for the individuals in the Original Position to choose principles of justice which allow the practice of shipping out to sea the severely cognitively disabled or other non-rational animals out to sea to kill them because of the value which human beings (and other animals) possess prior to the Original Position. Any system of justice which does allow such practices would surely be mocked. Secondly, even though the present-day free-state may deem it just to cause certain kinds of animals to perform certain labour-intensive tasks and live in certain conditions, the same cannot be said for severely cognitively disabled human beings, and this is because the severely cognitively disabled are not considered animals, but human beings entitled to human dignity befitting of persons.

Frankly put, in free-states of the present day severely cognitively disabled human beings enjoy the same human dignity which cognitively normal human beings enjoy. While this category of human beings may have extensive curtailments on their capacity to act and their capacity to be held responsible, there is no question that these human beings enjoy the fundamental equality that cognitively normal human beings enjoy. The severely cognitively disabled are considered equal citizens in the modern free-state. They are not members of a sub-category of citizens.

Yet this state of affairs cannot be accommodated in the Rawlsian picture. Rawls is quite clear that “[o]ur conduct towards animals is not regulated by [the principles of justice]” (1999b:441), and his definition of moral persons, as already cited, excludes the severely cognitively disabled. For Rawls, building on Kant, it is the individual’s value as an end; value as a moral person that allows the individual to enter and engage in the Original Position; and which gives rise to further values such as rights and liberties. For Rawls, value subsists in the individual in the Original Position which is an end in itself, and in the principles of justice which that individual chooses in that Original Position. But this wholly excludes the severely cognitively disabled from the value which the present-day free-state affords the severely cognitively disabled.

Concisely, it is the capacity for reason that gives value in the Rawlsian state. There are no other sources of value in the Rawlsian state. Yet I want to be clear that I will pit Rawls’s criterion of the capacity for reason against other arbitrary features of human beings such as being Black, being Jewish, having an anatomy like Sarah Baartman’s, being HIV positive, or so on and argue that Rawls’s criterion is no different. Some may argue that Rawls’s system is established against the backdrop of a broader metaphysics, setting his system and so the sources of value apart from other systems of discrimination. Rawls

certainly appeals to the rationality of parties in the Original Position, as well as the ignorance of specific details of the position of parties in society, as bases of establishing equality amongst all citizens and avoiding unfair discrimination. But these retorts are unsatisfactory, for radical Islam too offers a political arrangement against the backdrop of a broader metaphysics. The various Marxist states of the twentieth century, for instance, were formed against the backdrop of a materialist metaphysics. Various aspects of these states however are rejected as unjust. It is difficult to think of a single political arrangement that discriminates against classes of human beings that does not justify its actions on the basis of a broader system of metaphysics. And so the appeal to principle in the case of Rawls's distinction is unsatisfactory. Furthermore, Rawls's appeal to rationality and the work of the Veil of Ignorance is also unsatisfactory, as I will argue in the next section when I consider the social contract nature of Rawlsian justice. I will argue this on the basis that while it may be true that he establishes equality in and through the Original Position, it may nevertheless be the case that certain groups of people, as in the case of the severely cognitively disabled, are excluded from the Original Position altogether because they lack the requirement of rationality of the parties, and therefore discrimination persists.

The ultimate problem concerning Rawls which this project raises therefore is a metaethical one. It is a question of the sources of political value. Rawls is a constructivist: he coined the term. Rawls is of the view that political value is constructed by rational human beings in the Original Position. For Rawls there are no sources of political value that are independent of the rational human mind which features so strongly in the Original Position. It is however precisely the view of present-day free-states that human beings do not have moral worth because they possess a certain feature; but rather, that human beings have the moral worth of human dignity by mere virtue of being human beings. It is precisely the view of present-day free-states that human beings do not construct the moral worth of



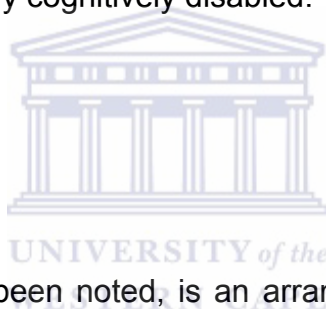
other human beings; but rather, that human beings have inherent, inalienable moral worth in their human dignity which they bring into the present-day free-state. Such moral worth is not constructed, but rather, it is discovered. Rawls cannot accommodate this kind of moral worth. At best he locates this moral worth in the capacity to reason. But this is at odds with the severely cognitively disabled who enjoy this moral worth but lack capacity for reason. And in being unable to accommodate this kind of moral worth, the severely cognitively disabled are not considered full citizens in his polity.

In the next section I identify this problem with Rawls's theory as a problem created by the social contract nature of Rawls's theory. I argue that it is the very structure of the social contract that excludes the severely cognitively disabled.

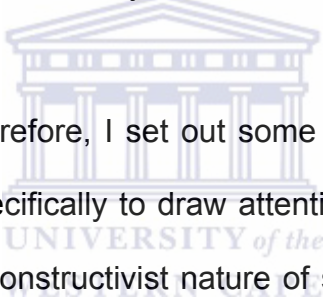
## **2.3 The Social Contract**

### **2.3.1 Introduction**

A political arrangement, as has been noted, is an arrangement for persons. In being an arrangement for persons, persons have special political value. Any political arrangement, in not only distributing economic resources to the various members of such an arrangement, appropriates political value to certain beings by recognising those beings as persons, which that political arrangement serves. Furthermore, we know, from common-sense, that any political arrangement that excludes categories of persons, say Blacks or Jews, is an unacceptable political arrangement. Persons, by mere virtue of being persons, have political value – at least, equal human dignity. From our common-sense and widely-held intuitions then, we conclude that a political arrangement that excludes any category of persons is an unacceptable political arrangement. We rule out such a political arrangement on the basis of a metaethical point, for political arrangements must recognise the political value – derived ultimately from moral value – of *all* persons. My argument in



this project is that Rawls falls foul of this metaethical requirement: his political arrangement does not recognise the political value of a category of individuals that are regarded as persons in terms of common sense, namely, the severely cognitively disabled. I attribute this shortcoming of Rawls's system to the contract nature of his theory of justice. Contract theories, which require bargaining on the part of the eventual members of societies while they are still in a pre-political state, require capacity for reason so that such members are able to make choices. I aim to show therefore that contract theories, in general, require rational conceptions of members of the political arrangement; rational conceptions of persons, for the political arrangement is an arrangement for persons, and that such conceptions of persons, based on our common-sense notions and intuitions, are unrealistic and of no use outside of the ivory tower.



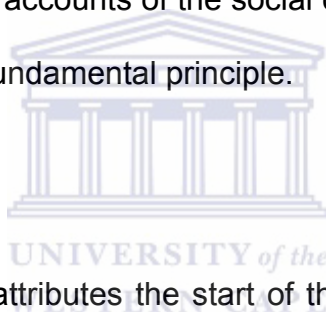
In the following few sections, therefore, I set out some of the major figures of the social contract tradition. But I do so specifically to draw attention to the constructivist<sup>8</sup> nature of social contracts. I will show the constructivist nature of social contracts by demonstrating how social contracts are dependent, in principle, on a conception of the person as rational, for parties need to be able to make (rational) choices in the social contract. And in adopting such a conception of the person, social contract theories are defective in principle and in general.

Before I venture into specific accounts of social contract theory, I can make an important observation about the social contract in general which pertains to my project. The fundamental action in the social contract, that of choosing features of the state,

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<sup>8</sup> *Constructivism* in metaethics requires that the source of moral and political value be the reasonable will, building on the Kantian categorical imperative, i.e. mind dependent. Realism, on the other hand, requires that the source of moral and political value is other than the reasonable will or rational mind, i.e. mind independent. There is a sense in which this project is therefore a critique of constructivism, but only in the sense that constructivism necessarily employs an unintuitive conception of the person. Or so I argue.

presupposes a capacity for reason and therefore excludes the severely cognitively disabled. This is a most fundamental aspect of the social contract. The social contract is based on what reasonable creatures would choose if they are in a certain position. It may be proposed that the severely cognitively disabled may be included if they have reasonable proxies choosing on their behalf, but the substantiation as to why reasonable choices are the right kind of choices for these non-reasonable creatures is at best unclear. This point will be revisited later in section 2.4. For now, we observe that the severely cognitively disabled are unable to renounce any rights they may have in the state of nature and to agree to absolute power of a sovereign. Social agreement depends on agreement of its members and so cannot be enforced where its members cannot so agree. The discussion of each of the specific accounts of the social contract which follows can thus be seen as an interpretation of this fundamental principle.



### **2.3.2 Socrates**

Christine Korsgaard (2003:101) attributes the start of the debate between constructivism and realism in metaethics to Samuel Clarke's response to Thomas Hobbes' social contract theory in the 16 and 1700s. In fact though, anybody who looks to the Ancient Greeks for discussion on the social contract will find Socrates gesturing towards the distinction between realism and constructivism in metaethics in his allusion to the social contract in *Crito*<sup>9</sup> and *The Republic* (1974). This survey of the greats of social contract therefore starts with one who is not usually praised for his contribution to the social contract tradition.

In *Crito* Socrates argues that the convict should accept the death penalty and not flee to another Greek city on the basis that an individual's way of life, up to the point of his very existence, is dependent on the law, which makes it possible for his parents to marry and

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<sup>9</sup> I use the online edition from Internet Classics Archive, Massachusetts Institute of Technology.

have legitimate children. Socrates argues that citizens are not coerced into obeying the law because they have the right, as adults, to take their property and move to a different city if they do not consent to the law of the city in which they live. He claims thus that staying in a city is equivalent to consenting to the law of that city, including the punishment which that city determines is suitable for crimes committed. It is this staying in the city which points to an implied social agreement or contract.

Importantly, this state law, if it could so be called, is law forged by the human inhabitants of that state. There exists no limit to this law: not even the value of the life of the individual supersedes the power of the state. And, importantly, the individual citizen, by remaining in the city and so consenting to this law, assents to the supreme authority of this state over the citizen, to the extent that the citizen may have to accept that the state has the authority to deprive the citizen of their life. It is interesting to note the idea that the individual citizen, through the social contract, has the power to bargain with his life with the state. But most importantly, we see the initial ideas of constructivism at work, precisely in a system resembling the social contract. What is crucially important for Socrates' argument is that the individual consents to the law and authority of the state, and rational capacity to do so is implied in this. The state receives its authority, even to execute the individual, because of this rational consent.

Yet in *The Republic* it is Socrates' interlocutor Glaucon who proposes a social contract in response to the question *what is justice?* (1974:41-53). Glaucon describes two extreme opposite scenarios. On the one hand, people want to be able to commit injustices against others to attain the greatest advantage, without the fear of any retribution which they may have to suffer at the hands of others. On the other hand, what people want to avoid is suffering injustice without having any recourse or being able to do any injustice to others in

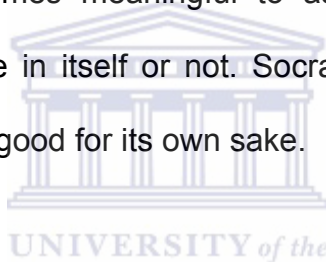
return. Glaucon therefore proposes a middle-path, which could easily be developed into a social contract: “the conventional result of laws and covenants that men make in order to avoid these extremes” (Friend, *DU*). What is needed, in Glaucon’s view, is a compromise, and such a compromise can only arise out of rational deliberation. The centrality of the capacity for reason in the contracting parties is again implied.

Socrates in response to Glaucon’s social contract rejects this view and argues instead for the intrinsic value of justice: that justice is good for its own sake, not for some benefit such as social cooperation which may arise out of it, as Glaucon argues.

Socrates’ appeal in *The Republic* to the intrinsic value of justice – that justice is good *for its own sake* – seems to suggest that there is indeed a pre-state, pre-contract moral value, i.e. justice, which would not quite fit his view in *Crito* that says that political value comes from the rationally consenting mind. Recall that in *Crito* he paints a picture in which an individual person owes his existence to the state. This would be inconsistent with his position in *The Republic*, at which point he does not know that a vitalism which says *justice is to preserve all life at all costs* may well be what justice is. The just thing to do cannot be *to send a man to the gallows and preserve all life at all costs* at the same time. This move in *The Republic* sets Socrates apart from the Rawlsian discourse on the distinction between the *concept of justice* and *conceptions of justice*. For Rawls,

[T]he concept of justice [is] defined...by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role. (1999b:9)

The concept of justice is an abstract objective which political arrangements aspire to. A particular conception, though, is closer to what Socrates describes in *Crito*: a particular “interpretation”, to use Rawls’s language, of the concept of justice. Contrast this, then, to Socrates’ view in *The Republic*: that justice, which for Rawls is a thin concept, has value in itself: it is good for its own sake. Rawls sees a concept; Socrates sees justice as having moral and/or political value in itself. And a concept cannot have moral or political value. The concept of justice, in terms of Rawls’s definition as referenced above, cannot have value in itself; cannot be good for its own sake. To attempt to do this would be to commit an error of confusion of kinds, for the concept of justice in its high abstraction cannot be evaluated. It is only when the concept is reduced to a conception that justice can be evaluated: at this point it becomes meaningful to ask or say whether (this specific conception of) justice is valuable in itself or not. Socrates, in *The Republic*, thinks that justice, at the level of concept, is good for its own sake.



This is important for any meditation on the social contract because key in social contract discussions is when and how value, moral or political, activates. The central critique of Rawls in this project is the way in which his political system is unable to accommodate the moral and political value of the severely cognitively disabled because of the conception of the person on which he relies. In other words, Rawls’s system cannot accommodate important ways in which moral and political value activate: values which cannot be ignored; values manifested in the common sense conception of the person, for which political arrangements exist. Rawls, in the conception of the person which he employs, sees political value activate in a way that is not consistent with how we recognise political value in common sense. And as we see in two positions from Socrates, it is more probably because of the contract nature of Rawls’s system that he fails to accommodate the common sense conception of the person.

As we therefore continue traversing the significant developments of social contract theory, with special focus on how each of a few greats have dealt with the question of the person, we keep in our peripheral view the metaethical issues at play.

### 2.3.3 Thomas Hobbes

Thomas Hobbes (1588-1679) is a titan of social contract theory. Before considering his political philosophy though, it is important to note some of his views regarding human nature in general.

Hobbes believed that human beings are ultimately self-interested creatures. Everything that human beings do is pursuant towards some greater self-interest. Even bearing children, according to Hobbes, serves self-interest because it is believed that one day when the parent is too old to care for himself, the child who was reared will look after the ailing parent. The thesis that we are motivated, deep down, by that which we perceive to be in our self-interest, is known as psychological egoism<sup>10</sup>.

Following from this view of human nature, Hobbes also describes a state of nature: a pre-political state. It is in this state to which Hobbes's famous description of life being "solitary, poor, nasty, brutish, and short" (Hobbes, 2006:58) is applicable. The reason for this is that in this state it is literally a matter of survival of the fittest: every man for himself. The single most important objective for every single human being is survival, because survival is the ultimate self-interest. Hobbes furthermore greatly admired the advances brought about by the Scientific Revolution and therefore sought a scientific explanation for human behaviour. Out of his mechanistic theory of human nature Hobbes concluded in favour of

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<sup>10</sup> Along with Hobbes, Jeremy Bentham is the only other prominent theorist associated with psychological egoism. Thanks to Joseph Butler, psychological egoism has been rejected by most philosophers. Nevertheless, the view finds a strong support in one of the greats, Hobbes; and it is important to take cognisance of this view in order to understand Hobbes's political philosophy.

subjective normative claims: as (Friend, 2004) would say, “moral terms do not...describe some objective state of affairs, but are rather reflections of individual tastes and preferences”.

Human beings are therefore self-interested and vulnerable (in the state of nature). Further attributable to his mechanistic worldview is his view that human beings are also reasonable. Reason, for Hobbes, doesn't confer moral value as in the case of the Kantian system, but rather, has the function of enabling us to find the things we desire. These then are the three most important features of humans: they are self-interested, vulnerable and reasonable.

The question as to what should govern relations between individuals thus almost naturally arises, because so far Hobbes has concerned himself only with the individual. According to Hobbes, the first important move is to realise that it is in the interest of human beings to move from a state of nature into a social contract so that life can be more than just short and brutish. It is precisely because of their vulnerability in the state of nature, but also because they are reasonable that they will agree that there should be some sovereign to rule over them so that they can live in a society that is civil. In contrast to the state of nature, such a society would be in the interest of men as it would serve their survival better than the state of nature would. This civil society is established by the social contract, which consists in two major features:

- 1) all men are required to renounce the rights which they had against each other in the state of nature, and;
- 2) all men must agree to empower one person or a group of persons with the power and authority to enforce the first feature.



Laws enacted thus by the authority must seek to serve these two principles. They must protect individuals from each other, and such protection must come from the authority through the laws which it enacts. According to Lloyd & Sreedah (2014), it is also very important to Hobbes that any such authority is the absolute authority so that any risk of instability in society which may come about as a result of having two power-sharing authorities in the event that they are in conflict is avoided.

Such then is the superstructure of Hobbes's social contract. This will suffice for an analysis of the severely cognitively disabled in the Hobbesian picture, which I now offer.

Hobbes is very clear about who is included in the social contract. His conception of human beings is that they are self-interested, vulnerable and reasonable, with survival as the highest form of self-interest. While the severely cognitively disabled could be seen as vulnerable, they are certainly not reasonable, and it may even be hard to see how in some cases severely cognitively disabled human beings can be seen as self-interested. There is a sense in which certain cognitively average non-human animals are more self-interested than some severely cognitively disabled human beings. And it is out of this self-interest, vulnerability and capacity for reason that the political arrangement is formed. Such an arrangement therefore excludes the severely cognitively disabled.

The severely cognitively disabled, because of the structure of the Hobbesian contract, cannot be seen as equal participants in this society-forming tool, the Hobbesian social contract; and therefore cannot be seen as equal citizens with those who participate in the very formation of the society.

We therefore move on to another titan of the social contract theory.

#### 2.3.4 John Locke

Locke shares Hobbes's method in appealing to the state of nature and social contract, but that is just about where the similarity between the two ends. The most influential of Locke's political writing is captured in his *Two Treatises on Government*. Elsewhere in this project (3.3.4) I have described the first of the two which is a response to Filmer's *Patriarcha*. Here I delve a little deeper into the second of the two.

For Locke, in tandem with Hobbes, the state of nature is pre-political, but, in contrast to Hobbes, it is not pre-moral. Thus, while the state of nature is a condition in which there is complete liberty, there is very specific definition attached to this liberty, through the already existent morality, and man is not allowed to simply do as he pleases. Importantly, individuals in the state of nature are considered to be equal with one another, having already refuted the argument for divine supremacy which monarchs, for instance, enjoy; and because of this equality, they are equally bound by the Law of Nature because they are all capable of discovering this Law. This Law requires of men that they do not cause harm to each other in terms of "life, health, liberty, or possessions" (Locke, 2008:4). This state of nature therefore contrasts the Hobbesian state of nature significantly.

The state of nature is disrupted and war commences when one man violates the natural law by causing harm to another on one or more of the abovementioned grounds. For Locke, once war starts it is unlikely to come to an end, and it is in trying to avert this never-ending war that the need for a civil authority activates. Through the activation of this civil authority and the formation of the state, three things happen which then demarcates the state from the state of nature. Firstly, laws are enacted. Secondly, judges are required and

appointed in order to adjudicate the laws. And thirdly, an executive power to enforce these laws is established<sup>11</sup>.

Locke has been most influential in the area of the philosophy of personhood. It is Locke who is the pioneer of the PCV. From his political philosophy as sketched above we see that the citizens who are party to the social contract necessarily have the capacity for reason because they need to be able to see, when war breaks out, that appointing a sovereign authority to maintain law and order is the best way towards achieving same. From his philosophy of personhood, Locke's definition of *person* excludes the severely cognitively disabled, at least according to the conventional reading of Locke. Locke defines person as:

a thinking, intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing at different times and places (2007:115)



As we will see later, whether in fact this is what Locke's view holds has recently been opened for debate through Schechtman who proposes what she describes as a neo-Lockean conception of the person that accommodates the severely cognitively disabled. In any event, even if a Lockean conception of the person that accommodates the severely cognitively disabled is accepted, it cannot be employed in a social contract that necessarily requires the capacity for reason.

### 2.3.5 Jean-Jacques Rousseau

Rousseau uses the social contract in two distinct ways, namely in terms of the *naturalised* account and in terms of the *normative* account. The naturalised account of the social

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<sup>11</sup> This is a clear indication of Locke's influence on political theory for in South Africa today government is separated into three tiers: the legislator; the judiciary, and; the executive.

contract describes the evolution of human beings in terms of morality and politics over time. Human beings move from being in a state of nature to a modern society by virtue of this evolution. The second, normative social contract, *The Second Discourse*, sees Rousseau try to address and alleviate the problems citizens of the modern society face. For Rousseau, people in the state of nature lived relatively uncomplicated lives; lives without competition, given the few people around relative to the number of people in modern society. These few needs, thus, were easily satisfied by nature in its abundance, and as such, there was no economic problem (limited means vs unlimited needs) and no need for distributive justice.

For Rousseau, one of the most important events in history for humanity was the invention of private property. It was private property that moved humanity from a state of nature which was simple and pure into a state that was characterised by competition, greed, vice, inequality, and vanity. It is the introduction of private property that led to growing inequality. This inequality, in which some have private property and others not, leads those who have private property to realise that creating a government would be in their interest as it could protect them from those who do not have private property and who may attempt to acquire that property by force. This thus establishes an interesting position for the existence of government. Government is established to treat all equally and to provide equal protection for all, but in actuality, this equality that government enforces has the specific purpose of protecting the inequality which the private property gives rise to. The way in which Rousseau sets out this view plays its part in showing that it is problematic. This is Rousseau's naturalised social contract.

His first, naturalised contract is an attempt at a descriptive account of how humanity evolved from a pre-contract state of nature into a modern society. His second, *normative* social contract seeks to offer answers to the questions raised by the naturalised social

contract. Rousseau's oft-quoted "Man was born free, and he is everywhere in chains" (Rousseau, 2010:1) captures his view that human beings are born free, and that the purpose of the political arrangement is to attempt to return to this state of freedom. For Rousseau, it is the evolution of civilisation that has led to humanity being enslaved. And this accounts for such categories that do not typically conform to conventional notions of slavery: social inequality, economic inequality, dependency, and even "the extent to which we judge ourselves through comparisons with others" (Friend, 2004). These often occur in societies where slavery has been made illegal, but as Rousseau suggests, they nevertheless have the same effects on our freedom as slavery does.

Rousseau argues that it is when citizens submit their individual wills in favour of the wills of the collective or general will that citizens are able to live together and freely. This is achieved through agreement with other citizens who are born free and equal. It should therefore be clear that Rousseau's citizens need the capacity for reason. This general will is thus the highest authority, and it is therefore only the authority generated out of covenants or agreements that is justified authority. Rousseau states that the act of individuals who come together to form the community is the foundation of society. A major problem for Rousseau in including the severely cognitively disabled is that the severely cognitively disabled lack the ability to consent to relinquishing their pre-political rights in favour of the general will. Rousseau's argument is precisely that it is the rational option to trade individual rights in the state of nature for the rights offered by the political arrangement because this would be packaged with protection from the state, which affords and ensures those rights. And, of course, any ability to make a decision presupposes a rational capacity. At the least then, and as with all the social contracts considered so far, the rational capacity required to participate in both the naturalised and normative social contract excludes the severely cognitively disabled from Rousseau's social contract.

### 2.3.6 Rawls in the Social Contract Tradition

The social contract theorists referenced above can all be seen to have treated the state of nature as an actual state. Hobbes, for instance, thought that all sovereigns are in a state of nature (Lloyd & Sreedhar, 2014), in addition to thinking that uncivilised societies – “the savage people in many places of America” (Hobbes, 2006:58) – and societies which were once in a state of peace but which “have collapsed into a state of war” are also in states of nature (Lloyd & Sreedhar, 2014). In the naturalised social contract Rousseau sees the constant evolution of morality and politics as moving from a state of nature to a state of peace, and so there is a sense in which we are in a state of nature right now. And in seeing the state of nature as the goal of our political arrangements, so closely characterised to the unadulterated creation of God, at the very least, Locke sees the state of nature on the day God rested, i.e. the seventh day; and can see the restoration of the state of nature in heaven, which is in an actual state, even if that state is at the end of time. The idea that humans have to actually choose to move into a political arrangement to avoid the unfavourable, dangerous conditions of the state of nature is quite different to the Aristotelian view that human beings are political by nature. Human beings have to actually make the decision; they have to move from the state of nature to society. The state of nature is not some hypothetical situation: human beings have to go against their nature and enter into some kind of compromise in order to survive. In describing a human being, contrarily, as a political being; by nature a social being, Aristotle grounds the political arrangement not in human construction or choice, but rather in (human) nature itself. In this sense, it is not so much in the interests of individuals to consent to a social contract as the above theorists opined as much as it is natural and therefore closer to something that individuals have to deal with, whether they like it or not.

Rawls marries the two seemingly contrasting views of Aristotle and the social contract. Rawls's answer is to use the Original Position specifically as a hypothetical scenario, such that it becomes, rather than an actual means of setting up the political arrangement, a test and assessment at any chronological point in the existence of the existing political arrangement. So, at this very moment it is possible to put yourself in the hypothetical Original Position to assess an existing political system for justness. And because you are a rational being, you are bound by the rational products of the Rawlsian system. But what is significant is that the Original Position, Rawls's state of nature, is *conceptually* hypothetical. Society and the political arrangement, akin to Aristotle's view that human beings are by nature political beings, are existent where human beings are. It is not possible to conceive of human beings in an actual state of nature on the Rawlsian view, because the state of nature, for Rawls, is strictly hypothetical: it is a thought experiment.

The structure of Rawlsian justice is such that it is not a subjectivist type of justice that legitimates the whims and capricious desires of the individual citizen, but rather, it is subjective in the sense that it seeks to prioritise the needs of the individual in the society. This is why the centre of the Rawlsian system is the question, *if you were in the Original Position, what principles of justice would you agree to?* What negates the subjectivism in Rawls's system is his requirement that those who are asked and answer that question are rational, and therefore, through rational exercise, Rawls is able to forge an argument for principles of justice that all rational beings, ignorant of their individual characteristics in society behind the Veil of Ignorance, will agree to. The structure of Rawlsian justice is also therefore necessarily that its principles of justice apply only to rational beings, and exclude all creatures incapable of rational deliberation – being incapable of answering the central question. The severely cognitively disabled are certainly excluded in this way from Rawlsian justice.

This brings us to another major objection to the social contract, which Rawls must also answer. Specifically, as hinted at in the introductory remarks to this section, Clarke complained that Hobbes could not account for obligation. It is worth quoting Korsgaard (2003, 102) here in full,

...Hobbes says that obligation springs from the social contract, and if that is right, how are we to explain the obligation to be faithful to the social contract itself? *That* obligation cannot come from the contract. So according to Clarke, Hobbes faces a dilemma. On the one hand, Hobbes could admit that being faithful to the social contract is fit and reasonable in itself. But in that case he may as well admit that other morally required actions are fit and reasonable in themselves too, and therefore do not depend for their obligatory character on the social contract. On the other hand, Hobbes could insist that being faithful to the contract, and the other things the sovereign compels us to do, are not fit and reasonable in themselves. In that case what we call “moral obligation” is really just the exercise of arbitrary power, on the part of either God or a sovereign.

Now mention should be made of the *a priori* fact that, considering the nature of the concept *God*<sup>12</sup>, assuming that God existed, if moral obligation does come from God then it is literally the “exercise of arbitrary power”, as Korsgaard characterises it. But this kind of

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<sup>12</sup> I am generally unimpressed by the way in which mainstream secular philosophers use the concept *God*. The conception of God used here by Korsgaard, for instance, necessarily is a *being* that is ontologically separate from *the good*. The Euthyphro dilemma, considered in mainstream secular philosophy as a strong challenge to grounding morality in God, also employs such a conception of God/the gods. I need only point to Thomas Aquinas who proposed the ‘*ipse actus essendi subsistens*’ which is not only *not* a being – even *a/* the Supreme Being – but which is also ontologically attached to the good, which means that both Korsgaard and Euthyphro don’t apply to Aquinas. The treatment of the concept *God* in mainstream secular philosophy is of course not something that can be addressed, let alone exhausted in this project, but the point that it is not as clear-cut as it would seem in Korsgaard’s quote above or the Euthyphro dilemma should be made in this project, especially in so far as our reflection on Locke’s political arrangement is concerned.



exercise of arbitrary power, i.e. on the part of God, would be quite different to the exercise of arbitrary power of a sovereign, because there is an *a priori* distinction in the conceptual natures of God on the one hand and (political) sovereigns on the other. The conceptual nature of God would justify exercise of arbitrary power on the part of God, and give it normative force, and so nullify the arbitrariness of the exercise of power, precisely because the exerciser is God. The same cannot however be said of a political sovereign.

In short then, nothing in the contract itself can tell us why we should obey the contract. Locke offered a solution to his contract which was very different from the Hobbesian contract: God; and as we have just said, even though at least Clarke and Korsgaard are reluctant to accept Locke's proposal, there is at least some explaining to do on both sides. There is considerable scholarly activity looking at Hobbes's subscription to religion and God, but Hobbes's characterisation of the state of nature, on the face of it, excludes the hope which the concept of a god gives, for life indeed is short and brutish. Locke, on the other hand, characterises the aim of the social contract, which is a human construct, as being the attainment of the state of nature, God's construct. And, as stated in the previous paragraph, in light of the very nature of the concept *God*, the will of God has normative value and pursuing it is an obligation. The problem with this though was that people were taking a more and more unfavourable view of God, given all the other intellectual problems which religion and so on had given rise to. This was therefore not a satisfactory answer either to the question of the source of obligation in the contract.

In response to the question about obligation in the social contract Rawls points to Kant, and specifically, the Kantian conception of the person. Not only does the rationality of the Rawlsian Original Position lock you into the social contract, it also secures your pre-contractual moral value as individuals should never be treated merely a means to an end,

but always as an end too, to rephrase the second formulation of the categorical imperative. The reasonable will of rational human beings, in terms of Kantian moral philosophy, is the source of normativity and obligation. Christine Korsgaard (1996) has written an impressive book arguing for this. But recall that we have said that there is no such thing as an actual pre-contract position for individuals included in the political situation, as far as Rawls is concerned. At best such a position is only hypothetical, as the Original Position is hypothetical. While you may therefore speak of the pre-contract moral value of individuals, such pre-contract value can only ever be considered hypothetically. For Kant, normativity arises out of the reasonable will of a rational human being. This, after being imported into the Rawlsian system, is what enables the individual to consider itself in the hypothetical position and which gives the individual moral value which the individual therefore possesses intrinsically. It is the capacity to form a reasonable will which demands that the individual never be treated only as a means to an end, but always as an end as well. It is the ability of the individual to consider himself in the hypothetical situation that constitutes this intrinsic moral value, for the ability to consider himself in any hypothetical situation presupposes rational capacity. Along with all other non-rational animals in creation, the severely cognitively disabled, in their inability to consider themselves in that Rawlsian hypothetical situation, are therefore excluded on the count of the obligation to obey the social contract in Rawls's system.

Rawls is therefore committed to a conception of the person as necessarily rational and as having the capacity for reason. The obligation to obey the social contract, forged out of rational deliberation, arises out of the capacity for reason which the parties to the contract possess. If the parties to the Rawlsian contract do not possess the capacity for reason, his system comes apart. The problem with Rawls, and all of the other great social contract theorists, is the very nature of the social contract. It presupposes a conception of the

person that is simply not employed in our modern political arrangements. The social contract nature of Rawlsian justice presupposes a conception of the person that makes unacceptable exclusions of a certain group of human individuals: the severely cognitively disabled. And by today we have reached a point where any exclusions are unacceptable, for as Schechtman (2014:113) says,

We do not, when we encounter animate things in daily life, make an assessment of their attributes and capabilities before deciding whether they should be view and treated as fellow persons. When we encounter other humans we automatically see them as persons and interact with them as such.

What appears here as an intuition from Schechtman has been substantiated in the positive law, which will be considered in due course. What I am saying now is quite simply that a conception of the person that excludes any human being from personhood is unacceptable, and this is something most patent in the political arrangement. Rawls is guilty of just this.

## **2.4 The Problem with the Structure of the Social Contract**

To further spell out this problem, consider that apartheid South Africa was democratic. There was nothing new in introducing democracy to South Africa in 1994. What was new about South Africa in 1994 was that democracy had been universalised amongst citizens over the age of 18 years across race divides. During apartheid, on the other hand, even though a system of democracy was employed, this system excluded the large Black majority of people in South Africa and treated them as non- or sub-citizens. Non-White South Africans did not enjoy equal citizenship to White South Africans. When the world imposed sanctions on South Africa during apartheid and accused the government of

human rights violations, the South African government may as well have retorted that democracy is in fact in place in South Africa, and, against the backdrop of an extensive apartheid ideology, that any exclusions were based on principle and therefore not arbitrary. The rest of the world, of course, appealed to the same common sense intuition that we have highlighted in the first chapter of this essay: that all human members of a political arrangement are equal citizens and therefore no disenfranchisement of any group of people can be justified. The apartheid ideology, including its metaethical system which accounted for the sources of political and moral value, which justified the apartheid political arrangement, was thus rejected.

Social contract theory, because it excludes a group of human beings from being equal citizenship, is akin to apartheid theory. It is indeed possible, within the social contract framework, to appeal to principles which justify the exclusions. A social contract theory such as the Rawlsian polity may well be based on a broader metaethical system such as neo-Kantian constructivism; which metaethical system can provide a principled, as opposed to arbitrary exclusion of a certain group of people. But our common sense intuitions which say any exclusion is unjustified must send us back down the same ladder of reason and rule the principles of our ideology as either deficient or outright illegitimate. We then need to reposition our ladder and start again.

Because of social contract theory in all its richness, the exclusion of the severely cognitively disabled is not arbitrary. But we are not prepared to accept that the severely cognitively disabled are not equal citizens, or any group of human beings for that matter, and therefore we are forced to accept that the social contract theory, as it has been presented with Rawls as its representative, is unacceptable.

## 2.5 Conclusion

In this Chapter we have reflected on two things, Rawlsian justice and the social contract. After detailing Rawls's system of justice sufficiently to appreciate his conception of the person, we proceeded to look at social contract theory and how Rawls has contributed to the tradition. We have therefore both unpacked the social contract in some of its major forms and considered Rawls's attempts to address the weaknesses of the social contract. We have, however, noted that the solutions which Rawls offers to set his social contract apart from other social contracts creates insurmountable problems for Rawls; problems which no serious thinker today could ignore; problems which speak to the heart of Rawls's system. We have seen that it is in adopting a contract approach in his political approach that Rawls is committed to a Kantian conception of the person, and because of this he is committed to things to which the modern day political philosopher cannot be committed.

Ultimately, while social contract theory provides grounds for the principled exclusion of the severely cognitively disabled, the exclusion only serves to cast a shadow on social contract theory itself.

## Chapter 3

### Who should be Included?

#### 3.1 Introduction

So far, I have explained the contract nature of Rawlsian justice and the centrality of Kantian personhood to Rawlsian justice precisely because of the contract nature of his system. I am therefore in an appropriate position to turn my attention to an important part of this project, that being why the severely cognitively disabled should be included as equal citizen in the political arrangement. As I have pointed out in the first chapter, the severely cognitively disabled are recognised as equal citizens in the modern political state, and this is an important aspect of modern day political states which is based on widely-held intuitions. Rawls's system does not include them, and at face value, this may seem to be an uninteresting statement because we have just seen how the social contract tradition excludes the severely cognitively disabled, and even Rawls admits that his theory does not address the demands of the severely mentally disabled. See, for example, what he says here (1993: 21):

While we would like eventually to answer all these questions<sup>13</sup>, I very much doubt whether that is possible within the scope of justice as fairness as a political conception.

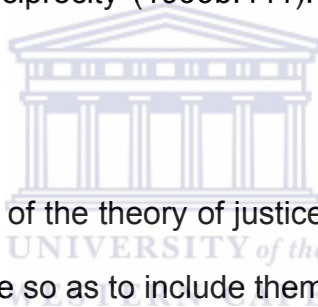
The objective of this project though is to show that the root of this problem subsists in the skeleton of Rawlsian justice, meaning that the problem has far-reaching consequences for Rawlsian justice on the whole. The objective is to show that the problem is so deep-rooted

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<sup>13</sup> These "questions" refer to four questions, a) care for the mentally and physically disabled; b) justice across national boundaries; c) what we owe to non-human animals; and, d) the problem of future generations. He goes on to say that care for the disabled and providing for non-human animals are areas in which justice as fairness fails.

that it renders the entire Rawlsian system questionable, if not objectionable, such that the hope of answering those questions expressed in the quotation cannot be met. It is true that he concedes that his system may not be able to deal with these issues at all, but he only recognises this in a way that nevertheless allows for his system to still be pursued. In fact, these issues strike at the heart of his system, such that his system should not be pursued.

In brief terms, I argue exactly why the fundamental problem with Rawlsian justice is the Kantian conception of the person on which it is based. Rawls is clear that rational human beings have no duties of justice to nonhuman animals because they (the nonhuman animals) have no capacity for reciprocity (1999b:441). He does say that they are owed “compassion and humanity”, but



they are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in any natural way (1999b:448).

Rawls, here, is talking about nonhuman animals. However, based on the Kantian conception of a person, what Rawls says here must be extended to non-rational human beings: the severely mentally disabled for instance. What is clear from the above statement is the centrality and weight of reciprocity: something of which the severely mentally disabled are not capable. It is this capacity for reciprocity, realised in the Original Position behind the Veil of Ignorance, which invites people to participate in the Rawlsian system. Reciprocity is tied to the Kantian idea of universalization as captured in the first formulation of the categorical imperative, and so the capacity for reciprocity is the capacity for reason: the capacity to universalise a maxim: *what I think should go for you, goes for me*. This is the way in which the Kantian conception of the person is placed at the centre

of the Rawlsian system, and it is the Kantian conception of the person that poses the greatest challenge for the Rawlsian system because of the counter-intuitive exclusions it involves.

Firstly, I raise the question that Rawls has to answer by looking at the work of Martha Nussbaum. Nussbaum is critical of Rawlsian theory, which she describes as “the most subtle and adequate” of all social contract theories, in that the principles it suggests are unable to afford people with severe mental disabilities their entitlements (Nussbaum, 2009: 332). And so Nussbaum offers a response to Rawlsian justice as part of her advocacy for her own project in the capabilities approach. While there can be no doubt that the capabilities approach, at the very least as developed by Nussbaum, is a system with serious theoretical credentials, part of my project is to show that the response that Nussbaum offers to Rawls does not adequately address the problems which she raises in Rawls, and I intend to do so by arguing that she is addressing only the symptoms of a greater problem which affects Rawls. This greater problem is that because of the Kantian conception of the person which is at the heart of Rawlsian justice, non-rational human beings are not equal citizens; and I argue that Nussbaum either does not sufficiently dispel subscription to Kantian personhood or, where she does, does not detach herself sufficiently from it, as evidenced by the actual capabilities which Nussbaum lists. Nussbaum, as will be shown, does attempt to incorporate the severely mentally disabled and show why they have entitlements, but she does so on the basis of what she calls a non-contractarian version of the ethics of care, and as such, in light of her other work as will be shown here, is not in a position to include the severely mentally disabled as equal citizens.



I then proceed to look at the actual problem of the Kantian conception of the person. Nussbaum assists us in making the move from philosophy to constitutional law as she is clear that her list of central capabilities should provide foundational principles for constitutions around the world, and so the second section in this chapter looks at the way in which the positive law in South Africa post-1994 has dealt with the question of human dignity. The reason I venture down this road is to demonstrate confusions between different kinds of moral and political values. At the outset, I acknowledge that when the justices of constitutional courts were looking at the issue of human dignity in adjudicating their cases they were probably not mindful of the concerns of this project. Nevertheless, I argue that there is enough information available to these justices to avoid the confusions I point out. These confusions are confusions of kinds of value. I argue that the confusion arises out of a misunderstanding of the way in which these different kinds of value relate to each other. And I show how the confusion not only has implications for the capabilities approach, but, much more importantly for the charge against Rawls, I argue that it is this confusion that leads to the exclusion of the severely mentally disabled from Rawls's system. It also bears mention that while I look at South African constitutional law, the principles I pursue are universal and so should apply beyond the borders of the Republic of South Africa.

Finally, in this section looking at Nussbaum, the astute reader may well find themselves being annoyed at the way in which the terms *person*, *citizen* and *human being* are used interchangeably, and rightly so. This is an essay in the metaphysics of personhood, which is precisely concerned with distinguishing between these kinds of terms and seeing how they fit together. To run them together in the way in which they appear to be below should amount to a grave difficulty. All I can ask of the reader is to bear my acknowledgement of this in mind because my use of the terms as they appear below bears testament to what I

claim is in reality Nussbaum's fault: that she runs the terms together at certain times while keeping them appropriately separate at other times. I therefore share the sentiments of the astute reader.

In brief then, I establish the main problem with Rawls by using the work of Nussbaum. I then look at why the problem is a problem.

### **3.2 Nussbaum and the Capabilities Approach**

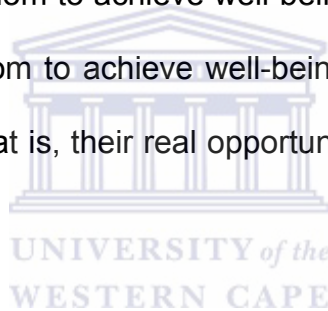
#### **3.2.1 A Political System is a System for Persons, not Grizzlies**

Imagine a metaethical theory that describes the source of dignity, and the rights that flow from this dignity, to be a quality that only grizzly bears possess. As such, an ethical theory may be developed containing something like human dignity as we know it which applies to grizzly bears: *grizzly dignity*, if you will. From this grizzly dignity we are able to develop a political system making provision for a number of rights or entitlements based on this grizzly dignity: the right to roam freely in the woods; the right to catch all the salmon they can eat; the right to territorial protection for males; the right to not have to mate for two years after a litter for females; the right of protection for two years from parents for cubs; and so on. It should be clear in this system that the rights which flow from the dignity possessed by the bears need to be applicable to bears. It is because of this grizzly dignity that the bears have the grizzly rights, but the grizzly rights need to be based on grizzly dignity. So, for example, it wouldn't make sense for the political system to contain the right to freedom of speech because bears can't talk. It wouldn't make sense for bears to have a freedom of religion because bears do not have sophisticated enough cognitive states to be religious. The rights which bears enjoy are a protection of the dignity which bears possess: so roaming in the woods, for example, is an essential part of the nature of the bear and this is why the bear has that right to roam the woods freely: it allows it to live a life that is

becoming of a bear. Male bears are territorial, and this is an essential part of the nature of a bear. On this basis the right to territorial protection for male bears is established, and an infringement on this right to territorial protection is ultimately an infringement on the dignity of the bear because it denies the bear of being a bear. In other words, the purpose of rights is to enable bears to be bears and not for them to be that which they are not.

This is a translation of the underlying thinking of the capabilities approach. The capabilities approach is a theoretical framework that is based on two main normative claims, here described by Robeyns (2011),

first, the claim that the freedom to achieve well-being is of primary moral importance, and second, that the freedom to achieve well-being is to be understood in terms of the peoples' capabilities, that is, their real opportunities to do and be what they have reason to value.



The first normative claim is based on the Aristotelian question as to what activities characteristically performed by human beings are so central that they seem definitive of a life that is truly human. The idea is thus that there is a minimum standard which determines when a life lived is a truly human life. To return to our opening story, the normative claims of the capabilities approach rely on a conception of the human being, and this conception of the human being includes a dignity which the human being possesses, which dignity informs a minimum standard that must be met in order for the human being to live a life that is truly human. The standard can either be translated into human rights, as I have done with the bears, or they can be described in terms of capabilities required in order to reach this minimum standard of a truly human life, as

Nussbaum has done<sup>14</sup>. They point to the entitlements which human beings enforce on society because by virtue of being human beings, those entitlements secure a truly human life.

The significance of describing this standard in terms of capabilities and not just rights as other liberal systems do rests in the second normative claim of the theory: that freedom is not some abstract concept that is contained and satisfied in terms of some lofty intellectual ideology and inaccessible bill of rights, but rather that freedom is to be understood in terms of the real opportunities that people have “to be and do what they have reason to value” (Robeyns, 2011). So whereas conventional liberal systems will contain a set of abstract ideals, and spend their energy on trying to achieve these ideals, there is a strong focus on the practical achievement and/or realisation of the capabilities by achieving the minimum standard. And this minimum standard is determined by what is essential to the concept *human being*: what the human being – not the grizzly bear – needs in order to live a life that is truly human.

According to Nussbaum (2000:78-80), the capabilities approach was pioneered by Amartya Sen, and while he does not provide a list of capabilities, she does. I provide the list of capabilities here, with the explanation of each which she provides:

- 1) *Life*. Being able to live to the end of a human life of normal length; not dying prematurely or before one’s life is so reduced as to be not worth living;

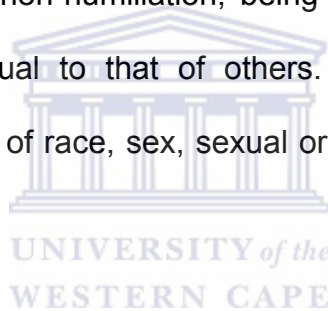
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<sup>14</sup> The disjunction here does not contrast capabilities and human rights at the conceptual level, because, conceptually speaking, Nussbaum thinks of her capabilities in terms of human rights. The disjunction here rather refers to what the political arrangement actually articulates in practice. In other words, South Africa has a Bill of Rights and not a Bill of Capabilities, but it could just as easily have had a Bill of Capabilities.

- 2) *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter;
- 3) *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction;
- 4) *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and reason — and to do these things in a ‘truly human’ way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth. Being able to use one’s mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise; being able to have pleasurable experiences, and to avoid non-necessary pain;
- 5) *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one’s emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6) *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience.)

7) *Affiliation* (A) Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and to have compassion for that situation; to have the capability for both justice and friendship. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.) (B) Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or national origin.



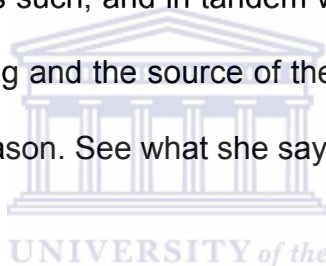
8) *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9) *Play*. Being able to laugh, to play, to enjoy recreational activities.

10) *Control over one's Environment* (A) Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association. (B) Material. Being able to hold property (both land and movable goods); having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work,

being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

It should be clear that the above list of capabilities is based on a specific conception of the human being, for these capabilities secure a truly human life. And at face value, all of this is acceptable enough. But things become interesting when we return to the central question of this research project, because the same question which Rawls must answer is also an important question for Nussbaum to answer. If the capabilities approach is based on enabling people to live truly human lives, then the concept *human* is crucially important to Nussbaum's project. Nussbaum (1999:71) subscribes to a "conception of human beings as essentially rational agents." As such, and in tandem with Kant and Rawls, the essential quality that defines a human being and the source of the value 'human dignity' is practical reason, i.e. moral and political reason. See what she says here:



At the heart of [the tradition of liberal political thought] is a twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is a power of moral choice within them, a power that consists in the ability to plan a life in accordance with one's own evaluation of ends (1999: 57);

and here,

the core rational and moral personhood is something all human beings share, shaped though it may be in different ways by their differing social circumstances. And it does give this core a special salience in political thought, defining the public realm

in terms of it, purposefully refusing the same salience...to gender and rank and class and religion (1999:70).

In *Woman and Human Development* (2000), in putting forward her own brand of feminism, Nussbaum embarks on an interesting discussion on paternalism. She begins by noting that many cultures reject external values as paternalistic: as ‘the Other’ – usually Western – telling them what to do. She proceeds to show that this principle cannot be applied in blanket fashion because in some cases paternalism applies where

we should prefer a universal normative account that allows people plenty of liberty to pursue their own conceptions of value, within limits set by the protection of the equal worth of the liberties of others. [Paternalism] gives us no good reason to reject all universal accounts, and some strong reasons to construct one, including in our account not only the liberties themselves, but also forms of economic empowerment that are making the liberties truly available. (2000:55)

Nussbaum makes a valuable point about the way in which terms such as *paternalism* are used, particularly in the political movements such as feminism. What is significant for our purposes here is the assumption she makes with regards to the truisms of liberalism.

That these are truisms in Nussbaum’s thinking is demonstrated in her extensive work on Ancient Greece, particularly that of Aristotle. She (2000) describes what she refers to as her version of the capabilities approach with the following reference to Karl Marx (1844, as it appeared in Nussbaum, 2000:34), which is worth quoting:



It is obvious that the human eye gratifies itself in a way different from the crude, non-human eye; the human ear different from the crude ear, etc...The sense caught up in crude practical need has only a restricted sense. For the starving man, it is not the human form of food that exists, but only its abstract being as food; it could just as well be there in its crudest form, and it would be impossible to say wherein this feeding activity differs from that of animals.

Nussbaum points out (2000: 230) that at the time of writing the above, Marx “was reading Aristotle and was profoundly influenced by Aristotelian ideas of human capability and functioning.” He attempts, in this passage, to point out that it is something to perform certain functions – seeing, hearing, eating – “in a fully human way – by which he means a way infused by reasoning and sociability” (2000:230), in contrast to performing these functions in “a merely animal way” (2000: 230). She goes on to use this as a means of developing an understanding of human beings, and that understanding as a foundation for her version of the capabilities approach and the list of capabilities which she characteristically commits to. Educational deprivation, for example, is therefore an important issue for Nussbaum and is an issue she returns to repeatedly whenever she wears her feminist hat. Education is to rational beings what roaming in the woods is to grizzly bears. Her thinking can be captured in the reasoning that because human beings are rational creatures, human beings possess human dignity. Because of this human dignity, all human beings have certain entitlements based on their capabilities. The content of the capabilities is determined by the content of the human dignity: what kind of life is a life truly worthy of a human being? Hence, as human beings are rational – so a typical Nussbaum argument will go – and as women are human beings, women are entitled to the capabilities specific to rational creatures, such as education. In this way she has made significant contributions to development discourse.

Influential as her work has been for development discourse, it is part of the objective of this project to demonstrate that Nussbaum's work should leave philosophers perplexed. As we have seen with the opening remarks about grizzly bears, gesturing at it again in the immediately preceding discussion of Nussbaum, the content of the dignity informs the rights or capabilities. The content of the dignity is therefore crucially important, for it justifies why human beings have one entitlement and not another. Yet Nussbaum seems to have missed this important specificity, and as such, has built a house on sand. And it is not as if she has not thought about it (2000: 231):

At one extreme, we may judge that the absence of capability for a central function is so acute that the person is not really a human being at all, or any longer – as in the case of certain severe forms of mental disability or senile dementia. But I am less interested in that boundary (important though it is for medical ethics) than in a higher one, the level at which a person's capability is 'truly human', i.e. 'worthy' of a human being.

Here she explicitly excludes the severely mentally disabled as "not really a human being at all". But this flies in the face of the common-sense notions of human rights and its applicability to the severely mentally disabled. We simply do not think that when we speak of *the right to life* that it excludes the severely mentally disabled, and we certainly don't consider the severely mentally disabled non-humans. The common sense notion of human beings includes the severely mentally disabled, as does our common sense notion of human rights. This is therefore not a matter merely for medical ethics: it is, in fact, at the heart of her project because it answers the question as to the constitution of a life truly worthy of a human being, as such a life would have to be constructed on an acceptable

conception of *human being*. Nussbaum is caught between her acknowledgement of the common sense notion of human being which includes the severely cognitively disabled, when she critiques Rawls; and the conventional conception of the person in professional philosophy, when she constructs her capabilities approach. The fundamental problem which Nussbaum therefore faces is *arbitrariness*, because she is helping herself to the target group she wants while claiming a more universal foundation. The foundation group is 'human being', and once more, she is critical of social contract theories that exclude the severely cognitively disabled. But when obvious counter examples are presented – humans who do not have the capabilities, for instance – she denies they are humans, only allowing those with the capabilities into the group. Anthony Flew called this a “conventionalist sulk”. Nussbaum needs a principle concerning humans as humans to exclude them, and this is just not available. Individuals do not become human when they develop psychological sophistication, though they may well become *persons*. Nussbaum then either needs an argument to establish how the concept of person can be principally extended to include all humans or she needs, like Rawls, to exclude those without psychological capacities. But, as we have said, she has already committed herself to complaints against Rawls for doing so.

### **3.2.2 Aristotelian, not Kantian Dignity**

Nussbaum has more recently taken issue with Rawls directly with regards to the severely mentally disabled. She has addressed the centrality of the rational person, among other things, in *Justice as Fairness* (1985). In fact, Nussbaum faces the same problem that Rawls does. The problem is that, in both cases, the source of the minimum standard of a life truly worthy of a human being leads to an inadequate conception of the equal citizen. It seems Nussbaum's conception of the human being is more consistent with the Kantian conception of the person in the structuring of her capabilities approach than she should

allow for. And this preserves the kinds of questions she rightly says Rawls has to answer such as the question as to how we get from the Kantian conception of the person to why the severely mentally disabled have entitlements in the political arrangement. In a sense, it is as if Rawls either avoided the question or depended on his intellectual descendants to work out the question. Nussbaum builds her capabilities approach on a particular conception of the human being, which conception is consistent with the conception of the human being that is “at the heart of [tradition of liberal political thought]...”, and then later on brings in the severely mentally disabled on the basis of a non-contractarian approach to care, after saying why Eva Kittay’s suggestion of adding a third principle of justice to *Justice as Fairness* cannot work. The problem is that this does not make equal citizens of the severely mentally disabled. All of this will now be discussed, bearing *Justice as Fairness* in mind.



Nussbaum addresses this issue in *Frontiers of Justice* (2006) and is critical of the Kantian foundations of Rawlsian justice. She adopts a strategy of raising four problematic aspects of what she calls “the Kantian split”<sup>15</sup>. The first problematic aspect is that

the Kantian split between personhood and animality ignores the fact that our dignity is just the dignity of a certain sort of animal. It is the animal sort of dignity, and that very sort of dignity could not be possessed by a being who was not mortal and vulnerable, just as the beauty of a cherry tree in bloom could not be possessed by a diamond (2006:132).

Here Nussbaum has in mind a contrast between the dignity of God or angels, which were other beings Kant considered to be rational, and human beings, for she points out that the

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<sup>15</sup> The Kantian Split refers to Kant’s two-world view of human beings in the distinction between the rational and moral powers on the one hand and other aspects of the human animal on the other hand.

dignity of human beings is not the same as the dignity of God or angels, but rather the dignity of “a being who [is] mortal and vulnerable”: an animal. Nussbaum thus links personhood to the rational functions of human beings and makes the point that the animal nature of human beings in terms of the Kantian view affords human beings a dignity, a dignity not necessarily afforded to human beings on the Kantian view, thus locating a dignity of human beings separate to personhood in the animal aspect of their two-fold nature. It is not clear what the content of this animal-based dignity is besides mortality and vulnerability, and how this assists in the establishment of capabilities to ensure human beings live a life that is truly human is not clear either, because it is unclear as to what would distinguish the animal dignity in humans from the animal dignity in non-humans if the content of this animal dignity is mortality and vulnerability. But most importantly, the animal dignity which she extends to the severely mentally disabled is different to the rational being or person dignity which she extends to citizens. And it is this latter dignity, and not the animal dignity, that informs her list of capabilities, which must be seen as a whole. The way in which Nussbaum therefore uses Aristotle is important, because the subtle differences in her use and of the way I will use Aristotle in Chapter 5 must be detected and appreciated.

Secondly, Nussbaum says (2006:132),

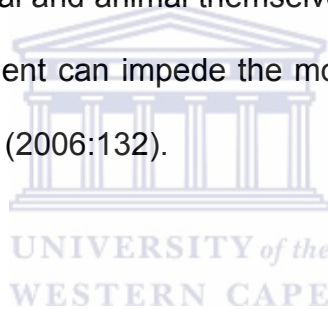
the split wrongly denies that animality can itself have a dignity; thus it leads us to slight aspects of our own lives that have worth and to distort our relation to the other animals.

The observations made about the so-called first problematic are largely applicable to the second problematic too. It bears mention that Nussbaum here affirms the grizzly-dignity

principle in that the content of the dignity informs the lower-order values such as capabilities – “...aspects of our own lives that have worth...” which she says the Kantian view would “slight” because it doesn’t take into account the whole human being – and how we see ourselves as a species or citizens in relation to other animal species, specifically in terms of the distribution of moral and political value.

Thirdly,

it makes us think of the core of ourselves as self-sufficient, not in need of the gifts of fortune; in so thinking we greatly distort the nature of our own morality and rationality, which are thoroughly material and animal themselves; we learn to ignore the fact that disease, old age, and accident can impede the moral and rational functions, just as much as the other functions (2006:132).



And fourthly,

It makes us think of the core of ourselves as atemporal. Thinking in this way, we may forget that the usual human life-cycle brings with it periods of extreme dependency, in which our functioning is very similar to that enjoyed by people with mental or physical disabilities throughout their lives (2006:132).

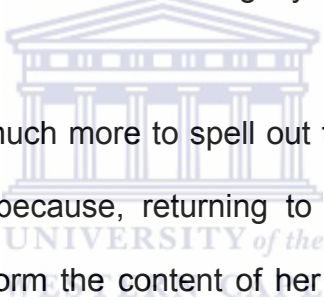
The last two problematic aspects speak to issues and concerns which are linked to some of the concerns raised by communitarians<sup>16</sup>: the idea that it is possible to think of ourselves as being able to make choices while being completely detached from everything else that constitutes selves besides rational nature. Significantly, Nussbaum points out

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<sup>16</sup> Alisdair McIntyre in *After Virtue* (1981); Michael Sandel in *Liberalism and the Limits of Justice* (1982)

here that newly born babies, for instance, share the same level of dependency as the severely mentally disabled.

The first two deal with issues pertaining to dignity and inherent moral value, and it seems this should serve as a response to the Kantian constructivist metaethics which says the reasonable mind imposes value onto a value-neutral world. The way in which Nussbaum describes dignity here implies a mind-independent value. Firstly, she would have to do much more to counter the extensive constructivist Kantian theory of value than she has done here. It seems that there are any number of people who would have reservations about the idea that human beings have an “animal sort of dignity” and that the Kantian split *wrongly*<sup>17</sup> denies that “animality can itself have a dignity”.



Secondly, Nussbaum has to do much more to spell out this view that human beings have the dignity that she describes, because, returning to the grizzly-dignity principle, it is ultimately this dignity that will inform the content of her list of capabilities, lest her list of capabilities be arbitrary. The jurist John Finnis (1980), in an interestingly similar way to Nussbaum’s list of capabilities, developed a list of seven basic human goods or forms of human flourishing. Finnis develops his list on the basis of natural law theory, having drawn from his colleague Germain Grisez, and as van Blerk describes in commentary, “especially Grisez’s grasp of Thomas Aquinas’ theory of practical rationality” (van Blerk, 1996:114). Now on what basis are we to say that Nussbaum’s list should be preferred over Finnis’s? Finnis, for instance, has no good on his list that correlates with Nussbaum’s *Control over One’s Environment*: so how do we measure the two? We measure the two by the extent to which they each ensure that they enable a life truly worthy of a human being; by the extent to which they correspond to the nature of the human being. And if the goods which a list

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<sup>17</sup> My emphasis.

ascribes don't correspond to the nature of the holder, then they must surely be cast aside. For just as bears don't need a right to freedom of religion, female human beings don't need a right not to mate for two years after giving birth or any other right that isn't essential to the nature of being a human being.

These concerns with the Kantian system point to the kind of diagnosis Nussbaum makes of the shortcomings of the Rawlsian system with regard to the severely mentally disabled. Nussbaum deals largely with the symptoms. Nussbaum reduces the problem to one of distribution of material goods so as to address the material needs of the severely mentally disabled. And considering that Rawls has repeatedly emphasised that his project concerns distributive justice, which looks at arranging our limited goods in such a way that it responds to our unlimited needs in the most fair and efficient way, one can easily see why this is so. But she is jumping the gun, for before we can ask how we are to arrange society to accommodate all those who enjoy entitlements, including the severely cognitively disabled, we must ask why the mentally disabled have any entitlements in the first place. In other words, if we are not able to say why we should make provision for the needs of the severely cognitively disabled at all in questions about distributive justice, then the most efficient arrangement in answer to the question of distributive justice would indeed include the disposal of those members of the human race who will put excessive strain on society through the very arrangements that Nussbaum goes on to argue for. It is therefore crucial for Nussbaum to answer the question as to whether or not the severely cognitively disabled should be included at all, before she can go on to say how they should be included. And in this way, both Rawls and Nussbaum cannot get away from the need to address questions of moral value before they can address questions of distribution. Rawls excludes the severely cognitively disabled from citizenship because of his subscription to the Kantian conception of personhood. This goes against our common sense. Nussbaum



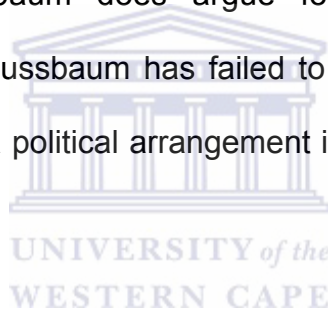
addresses this by including the severely cognitively disabled on the basis that they have an animal sort of dignity, but fails to see that she too excludes the severely mentally disabled from equal citizenship. Even though she argues that the severely mentally disabled do have entitlements, they are nevertheless not the entitlements of equal citizens; they are the entitlements of some other category of sub-citizens, perhaps parallel to non-human animal rights. Not only does she need to address the question as to why they are entitlements, she also needs to address this inconsistency with the common-sense view about the severely cognitively disabled and citizenship: the severely cognitively disabled are deemed equal citizens, albeit citizens with limited capacity to act.

### **3.2.3 Conclusion to this section...**

Recall the opening story in this section about grizzly dignity. The source of the moral and political value which informs what it means to live a truly human life must inform any entitlements. In the same way that it does not make sense to have a right to freedom of speech for bears, in order for Nussbaum's list of capabilities to work the capabilities contained therein must be based on what it means to be human. Nussbaum's conception of the human being, like Rawls's, is incompatible with the common-sense notion of a human being, which common-sense notion should adequate for the concept of citizen in free states, for while the severely cognitively disabled lack Nussbaum's core quality of what constitutes a human being, the common-sense view is not that the severely mentally disabled are non-humans and non-citizens. And this is fatal for Rawls's system because of what we have said of the importance to it of the Kantian conception of the person. But it also has implications for Nussbaum's list of capabilities, for in the severely mentally disabled we find human beings who do not qualify in terms of some of the items on her list, most obviously and at least the items dealing with senses, imagination and thought; practical reason; and control over one's environment, which includes being able to

participate in political activity in society, and the ability to hold property and seek employment (2000: 231-233). Part of Nussbaum's explanation would therefore be to tell us why Finnis's list is incomplete as they both rely on the conception of a life worthy of human being.

In concluding this section, we note that Nussbaum does take issue with Rawls by saying that Rawls's system does not adequately address the entitlements of the severely mentally disabled when it comes to distribution. But Nussbaum thinks *this* is the problem, when it is not. The problem is the Kantian conception of the person which stands at the centre of both *Justice as Fairness* and as I have argued, to too great an extent in the capabilities approach, even though Nussbaum does argue for an Aristotelian dignity which accommodates animal dignity. Nussbaum has failed to say why the severely cognitively disabled are equal citizens. Yet a political arrangement is an arrangement for persons, for persons are citizens.



Having said *what* the problem is, we now come to the reason as to *why* the Kantian conception of the person is a problem for political arrangements.

### **3.3 From Theories of Moral and Political Value to Constitutional Law**

I have said, so far, why both Rawls and Nussbaum suffer from the same essential problem: I have said that both *Justice as Fairness* and the capabilities approach is based on an inadequate conception of the person. In this section I focus on just why the Kantian conception of the person does not adequate to modern political arrangement. In brief, I argue that the incorrect conception of the person is based on a confusion of kinds of value.

### 3.3.1 Different kinds of value and Constitutional Limitations: Part I

When I was about twenty years old I was studying law at university. While busy with a particular assignment one day, I happened upon the Bill of Rights in the South African Constitution<sup>18</sup>. I noticed that the Bill of Rights afforded a number of rights – what I will call ‘practical rights’ – for different things: the right to freedom of speech, the right to equality, the right to freedom from slavery, and so on; but that when it comes to the issue of human dignity, the Bill of Rights states that

Everybody has inherent dignity and the right to have their dignity respected (s10).

For reasons unknown to me at the time this little deviance interested me, and has ever since. The drafters of the Constitution clearly approached the question as to which rights would be afforded to human beings on the basis of distinguishing between citizens *having inherent dignity and the right to have their dignity respected*. It interested me that the drafters would treat the value of human dignity as something that *everybody possesses inherently*, and that the practical right extended only to *having this dignity respected*. In other words, the clause could be read as being like

Everybody has a head and the right not to have their heads patted.

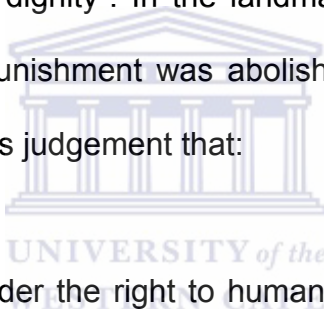
The idea in the above explanation is that the constitution or political arrangement cannot give citizens heads: citizens have heads whether they are part of the political arrangement or not. The right which the political arrangement extends to citizens merely extends to having their heads patted. This means that if individuals are not citizens of the political arrangement, they don’t have the right which the political arrangement affords them: not having their heads patted. It is only once they are in the political arrangement that they

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<sup>18</sup> Of the Republic of South Africa, Act 108 of 1996

have this right. And this is the way in which the human dignity clause in the Constitution of the Republic of South Africa works. The Constitution, according to the drafters at least, does not bestow a right of human dignity on people: human dignity is inherent to human beings, in the same way that heads are inherent to human beings, in a sense. The practical right merely extended to having that dignity respected. There is therefore a distinction between the kinds of values that inherent dignity is and other practical rights are.

Now it appears that there is not a strict distinction between the two kinds of value as far as the courts in the application of the law is concerned, and the Constitutional Court has on occasion spoken of “the right to dignity”. In the landmark Constitutional Court case *S v Makwanyane*, in which capital punishment was abolished in South Africa, Chief Justice Arthur Chaskalson remarked in his judgement that:



[u]nder our constitutional order the right to human dignity is specifically guaranteed (para. 58).

It would seem thus that the distinction between human dignity as something inherent in human beings and a constitutionally guaranteed *right to human dignity*, specifically as opposed to *the right to having your human dignity respected*, is not clear in so far as the interpretation of the statute by the courts goes. It would appear as though the courts treat *inherent human dignity* and *the right to human dignity* as being the same thing.

The matter cannot be left, though. As far as South Africa is concerned, the Constitution has a very specific theme and purpose, described in the provisions on National Unity and Reconciliation, in that it

...provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

Section 232 (4) affirms this as being the purpose of the Constitution and decrees that no other provision of the Constitution shall have a greater status than this one. The thematic purpose therefore of the Constitution is to provide a bridge between a society that was based on an old, now-rejected conception of justice and a society that is based on a new conception of justice: a conception of justice that recognises value in human beings that even the Constitution cannot dilute, for this is precisely what happened in the old order. In the old order the constitution afforded rights to only certain citizens<sup>19</sup>, thus legalising oppression. By appealing to a value beyond itself the Constitution at the same time places limits on itself. The Constitution can therefore be seen as the implementation of what Rawls theorises about: a better conception of justice: a conception of justice different from the previous conception of justice which Rawls and the new South Africa wants to improve upon.

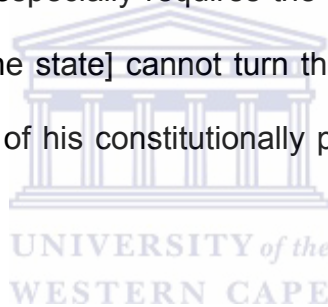
Yet to return to the reason for our venture into the field of constitutional law in the first place, there is an interesting relationship between the assertion in the Constitution regarding human dignity and the fact that it is inherent in everybody, and the way in which it has been interpreted by the courts. It is certainly not part of my objective to offer a

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<sup>19</sup> In *Staying Alive* Schechtman offers an interesting view on social infrastructures which oppress persons. My intuition is that such social infrastructures, e.g. apartheid South Africa, don't recognise the personhood of the oppressed. Schechtman says such social infrastructures do. I discuss this in section 4.2.2.2. For now, we take this literal statement at face-value.

critique of the judgments in the Constitutional Court of South Africa: the intention is merely to raise a *prima facie* problem to support and substantiate what I call the common-sense view of personhood, and then to point out its significance in terms of my critique of Rawls. The South African case is particularly interesting because the Constitution of 1996 is seen as the beacon of a shift from the old order to the new order: an old order that determined who was entitled to human dignity and rights and who was not. Furthermore, towards the objective of the new order, the drafters of the Constitution would have drawn from other constitutions around the world. To this end, a quick glance at what the German Constitutional Court has said on the matter may be of interest (1977):

Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.



The German Order seems therefore to be recognising the intrinsic moral value of individuals and rejects arguments which attempt to treat human beings merely as a means to an end, even if that end is crime prevention. From this intrinsic value wells a social worth and respect which is protected, and not activated, by the German polity.

In the Constitutional Court of the United States of America, Brennan, J (1976:173) said in his judgement that

[t]he fatal constitutional infirmity in the punishment of death [is] that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. [It is]

thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

These are cases dealing with capital punishment, and Brennan clearly sees a link between “treating members of the human race as nonhumans” and an infringement of human dignity. Chaskalson (in *S v Makwanyane*) cites Brennan (1972) in saying that the death penalty is inhumane because it “...involves, by its very nature, a denial of the executed person’s humanity”, and does so within the context of his interpretation of section 10 of the Constitution which deals with human dignity. The courts were certainly not concerned with the metaethical question of the sources of the values embedded in the Constitution and this is perhaps why the disparity between the Constitution statute and the interpretation of same by the courts exist. Yet all of this assists in laying the foundation for my critique of the Rawlsian system. All of this shows the connection between human dignity and humanity. Human dignity is not a moral value so malleably abstract that it can be anything and everything, including nothing. Human dignity has specific content because it is based on something specific: it is based on what it means to be a human being.

### **3.3.2 Different kinds of value and Constitutional Limitation: Part II**

What I have called ‘practical rights’ are based on this human dignity. The rights contained in the Bill of Rights, such as the right to equality, the right to privacy, the right to thought and freedom of religion, etc. are all guaranteed by the Constitution. Perhaps it can be said that in Rawlsian terms, the Constitution is based on the principles of justice chosen by South Africans in the Original Position<sup>20</sup>. The source of the practical rights enshrined in the Constitution is therefore the Constitution itself. That these practical rights are guaranteed by the Constitution is evidenced furthermore by the fact that section 36 of the Constitution

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<sup>20</sup> This claim, of course, is subject to some measure of oddity, and should therefore just be read in a literal sense and for the sake of analogy.

makes provision for the limitation of any of these practical rights. The Constitution is therefore the source of these practical rights for if the Constitution was not the source of these rights it would not be possible to limit the rights which it guarantees. If, for example, the source of the right to life was not the Constitution, then discussion on capital punishment would not even be possible in the Constitutional Court, for society would have to venture to the source, other than the Constitutional Court, of the right to life. It is the fact that the right to life is guaranteed by the Constitutional Court that enables the Constitutional Court to hear a matter like the *constitutionality* – which gives us a clue – of capital punishment. This places all of these practical rights in a particular category.

In a different category is the value of human dignity. The value of human dignity is inherent in human beings, as recognised by the drafters of the Constitution, because the value of human dignity is not subject to the limitation of section 36. Observe the essential difference between the two kinds of values, the value of *practical rights*, and the value of *human dignity*. I propose that we can distinguish between these different kinds of value by seeing practical rights as political value, and human dignity as moral value.

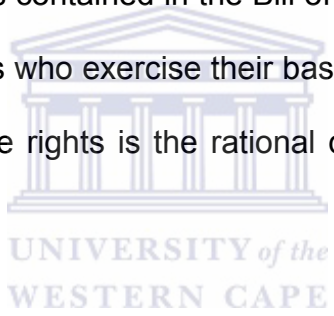
The political value of practical rights is something that Rawls recognises as a product of one of his principles of justice. The practical rights themselves are ultimately based on one of the two principles of justice, and the principles are derived from the decision making in the Original Position. In terms of its Kantian roots, it is the capacity to enter into the Original Position that affords persons human dignity: the fact that persons are ends in themselves. In this sense, it is the moral value of human dignity that gives rise to the political values of rights, via the first principle of justice. How exactly the value of rights are constituted in Rawls's system is specific to his system, i.e. in terms of the neo-Kantian constructivist metaethics which says that moral value arises out of the application of



practical reason by a rational being. From such an application Rawls derives his two principles of justice, one of which deals with equal distribution of liberties. These liberties are not practical rights, such as the rights contained in the Bill of Rights, but rather, these rights refer to basic liberties. Rawls says that the

[liberties not on the list, for example, the right to own certain kinds of property (e.g. means of production) and freedom of contract as understood by the doctrine of laissez-faire are not basic; and so they are not protected by the priority of the first principle (1999:54).

Practical rights, such as the rights contained in the Bill of Rights, are then derived from the decision-making of the individuals who exercise their basic liberties. And, in Kantian terms, the source of normativity in these rights is the rational decision making which underpins these rights.

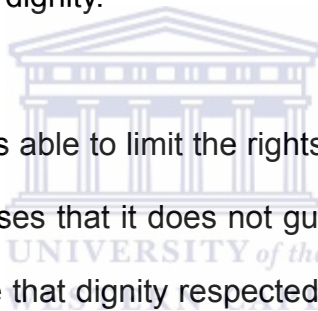


We can therefore think of these different kinds of value in these terms:

| <b>Kind</b> | <b>Value</b>          | <b>Description/eg.</b>        |
|-------------|-----------------------|-------------------------------|
| 1           | Human Dignity         | Original Position             |
| 2           | Principles of Justice | Basic Liberties               |
| 3           | Practical Rights      | Constitution (Bill of Rights) |

This table can be viewed in Rawlsian terms or otherwise. Each of these kinds of values is distinct. Starting at Kind 3, each of the kinds is dependent on the numerically preceding kind. Recall the points made regarding grizzly dignity and human dignity; that human rights are appropriate for human beings, not grizzlies, and vice versa. We determine what rights

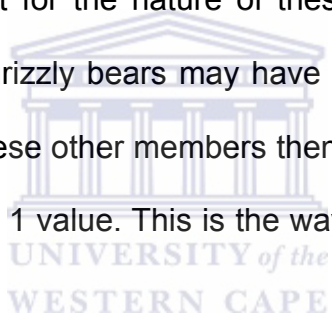
are appropriate for human beings based on what the nature of human beings is, and this nature is captured in the value human dignity. The Bill of Rights therefore guarantees rights on the bases of values of preceding kinds. That this is so explains both the source of normativity of the Bill of Rights, as well as the limitation of the Bill of Rights. The Bill of Rights is therefore not subject to the source of obligation that the social contract is subject to, for obligation to observe the Bill of Rights is contained in the principles of justice, which in turn is based on human dignity. Obligation to observe the Bill of Rights is not contained in the Bill of Rights. But this also places a limitation on the Bill of Rights because it cannot afford human beings the rights befitting of grizzly bears, based on grizzly dignity; based on anything other than human dignity. This is why the political arrangement is an arrangement for persons: it is based on human dignity.



This is also why the constitution is able to limit the rights it guarantees because *it* provides the rights. Significantly, it recognises that it does not guarantee human dignity, but merely guarantees a Kind 3 right to have that dignity respected. To limit a person's human dignity would be for the Constitution to act *ultra vires*. On reflection, it should become quite clear that the limitation clause in section 36 cannot apply to the inherent dignity mentioned in section 10, and that the Constitution can limit the dignity enjoyed by all human beings, even in terms of section 36, is quite an absurdity. The Constitution, it should be recalled, is sensitive to past injustices where people were discriminated against on the basis of law. It is therefore a specific objective of the South African Constitution to avert a situation where a constitution is able to justify blatant injustice. The very structure of that previous sentence depicts a distinction between kinds of justice: justice in terms of the law, an example of which would be the racist laws of the apartheid regime; and justice in terms of what is truly just: that which drove South African society to eventually abolish apartheid laws. Constitutions therefore have to be limited and cannot bootstrap: they depend on

something outside of themselves for legitimation. In fact, it is the Kind 2 value, principles of justice, which leads to constitutions; with the Kind 2 value ultimately being contingent upon the Kind 1 value of human dignity.

This, of course, does not mean that a constitution cannot provide rights for members of the political arrangement which are not subject to Kind 1 value. It may well be the case that non-human animals have Kind 3 animal rights. It may be that a juristic person, such as a company, has specific Kind 3 rights too. The difference is that these other members of the political arrangement are subordinated to citizens who participate in the formation of the political arrangement, appealing to different sources of direction when doing so. One such source when doing so is respect for the nature of these other members of the political arrangement, in the sense that grizzly bears may have the right to freedom from torture, but not to freedom of religion. These other members then cannot, in principle and by virtue of their nature, be targets of Kind 1 value. This is the way in which the above table should be understood.



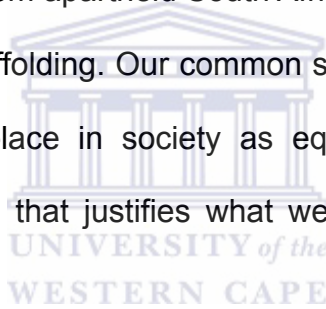
### **3.3.3 Persons have Kind 1 value...**

The primary concern of this project is the value in Kind 1. It was important to make the distinction between Kind 1 value and Kind 3 value because in the Rawlsian system it is the Kind 1 value that gets you through the door in the first place. It is not possible to attribute the same Kind 3 values to a class of beings as you would to another class of beings if only one of the two classes are subject to the Kind 1 value for it is the value in Kind 1 that leads to the values in the other categories: this would infringe the equality of all beings enjoying Kind 1 value. For Rawls, it is the capacity to reason that gets the subject into the Original Position at all, and then from the point of the Original Position the subject moves down the kinds and benefits from the rights guaranteed by the constitution. It is indeed logically

possible for a class of beings who do not enjoy Kind 1 value to enjoy the same value as those who do enjoy Kind 1 value at Kind 3: those who do enjoy Kind 1 value may go through the various kinds and give the other class Kind 3 values. This is what Nussbaum does by building her theory on a liberal political traditional conception of the person and then incorporating the severely mentally disabled into the fold through an ethics of care. But this goes against our common-sense understanding of Kind 3 values whenever the classes of beings are all human beings: the right to freedom from slavery is not enjoyed simply because one group of human beings have permitted another group of human beings to enjoy this right. For if this is the case then the group enjoying Kind 1 value can distribute Kind 3 values just as well as they can decide not to. Such a situation, in the modern political arrangement, should not even be possible because our common sense intuitions, which rule out any arbitrary distribution of rights, requires that Kind 1 value be recognised in each and every human being, regardless of psychological capacity. This is what the intuition that the severely cognitively disabled are equal citizens requires. The intuition is that the severely cognitively disabled are entitled to more than just the Kind 3 value which human beings recognise in non-human animals, for the severely cognitively disabled human beings are human beings, not non-human animals. And this, of course, is exactly what the new order Constitution of South Africa aimed to allow.

In less abstract terms, I am specifically talking about the class of human beings who are cognitively normal in relation to the class of human beings who are considered severely mentally disabled. In terms of Rawls's system, the cognitively normal enjoy Kind 1 value and the severely mentally disabled do not. It is especially important to realise that the severely mentally disabled do not make it through the door to the point of Kind 1 to enjoy this inherent value. This excludes them from Rawls's system. There is no reason why the Rawlsian system should treat the severely mentally disabled any differently to orcas or any

other creature known to us that does not possess the capacity for reason. And this is quite the same as the Rawlsian system treating one class of human beings differently because they are Black or because they are Jews. It is precisely the kind of discrimination that the new order Constitution attempts to avert. Rawls may appeal to a relevant difference of principle to justify the different treatment of the severely cognitively disabled, and say that the different treatment of people on the basis of race is arbitrary. Rawls appeals to the contract nature of his system and the Kantian conception of the person it employs to justify the exclusion of the severely cognitively disabled, but as we have said at the end of the previous chapter, the structure of social contract theory is as arbitrary as apartheid South Africa, which was a democracy that disenfranchised non-Whites, was. The principled position to exclude non-Whites from apartheid South Africa democracy was rejected, along with its justifying metaethical scaffolding. Our common sense intuitions about the severely cognitively disabled and their place in society as equal citizens should cause us to question the metaethical system that justifies what we know is unacceptable; what we know is unjustifiable.



As such it is not enough to simply add the severely mentally disabled to the system at Kind 3, as Nussbaum attempts to do when she diagnoses the problem that Rawls has with the severely mentally disabled as being essentially a problem of distribution, even if her justification is based on an ethics of care. What this means is that Nussbaum has managed to establish that the severely mentally disabled have entitlements based not on their status as equal citizens in the polity, but rather on a responsibility which the 'real' citizens in Nussbaum's polity have towards this other class of non-citizen human beings. Once more, by now history should have taught us that one class of human beings should never be allowed to decide whether or not another class of human beings are to be equal citizens in a polity.

Furthermore, Kind 3 rights are determined on the basis of the nature of the being at Kind 1, as we have also already said. In other words, as the constitutional court justices point out, all infringements of practical rights and discrimination can essentially be dealt with as disrespecting the subject's human dignity (O'Regan, 2011). This is why we have certain practical rights and do not have others. The practical rights arise out of the inherent value possessed by human beings, and as such, these practical rights are informed by this human dignity. It is because human beings possess human dignity and not grizzly dignity that human beings have the right to freedom of religion and not the right to two years of care from their parents while they are cubs. And where the practical right to the freedom of religion is infringed it is essentially an act of disrespecting the dignity of the being as a human. Rights and entitlements, such as those contained in Nussbaum's list of capabilities, must therefore be based on human dignity. The concept of 'human' in 'human dignity' cannot exclude any members of the human species. What Nussbaum has done, like Rawls, is develop a theory of justice based on a concept of 'human' that excludes a class of human beings: the severely mentally disabled. This is seen, if not clearly in who they regard as full citizens; in the principles of justice which their theories give rise to. Because their theories of justice are based on limited or inaccurate conceptions of human beings, there is nothing to tell us that these principles are actually more appropriate for grizzly bears. And it is crucially important for Nussbaum, judging from what she has said in *Frontiers of Justice*, to include the severely cognitively disabled in her conception of human being so as to ensure that her system of justice affords the severely cognitively disabled their entitlements and averts the very charges she lays against Rawlsian justice.

### 3.3.4 Remembering Locke's Social Contract

Before leading into the conclusion of this chapter, let us consider once more a social contract position different to that of Kant and Rawls, pursuant to making the same point with a more positive approach. When John Locke first proposed that human beings were entitled to various fundamental rights it was revolutionary for the milieu in which he wrote. Locke's *First Treatise of Government* (1823) was dedicated to disproving Sir Robert Filmer's theory as presented in a book called *Patriarcha* which defended the so-called divine right of monarchs to rule. Filmer's argument, in general, incorporated broadly the theme that monarchs stood as descendants of Adam (from the Book of Genesis in the Bible), and as such, were bestowed with divine power to rule over subjects. Locke identifies Filmer's system as follows (1823:8):

[Filmer's] system lies in a little compass; it is no more but this,

"That all government is absolute monarchy."

And the ground he builds on is this.

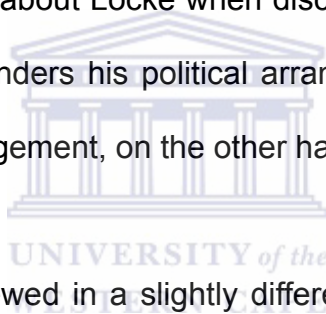
"That no man is born free."

Of Filmer's argument Locke is entertainingly critical, describing in one place Filmer's approach as being similar to that of

...a wary physician [who] when he would have his patient swallow some harsh or corrosive liquor...mingles it with a large quantity of that which may dilute it, that the scattered parts may go down with less feeling, and cause less aversion (1823:10).

Locke deconstructs Filmer's argument that human beings are not born free. He does so as a precursor to arguing that human beings are born with natural rights, which natural rights

exist and are held by human beings even before human beings enter into the social contract of society. Locke's view is that the primary function of society is not to bestow rights on people: people are born with these natural rights. The primary function of society, in Locke's view, is the protection of the rights of the people in society. People enter into the social contract so as to avoid the state of war which can break out in the state of nature, which state of war is then only resolved once the two fighting parties, which typically needs to be the stronger of the two parties, stop fighting and agree to right wrongs committed. In a society, on the other hand, the two fighting parties are able to seek protection of their natural rights from the government. And this is the function of government according to Locke: to protect the natural rights of all men who are born free and equal. At this point I also reiterate what we have said about Locke when discussing his social contract: it is his conception of the person that renders his political arrangement as problematic. The role and purpose of the political arrangement, on the other hand, is of useful importance<sup>21</sup>.



The above table can thus be viewed in a slightly different manner on the Lockean view. Kind 1 values are natural and therefore inherent to all human beings, but the state has the role of protecting and limiting these natural rights where necessary. We do not think it a non-issue to eliminate the severely cognitively disabled specifically because they are sub-citizens. The severely cognitively disabled are equal citizens. They are not activated by the constitution or some other state institution; nor by some feature which human beings may or may not possess. In the same way in which the table works for the Rawlsian system it works for Locke: human beings decide upon the structure of Kind 3 values through the processes and on the basis of the values in the kinds 1 and 2. Significantly, not all human

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<sup>21</sup> It bears mention, perhaps, that even if the details of Locke's political arrangement are objectionable, say perhaps in the kinds of practical rights which he may or may not have recognised, what is important here is that for Locke, the role and purpose of the political arrangement is to recognise and protect the rights of citizens, based on their pre-political nature as beings. I would say that Locke's conception of the person, i.e. who counts as a citizen in the political arrangement, is a matter of detail.



beings will be able to actively participate in processes establishing kinds 2-3; and not all human beings will be able to enjoy all the values in Kind 3; but all human beings will enjoy Kind 1 value and this alone is sufficient to establish that all human beings have entitlements.

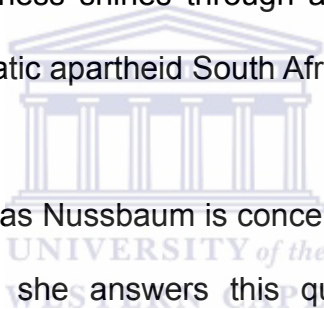
This view of moral and political values is thus more consistent with what I have referred to as the common-sense notion of human rights in the new order South Africa. It is more or less how the modern day political arrangement can explain moral and political value of its citizens. Crucially important, though, it is not how Rawls's system can work.

### **3.4 Conclusion**

The different kinds of values that we have discussed here are distinct but related. It is important, as we have seen, not to confuse the different kinds of values because such confusion leads to absurdities. At the same time, we have also seen that the different kinds of values are related in specific ways and that is why practical rights eventually assigned to citizens in a polity are not arbitrary: they arise out of our conception of that which stands at the centre of the political arrangement: the person.

I have argued in this chapter that even though Rawls is concerned with distributive justice, the question as to who should be included in this distribution is one which needs to be answered before the task of setting up the social arrangement can be completed. This leads all inquirers into the field of value. The political arrangement is an arrangement for persons, and as such, it requires us to deal with such questions as what should be considered person and what not. Nussbaum has assisted greatly in her criticism of Rawls and Kant, but her remedies have spoken largely to ethics and distribution, not metaethics and metaphysics. I have argued that this cannot be the case, as Nussbaum needs to

answer the question as to why the severely cognitively disabled need to be accommodated at all as equal citizens with entitlements, seen as a question of personhood, with personhood equating to citizenship and thus a matter a value. Otherwise she has to admit that the severely cognitively disabled are not equal citizens, which would go against the common-sense notion of human rights or entitlements in the polity and citizenship. I also suspect that Nussbaum would not be willing to accept the severely cognitively disabled are not equal citizens. Rawls has clearly taken the position that they should not be accommodated; even though he has acknowledged that this presents a big problem for his theory. I have argued that this is fatal for his theory; that it reduces his theory to the category of apartheid South Africa, for even though he may appeal to some principled exclusion, the arbitrariness shines through at the level of the structure of his system, as in the case of democratic apartheid South Africa.



I have raised the question, as far as Nussbaum is concerned, as to the extent to which her system will remain intact once she answers this question as to why the severely cognitively disabled should be included in political arrangements as equal citizens. Her capabilities is based on a conception of the human being, for this is what enables her to say that ensuring the capabilities guarantees citizens to a life that is truly human. If she is to change her conception of the human being, it remains to be seen to what extent her list of capabilities will change.

I have also argued that the problem, correctly diagnosed, is one of a confusion of kinds of value. Human dignity is a value which is inherent in human beings and which human beings bring into the social contract. Crucial to this project is the point that if human beings bring human dignity into the social contract, then they possess that human dignity prior to the social contract. This is very important for those human beings who are excluded from

the bargaining process in the social contract. For now we observe the support offered by Locke for a social contract theory based on natural rights: values which are inherent to human beings and values which human beings enjoy by mere virtue of their humanness<sup>22</sup>. This is not to say our classification of value does not apply to Locke, for even though Locke sees rights as natural, the practical rights afforded by a constitution are still subject to limitation by that constitution pursuant to the functioning of the social contract. There is therefore a difference between the kinds of rights that Locke sees all human beings possessing naturally and the kinds of rights which a constitution bestows onto a citizen, that being that the latter can be limited; the former, not. Deciding which goes into which is perhaps part of the bargaining process.

This leads us to ask what conception of the person will be adequate for the purposes of establishing a political arrangement that is consistent with our common sense views about moral and political value in the political arrangement. The political arrangement which is for persons must accommodate a conception of the person which is consistent with the common sense notion of the citizen that is entitled to equal dignity. This citizen is equivalent to the human being for all human beings are to be considered equal citizens, including the severely cognitively disabled. In order to do this, we need to acquaint ourselves with the various issues at play in the metaphysics of personhood first before we are able to even start thinking about our own conception of the person. This will be the focus of the next chapter.

Lastly, it bears mention that we started out by flagging Nussbaum's use of *person* and *human being* interchangeable, with the probable inclusion of *citizen* as well. We noted our

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<sup>22</sup> Bear in mind, of course, that we have flagged Locke's conception of the person, which does not include all human beings, but only Kantian persons. We are taking something else, i.e. the structure and purpose of the political arrangement, from Locke.

unhappiness with her failure to cordon off these concepts appropriately, as this caused confusion in the reading of her system. We are now at a point, having discussed the political arrangements and common-sense views, to say that human being and citizen may be used interchangeably in a justifiable way, for all human beings enjoy equal citizenship of the political arrangement. It remains to be seen whether all human beings are persons.



## Chapter 4

### The Person Life View

#### 4.1 Introduction

The various political philosophy issues we have touched on thus far are all implications of an essentially metaphysical question: the nature of personhood. We have seen the foundation of Rawls's political system - that being the rational individual in the Original Position choosing, through rational deliberation, which principles should govern the just society. We have identified the Kantian roots of Rawls's system, and in so doing, acknowledge the sources of political value in the Rawlsian system. Here we see three kinds of value. The capacity – for rationality – that gets the individual through the door into the Original Position is the source of inherent, inalienable human dignity for Rawls. This is one kind of value. Secondly, the individual chooses the principles of justice which is applicable to all in society: another kind of value. Thirdly, other rights and liberties are established on the basis of these principles of justice: a third kind of value. Value kinds two and three are based on or flow from value kind one: personhood. Yet we have also noticed that this theory of political value cannot accommodate the modern political state's position that the severely cognitively disabled possesses inherent, inalienable human dignity; possesses the moral and political value attributable to persons. This position of the modern political state is supported by Nussbaum's intuition even if not by her theory. That Rawls's system is unable to accommodate the entitlements of the severely cognitively disabled, as Martha Nussbaum (2006; 2009) agrees, is a major problem for Rawls's or any system of justice. This, however, is only symptomatic of the real problem of Rawls's system, which is that his conception of the person is unable to accommodate the severely cognitively disabled.

Rawls's problem is a deep-rooted one. It rests with his conception of the person which is consistent with the Kantian notion of the person, and which dominates current views on personhood. This conception of the person is at odds with *human being* and *citizen* as employed in modern political arrangements. At present, the dominant views of personhood are that persons must actually possess rational capacity: a capacity which the severely cognitively disabled do not possess. Yet, as we have seen in terms of the developments in political philosophy and the positive law, the severely cognitively disabled are not part of a sub-person category: they are considered equal persons with the cognitively normal: they are considered equal citizens.

The objective of this chapter is to assess the extent to which Rawls's system could be saved by an account of the person that accommodates the severely cognitively disabled: the Person Life View (PLV). The PLV is a recent theory of personhood developed by Marya Schechtman. I aim to do three things in this chapter. Firstly, I describe the PLV. Secondly, I see whether Rawls's system can be saved by Schechtman's account of the person. Third, I assess Schechtman's PLV for viability as an account of personhood on which to build a theory of justice.

## **4.2 The Person Life View**

I will start with the point of departure for the PLV, namely, that recent debate on personhood has been limited in two important ways. Firstly, the large literature on personal identity has been overly-focused on theoretical questions which seem to be detached from real-life in an unjustified way. Secondly, narrow practical concerns of personhood, while playing an important role, do not play the definitive role, and therefore other questions need to be asked. Both of these points support the intuitions I have spelt out in the previous sections of this thesis: there is an inconsistency between the conception of

personhood when it is discussed in philosophy classrooms on the one hand, and how the concept is employed in real-life, practical situations. It will profit this meditation to consider this point of departure. Once I have set out the point of departure I will then move on to a more general overview of the theory on the whole, with special mention being made of issues that affect the central theme of my own project.

#### **4.2.1 Two Points on the Point of Departure**

The debates around personhood, and especially personal identity in analytical philosophy, have been dominated by questions of numerical identity. In many ways, the debates can be reduced to this question: what feature(s) can be used to distinguish persons from non-persons, which persist through time so as to identify one and the same person over time? What makes Schechtman's latest work so interesting, though, is the attempt to chart a course into new terrain for debates around personhood. John Locke gave two definitions of person, namely that person is "a thinking, intelligent being that has reason and reflection; capable of considering itself as itself" (2007:115) and that person is a forensic notion, "having to do with actions and their merit" (2007:120), substantiating that person only applies to "active thinking beings that are capable of a law, and of happiness and misery" (2007:120). The traditional view generally sees the Lockean "forensic" nature of personhood as referring to moral responsibility, which is then also related to thinking and intelligence. A non-person, such as a dog, is not a thinking, intelligent being, and the forensic nature of person is not applicable to dog because *forensic*, at least on the traditional view, implies moral responsibility. The practical aspects of personhood on the traditional view, therefore, are limited to questions of moral responsibility. Schechtman, considering herself in some sense a neo-Lockean, says that what Locke actually meant by *forensic* was an expanded role for practical considerations, such that moral responsibility was one question among many; that if there was going to be anybody who ought to be

held morally responsible for a particular action, then the target of that potential responsibility would be the forensic target. But the forensic target already preempts any such moral responsibility: the moral responsibility which is attributed does not pick out the forensic unit. The forensic unit, Schechtman says, is “a suitable target about which particular forensic questions can be raised and judgements can be made” (2014:14), and these questions which are raised are raised pursuant to establishing whether or not a particular individual is a moral self or not. She contrasts this “unit”, i.e. the target of forensic questions, with the conception of the person that

sees the limits of a single person as set by the actions and experiences for which she is in fact held rightly accountable - those events in which questions of accountability are answered in the affirmative (2014:14-15).

This latter conception Schechtman refers to as the moral self. To see actual responsibility as a necessary condition for personhood, for Schechtman, is to place an undue limit on personhood and who the term applies to. This approach of the PLV can therefore broadly be seen as expanding the notion of personhood to beyond mere psychological criteria because *person* may or may not be the subject of moral responsibility which is the product of thinking and intelligence, or what we have generally referred to as the capacity for reason in this project so far.

The expansion of the notion of personhood beyond mere psychological considerations in terms of the PLV happens in the following definition of persons: beings that live person lives. According to this view, personal identity, that is, sameness of person over time, consists in *the sameness of person life over time*. Person X at time<sub>1</sub> is the same person, in other words, as the person at time<sub>2</sub> if the two persons share the same life. The motivation



for this approach is an interesting one: as lay people we don't think of persons, in everyday life and ordinary speech, in terms of the technical conceptions which are used and indeed which dominate the various debates in the philosophy of personhood. Instead, we distinguish persons from non-persons in terms of the relationships that we have with the various beings that make up our lives. Persons are beings we have specific relationships with; persons are beings we care for in a specific way; and so on. And in this sense Schechtman dilutes the importance that the question of numerical identity has enjoyed in personhood debates in recent decades: these are one kind of question among many, she says. Instead, she says, in our account of identity we must ask questions about a unified locus. And on this basis she points out that ownership of an action does not equate to responsibility for an action. We do not automatically attribute responsibility to a person because personhood seems to consist in more than just forensic capacities. And if being a person involves more than forensic capacity, then it is possible that a person may not have forensic capacity and may therefore not have responsibility for an action. Schechtman proposes that we deal with the forensic aspect of personhood in the following way:

If an action is mine it does not mean that I am responsible for the action, but it does mean that if anyone is responsible for it, I am, and it is toward me that questions about responsibility should be directed (2014:5).

Responsibility for an action is thus not automatically an attribute of personhood because persons incorporate more than just forensic capacity. Schechtman says that

it has been common to think of the relevant practical concerns exclusively in terms of forensic relations available only to beings with rationality and reflective self-consciousness (2014:6).

These, Schechtman says, are important. However, that personhood should be limited to these and questions about these she finds unconvincing. And she seems to think that such a new delimitation of person would bring the concept as discussed in ivory towers closer to, if not completely in line with, everyday usage of the notion. This is the general rationale in her book *Staying Alive*. We now take a closer look at the project.

#### **4.2.2 A Closer Look at *Staying Alive***

##### **4.2.2.1 Starting at the Beginning: Locke**

*Staying Alive*, as is the case with most of the major works on personhood and personal identity, looks to John Locke's conception of the person because of its influence on personhood debates today. The dominant view of personal identity today, the PCV, has its roots in the common understanding of Locke's view. PCV offers an account of personhood as well, and this account of personhood is shared by most other theories of personal identity. As Locke points out, identity conditions depend on the type of thing you are talking about. Locke's view was that memory unified a person: if Person A at time<sub>1</sub> remembers event D at time<sub>2</sub>, which came before time<sub>1</sub>, then Person A is the same person that experienced event D. It was Locke's move to locate personhood in the psychological, i.e. in memory, that explained practical concerns related to personhood. For Locke, if Person A could not remember action X, then Person A was not responsible for action X. Memory of action X was required in order for holding somebody responsible for action X, as far as Locke was concerned. This therefore lays the foundation for what Schechtman refers to as

“the coincidence model” of theories of identity which says that the limits of personal identity are the limits of moral responsibility and prudential concern.

Schechtman also sees Locke’s view as far more complicated than it is usually read as being, however. Locke said person is a “forensic term” (2007:120) and according to Schechtman, “forensic units are by their very nature the right kind of unit to delimit the boundaries within which it is appropriate to raise questions about holding of forensic relations” (2014:7). And Schechtman therefore argues that it is important to note the distinction between metaphorical and literal questions about personal identity. A person, Locke says, is “a thinking, intelligent Being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places...” and “a Forensic Term appropriating Actions and their Merit; and so belongs only to intelligent Agents capable of a Law, Happiness and Misery” (2007:120). A distinction is thus to be made between ‘forensic unit’ and ‘moral unit’. Jonathan Bennett, as editor of this edition of Locke’s *Essay*, notes that “forensic unit” is “a term designed for use in legal proceedings” (2007:12). The moral unit is different to the forensic unit, Schechtman says, in that it – the forensic unit – is “ready to act and can sometimes rightly be rewarded or punished for those actions” (2014:15). The forensic unit is therefore the unit that can be held morally responsible for actions or experiences, except that it may not be responsible for all of the actions of that person. Locke, as Schechtman reads him, makes

the claim that the limits of a person are set by those actions for which she is... *potentially*<sup>23</sup> responsible or those experiences for which she is *potentially* rational to experience egoistic concern (2014:19).

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<sup>23</sup> Author’s emphasis.

And, Schechtman says, Locke's view of the person is closer to 'forensic' than 'moral'. Literal, *prima facie* attribution of responsibility for actions is the focus when it comes to the forensic unit. Such literal attribution of responsibility is distinguished from metaphorical responsibility which consists of another layer of meaning including moral responsibility, for instance. In determining moral responsibility, questions are posed at and about the forensic unit, which may potentially be held morally responsible. There is a clear distinction, therefore, between the forensic unit and the moral unit. In regard to making this distinction, Schechtman says the following:

...when Mother comes into the living room to find Dick, Jane and Spot next to the broken lamp there is an initial question of which one of them actually came into contact with the lamp and knocked it over. Suppose that Mother determines that the proximate cause of the lamp's being knocked over was contact with Jane's body. Another step is still needed, most people feel, before we judge that Jane should be held fully culpable. Perhaps Jane wilfully pushed the lamp over during a tantrum, or was careless again despite several warnings, but perhaps she had one of her seizures or fainting spells and flailed into the lamp, or perhaps Spot ran in and knocked her over, or perhaps she is only eighteen months old and has no idea of the consequences of putting her hands on the lamp (2014:14).

Building on this is Schechtman's distinction between dependence models and coincidence models of personal identity. The coincidence model sees the limits of a particular person coinciding with the limits of particular practical questions. The dependence model, on the other hand, sees the person merely as an appropriate target of practical questions, and so there is what Schechtman calls "a relation of mutual dependence between [person and practical questions]" (2014:41). To explain this Schechtman looks at one of Locke's

thought experiments which involves the transfer of consciousness, such that it is sufficient to inquire about an action within a consciousness without looking to extra conditions necessitated for moral responsibility. That consciousness is sufficient, in turn, for the forensic unit, and Schechtman sees Locke to be indirectly incorporating a very strong role for practical considerations to play in characterising personal identity itself, to the extent that personal identity and practical considerations are dependent on each other. This reading sees “a person as an appropriate target of practical questions and concerns, and says that an account of personal identity must individuate such a target” (2014:41). This is the dependence model, contrasted from the model used by neo-Lockeans more broadly: the coincidence model which requires that “if I am the person who took action A then I am responsible for A, and vice versa” (2014:41).

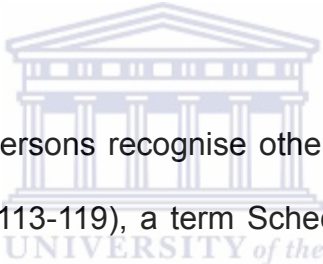
A forensic unit of this nature, distinguished from a moral self, ushers in the proposal that literal questions of identity and practical questions should be distinguished. In addition to being distinguished, these two separate questions should be pursued separately. Schechtman draws from two thinkers who argue along similar lines: Olson and Korsgaard. Schechtman reads Olson as arguing that “a metaphysical account of our identity that must justify practical judgements is mistaken and has obscured the debate” (2014:43). Korsgaard, for her part, argues that the unity of agents does not depend on unity of a metaphysical kind, and charges Parfit – the foremost proponent of the neo-Lockean psychological approach – with making the mistake of looking for unity of a life in the subject of experience. She argues that

the unity of the agent is a basic unity of its own that does not depend on the unity of self-conscious subject or any other kind of unity (2014:56).

The unity of the agent is therefore the unity we are looking for: we do not need a further unity – psychological unity, for instance – to establish the unity of an agent.

#### 4.2.2.2 Expanding the Practical

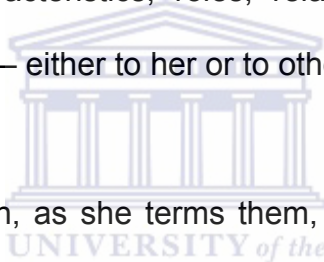
Having developed the position that a person can be considered as a forensic unit, on the basis of Lockean theory, the next step in Schechtman's project is to reflect on what exactly it means to be a forensic unit, with the objective of getting a "clearer [view] of the kind of unity we are conceiving persons to be" (2014:82). The approach here is to expand the practical conception of person so that it encompasses more than just moral rights and responsibilities, such that it includes other practical ways in which persons recognise other persons as persons.



There are many ways in which persons recognise other persons as persons, or ways of occupying "person-space" (2014:113-119), a term Schechtman sees as one part of what she also calls *social infrastructure*; and these ways go far beyond forensic considerations. These things are things which only persons do: dancing; going to school; working on computers; tending to the garden; the ways in which wives nag their husbands to tend to the garden; the creative and unique ways we develop in which to have sex; the list is quite open-ended. Instead of therefore looking for the right kind of relationship between action and responsibility, i.e. the one in which moral responsibility applies; we look for targets of all of these different kinds of activities which persons participate in. And as such, there are two aspects to the constitution of persons: internal and external. In addition to the specific features which are possessed by particular beings which make them persons, there are also factors external to them which participate in this constitution.

There are two aspects to Schechtman's expansion of the practical which are particularly important for my project, both of which draw from Hilde Lindeman's *Damaged Identities: Narrative Repair* (2001). Lindeman's work looks at the role external oppression plays in damaging identity, and the way in which the damaged narratives are repaired via alternative narratives. Schechtman (2014:69-70) cites Lindeman (2009) to describe the theme of the latter's project.

(A)n identity is a representation of a self: it's a narrative understanding of who someone is. It is generated from both an internal and an external perspective, and consists of the tissue of stories and story fragments that are woven around the acts, experiences, personal characteristics, roles, relationships and commitments that matter most about a person – either to her or to others around her.



She focuses on the way in which, as she terms them, oppressive narratives interfere in persons, particularly in terms of the ability of the persons to employ their rational, forensic functions, and on this basis, their personhood. In this situation, it becomes important for the particular person to combat the oppressive narrative and the damage it causes. Lindeman's discussion at this point is a reflection on agency, and the way in which others influence agency, for "one cannot be fully an agent without being recognised as such by others" (2014:86). How others therefore recognise our agency constitutes a path to 'person'. But it is because others don't merely recognise persons or agents in terms of forensic considerations that the practical needs to be expanded.

As mentioned earlier in section 3.3.1, Schechtman has an interesting interpretation of the relationship between personhood and oppression. According to Schechtman (2014:126), the cruelty of those people who oppress other persons extends to the oppressors

acknowledging that they are oppressing persons, precisely as persons. She speaks about the Kantian view, espoused by Korsgaard, which says that to deny someone of their agency is to deny them of their personhood. Schechtman sides with Stanley Cavell who, using the terms person and human interchangeably, says that what slaveholders “really [believe] is not that slaves are not human beings, but that some human beings are slaves” (Cavell, 1979:375). Schechtman proceeds to argue that the Korsgaardian route simplifies the positions of slaveholders because acknowledging that an individual is a slave requires acknowledgement that they are persons. Schechtman says that when a slaveholder rapes his slave girl he acknowledges that the slave girl is like him: a person. There is a sense then in which the social infrastructure in which slaves find themselves, and of which the legalisation of slavery is one aspect, on the PLV, constitutes the personhood of the slave, for according to the PLV, you must be a person in order to be a slave. This should not be seen as a justification of slavery though: it is merely the tacit acknowledgement that dogs or donkeys cannot be slaves; to treat an individual as a slave is to treat a person badly, and therefore to treat someone as a slave is to treat them as a person.

The practical aspects of personhood extend far beyond forensic capacities which have played so prominent a role in traditional personhood discourse. Key to the reflection between Schechtman and Lindeman is a personal story of the short life of Lindeman’s sister Carla. Carla was born with hydrocephaly and lived for only eighteen months, with the result that she had no conscious role to play in the construction of her own personhood and identity. Furthermore, in terms of the conventional views Carla would not be considered a person because an individual with hydrocephaly does not possess the capacity for normal psychological functioning. On Lindeman’s view though, Carla’s personhood is established on the basis of the third-person point of view: the people in her



life such as her family; the nurses and doctors who treated her; perhaps the priest who blessed and prayed for her, etc. Even though Carla was unable to consciously contribute to the constitution of her own personhood, it was constituted by “the many person-specific interactions her family and others had with her” (Schechtman 2014:88).

At this point of their reflection Lindeman displays her concern that anything that people may treat as a person may then be considered persons, on her account. How many people, for instance, treat their pets as animals: dressing them in jerseys; making beds for them; giving them special food; speaking to them at least in the same manner that people speak to their babies, and in ways that people may have spoken to Carla, etc.? Lindeman, in response here, offers *humanness* and *sentience* as factors which distinguish persons such as Carla from animals. Schechtman, for her part, disagrees with the details of Lindeman’s view<sup>24</sup>, even though she takes the two factors, sentience and humanness, very seriously. On the whole, in terms of Schechtman’s reference to Lindeman, it can be said that she takes three important points from Lindeman, namely,

the expanded conception of the practical interactions associated with personhood...  
the constitutive role of social recognition in agency and in identity more generally...  
[and] the role of being human in personhood and personal identity (2014:75).

And so Schechtman constructs her version of the expanded practical. Persons participate in activities and functions that are person-specific. Some of the activities include “singing duets, dancing a tango, picnicking in the park, playing tag, racing to the deep end” (2014:17). These practices or activities, in themselves, do not constitute forensic

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<sup>24</sup> Lindeman requires a kind of mutual recognition of personhood between subjects, whereas Schechtman allows for personhood to be conferred upon non-sentient beings who have lack advanced cognitive capacity, where no such mutuality is possible.

practices, even though they may give rise to certain moral or forensic considerations. But these practices are person-specific practices, for grizzly bears do not eat warm porridge, or go for walks specifically to kill time while they wait for hot porridge to cool down; and so on. And according to Schechtman, these activities assist in the external constitution of persons. Family members, furthermore, are not looked for when they are lost because they are rational beings: it is not the case, inversely, that if non-rational family members are lost the remaining family members are not bothered. Family members who are lost are sought because they are loved, precisely as family members and as individual persons.

The next step is to find the practical aspect or aspects of lives that make it possible to find a single and appropriate locus on which it is appropriate to base an inquiry of personhood. It is important to note, as we have just seen, that there are a number of practical concerns which go beyond forensic considerations and that these different concerns should be considered in terms of the different relations on which they rely. Schechtman, with reference to Shoemaker (2007), notes that

we do not need to assume that there is any single, unified target for all of our practical questions and concerns about person and the suggestion that we can pursue the practical questions on their own without looking for such a locus (2014:83).

This, however, as she notes, is also subject to some measure of absurdity because we do think in terms of single persons: the lady who tried to sell me a Big Issue today is the same person who tried to sell me one yesterday. We don't think of two or more different persons: the hungry, desperate animal person yesterday and the scheming, moral person today. At this point Schechtman draws on Olson who argued that we should consider the most

simple individual to whom all of our practical questions apply (2014:49-56), and for this Schechtman argues that the human animal can and does fulfil this function.

The next step is to use the work of Jeff McMahan as a starting point in Schechtman's attempt to answer the problem of synchronic challenge of individual unity, which refers to the question which

arises because it seems as if the fact that different practical concerns...can hold independently in different loci implies that each must have an independent relation that defines its appropriate target (2014:98).

In other words, we all have different practical roles and concerns, but what exactly is it that makes all an individual's thoughts and actions at one time the thoughts and actions of that individual? The person who tries to sell me the Big Issue is the same person who will later be tempted to go home using the train without paying for it, along with many other practical concerns. This is so particularly in light of the work Schechtman has already done in expanding the practical considerations of personhood, precisely to include more practical concerns. Schechtman is therefore mindful of the question about how all of those practical relations concerns the same person, and her system of incorporating all of these practical concerns, within the social infrastructure, speaks to this concern. It then also is at this point that Schechtman also returns to and reconsiders her own previous position, the Narrative Self-Constitution View<sup>25</sup>, developed in her book *The Constitution of Selves* (Schechtman, 1996), which can be seen as following the coincidence model, to highlight the issues it had

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<sup>25</sup> A most concise depiction of this view is that, "...the difference between persons and other individuals...lies in how they organize their experience, and hence their lives. At the core of this view is the assertion that individuals constitute themselves as persons by coming to think of themselves as persisting subjects who have had experience in the past and will continue to have experience in the future, taking certain experiences as theirs. Some, but not all, individuals weave stories of their lives, and it is their doing so which makes them persons" *The Constitution of Selves* (Schechtman, 1996:94)

with diachronic unity. She acknowledges that the Narrative Self-Constitution view had a problem in that it used the concept 'person' as a forensic concept, or primarily in terms of forensic capabilities. What is, however, useful in this account is its developmental holism. This developmental holism can account for the single, whole and complete subject. This is different to the PCV which she sees as reducing persons to time-slices which are connected together by psychological relations of similarity. The significance of this is that it becomes possible to consider persons as moral units at certain points in their lives, and not at other points. And this is important because it means that a single person may be a moral unit for much of his life, but not at infancy and not in advanced age when he has Alzheimer's, all the while still being a single person.

Thus the groundwork for the PLV is laid, and Schechtman moves on to depict the kinds of lives which can be counted as being person lives. Crucial to this account is the inclusion of the notion of cultural or social infrastructure. The PLV makes the general claim that those beings able to generate and maintain sets of social practices and institutions are what we call persons. This includes those everyday activities and recognised social practices that people participate in. Schechtman says that the social and culture infrastructure referred to and employed in the PLV is something that develops as we develop. As stated above, Schechtman refers to this cultural or social infrastructure as person-space and notes that the "infrastructure could not exist unless those who are part of person-space have the necessary capacities and attributes to create and maintain it" (2014:115) and that it "requires beings who have certain kinds of memory systems, reflective self-consciousness, rationality, and related cognitive and affective abilities – i.e. the forensic capacities" (2014:116). She is careful to point out that persons only "typically [have to] possess these capacities" (2014:116). Personhood, thus conceptualised, is not considered only in terms of either social, biological or psychological functions, but rather in terms of a

cluster of these three. Significantly, however, it is possible that these three dimensions come apart, but the coming apart of these three does not signal the cessation of the person. Just as in the context of human biology where neither a functioning brain nor a beating heart is necessary for biological life – either can be sufficient in certain circumstance - so too one or two of the three dimensions of personhood can come apart and/or cease without the cessation of the person. This, in its consistency with our intuitions about what persons are in the political arrangement at least, is crucially important for the PLV, and by implication strikes hard at the PCV which locates personhood in the psychological alone. To return to the example of Carla who lacked the psychological capacity to be included as a person under the conventional view because of the effects of hydrocephaly on psychological functioning, we are able to say on the PLV account that Carla is nevertheless a person because the social and biological functions persist, even though her psychological function does not. The same applies to cases where an individual enjoying all three functions suddenly loses one through, say, senile dementia. It may be that a perfectly healthy person grows up and lives a typical person life, enjoying all three functions; but in an advanced age, this person develops senile dementia and loses her psychological function. In such a case, on the PLV, the person does not cease: the person merely loses one of the functions, i.e. the psychological function. This would not be possible on the PCV view.

This account of Schechtman's rich text is painted with broad strokes and does not pretend to have exhausted it in any way. The focus has been on those aspects of the work which are relevant to my own questions in this project. On the basis of what has been described above, we can move on to whether or not Schechtman's account of the person can provide the metaphysical assistance which Rawls needs in his political arrangement.

### 4.2.3 Can Schechtman come to Rawls's Aid?

As we have just seen, Schechtman's account of the person is unique in its focus on the practical aspects of personhood. It develops the traditional Lockean conception of 'forensic unit' to show that instead of thinking of it merely as 'moral unit', pointing out *moral responsibility*, we should rather say that if responsibility for an action is to attach to anybody at all, it should attach to this or that particular individual. The appropriate distinction is thus potentiality vs actuality, and according to Schechtman mere potentiality is enough to satisfy the forensic requirement put forward by Locke. We will return to the importance of potentiality for the broader, positive aspect of this project put forward in Chapter 5. For now let us notice that this is significant because it does not mean that moral responsibility is necessary for personhood: *potential* moral responsibility is sufficient. It also means that rationality, the basis for prudential concern, is not needed for personhood. Personhood should be considered in practical terms: persons are those beings who we consider to be persons on a practical level: those beings who have a place in person-space. And this is good for a conception of the person that fits into political standards of today, such that we can account for the inherent dignity of the severely cognitively disabled.

So how would this conception of the person work in Rawls's system? Since the individual in the Original Position is required to make rational deliberations about what the principles of justice ought to be, and further, since the severely cognitively disabled individual would be unable to make such deliberations, there are two possible scenarios which may be employed for the purposes of incorporating the severely cognitively disabled into the Rawlsian system. Either (i) the severely cognitively disabled individual will be assumed to be rational for the purposes of the Original Position, or (ii) the severely cognitively disabled

will have a rational proxy acting on their behalf in the Original Position. We now consider their employment.

Recall the important role which the Veil of Ignorance plays with the Individual in the Original Position: the Individual is unaware of any particular features of his particular position in society: race, gender, class, religion, etc. The Veil of Ignorance could therefore also function to hide knowledge of whether or not the individual would be rational. What principles of justice would the Individual now choose? How would this possibility – that of being severely cognitively disabled – affect the decisions of the Individual? Rawls argues that the only reasonable choice that the Individual could make is the best worst position: *maximin*. The principle of maximin would therefore apply in society such that resources are shared equally, and where such equality is not possible, resources should be arranged to the advantage of the most vulnerable in society, which in many instances would be the severely cognitively disabled who fit the description of most vulnerable in society. Even though this could prove to be a costly endeavour, Nussbaum (2009) has argued that the costs involved do not constitute a justification for the decision not to go this route - not to cater for the severely cognitively disabled.

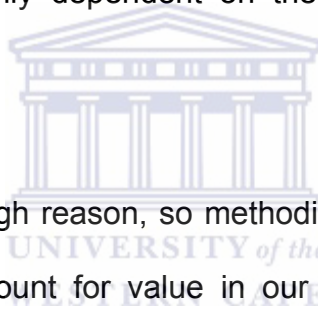
Before we go there, though, let us refer back to section 2.4 in which it was pointed out that the capacity for reason is but one feature among many which persons enjoy, along with race, sex, creed, and so on. We do not think of the severely cognitively disabled as being sub-humans: they are human beings in the full sense of the word. Similarly, we do not think of Black people as being sub-human; Jews as being sub-human; women as being sub-human; and so on. Humanity, rather, is more a matter of type of living creature, not a feature of the living creature. If it is accepted that the capacity for reason is one feature among many of the human type, a potential feature which some humans enjoy and others

don't, then the question that the Rawlsian is going to have to answer, even before he is able to put the severely cognitively disabled individual into the Original Position behind a Veil of Ignorance, one way or the other, is why the severely cognitively disabled individual needs a *rational* representative? We do not say of Blacks that they must find White representatives to stand in the Original Position: the individual in the Original Position is neither Black nor White. Nor would we say of Jews that they must find Catholic representatives to stand in the Original Position on their behalf: why do we say of the severely cognitively disabled that they must find rational individuals to represent them in the Original Position? The modern political state recognises the inherent dignity of all human beings, not just rational human beings. This means that rationality or the capacity for reason enjoys no special priority: it is one feature among many which a particular human being either enjoys or doesn't. But it doesn't define a human being, and it certainly doesn't determine whether or not the modern political state recognises the inherent human dignity of an individual. And this, as we have said when we looked at the social contract, is the problem with the social contract thought experiment: it presupposes a conception of the person that is incompatible with the conception of the person employed in the modern-day political arrangement. Our conception of person should thus reflect this, and this is why the Original Position, largely because of its contract-nature, is an unacceptable starting point.

And so the problem is a deeply-rooted one for Rawls. It cannot simply be a matter of including the severely cognitively disabled because Schechtman or some other thinker has provided an account of the person that accommodates the severely cognitively disabled. The structure of Rawls's system is in great debt to a particular conception of the person that contrasts with Schechtman's person, for many reasons, but mostly because Rawls's person is necessarily rational. The entire Original Position is based on a rational exercise,



an exercise legitimated by the fact that, for Rawls, persons are rational. The problem which highlights why Rawls's political system is unacceptable is a meta-ethical one: it is a question of moral value. And this metaethical question hinges on a further metaphysical problem: personhood. The person, in Rawls's political arrangement, has value by virtue of being a rational being. Rawls conceptualises his person on the basis of rationality to account for the metaethical question of the source of political value: the Kantian categorical imperative in its second formulation. And this necessarily puts it at odds with our contemporary views about human beings with severe cognitive disabilities, who are ends in themselves but who nevertheless lack the all-important Kantian requirement of an actual capacity for reason. Reflection on these questions then leads to the realisation that the Rawlsian structure, so heavily dependent on the rational exercise in the Original Position, is heavily compromised.



All of a sudden it seems as though reason, so methodically and systematically employed by Rawls, is inadequate to account for value in our political arrangements. Where in Rawls's system we were required to enter the Original Position with no imported political or moral value besides the acknowledgement of everyone else who is able to enter the Original Position as Kantian ends in themselves, all of a sudden the individual in the Original Position now has to contend with the pre-political, inherent dignity of human beings, regardless of whether they had the capacity to participate in the Original Position or not. Any theory of justice, today, has to accommodate the inherent dignity of the human being. Rawls's simply does not, and this is owed to his conception of the person.

#### **4.2.4 Schechtman's Person and the Political Arrangement**

Let us then assess Schechtman's account of the person for the purposes of setting up a political arrangement. Schechtman, admittedly, is not concerned with questions of political

value: she is concerned strictly with the metaphysics of personhood. If Schechtman's person is going to have any chance of forming the basis of a political arrangement then it is going to have to form part of a broader ethical and metaethical system: the basis of any political arrangement.

We therefore have to return to the question of what it means to have a *person life*. I will restrict myself to two important aspects of the PLV, namely, person-space and the moral question. I will deal with them in this order.

#### **4.2.4.1 Person-Space and Fairness**

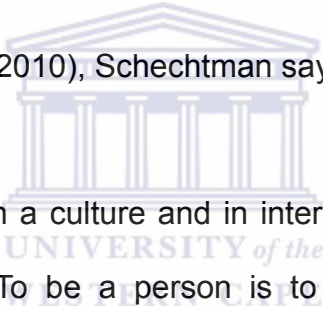
The beauty of the Rawlsian system is that it caters to the needs of the individual without being subjectivist in a relativist sense. Rawlsian justice is an objective justice. The reason for this is Rawls's conception of the person. Rawls asks each individual person to stand behind the Veil of Ignorance in the Original Position and choose principles of justice. He is able to predict what each person will say because the conception of the person which he uses is a rational one; and so, given the conditions he describes, he is able to say what each person will choose and uses that to paint an impressive picture of justice.

Schechtman's person, on the other hand, that is determined by social infrastructure or person-space, is unable to do this. Schechtman's system makes it possible for any one of the three functions - social, biological, psychological - to be lost, but her text also makes it clear that it is the social conditions and the place of the person in person-space that makes the continuing of the same person life possible. It is therefore not possible to consider the person outside of such person-space. And as a result, Schechtman is unable to abstract from her conception of the person to formulate an objective theory of justice.

I have had an intuition about this since the first time I read *Staying Alive*, which was in manuscript at the time. This intuition was developed when thinking about Schechtman's conception of the person as a basis for the just political arrangement, and finally confirmed when reading Raymond Martin's (2014) review of *Staying Alive*. The intuition was sparked by what I found to be unclear from reading *Staying Alive*: what exactly is it that unifies the locus of the person? Schechtman says that

Persons are loci of interpersonal interaction whose integrity as unified wholes results from complex and dynamic interactions among biological, psychological and social processes (2014:184).

In *Personhood and the Practical* (2010), Schechtman says that

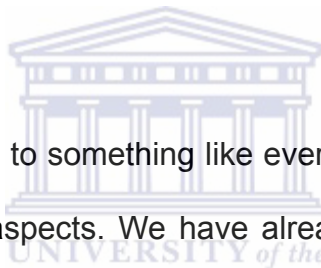


a person-life is a life lived in a culture and in interaction with other persons. One is not a person in isolation. To be a person is to be engaged in certain kinds of characteristic interactions with other persons—to take up a place in what I will call “person-space” (279).

Martin notes Schechtman's response to Shoemaker who is concerned about not finding a unity of these various loci:

The claim that we do not need to conceive of an ultimate locus to which the full range of our questions and concerns about a person are addressed, however, does not ring true to the experience of how we relate to the people who make up our social world. We know others as unified (albeit ridiculously complex and multi-faceted) individuals. This is most evident when we think of the people with whom we are most intimate

and therefore engage along many practical dimensions. The son I feed and clothe and comfort is the same person I chastise for behaving badly to his sister and the same person to whom I try to teach the value of hard work and explain the benefit of making small sacrifices now for larger benefits later. He is also the same person whose straight As bring me pride and whose disappointments are a cause for my sadness, and the person whose health I am concerned to safeguard. I do not have a moral son and an animal son and a psychological son -- I have a single son who has all of these aspects and is important to me in all of these ways. Similarly it would be absurd for a doctor to tell a worried husband that his animal wife survived the stroke, and perhaps his sentient wife, but probably not his moral or rational agent wife. (2014:83)



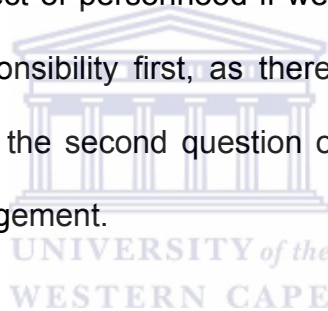
Schechtman, in a sense, appeals to something like everyday reality: we *just treat* persons as unified loci of these various aspects. We have already spoken at length about these different aspects; the importance they hold for the PLV, and the upper hand it gives to other approaches such as PCV. Schechtman says that these three aspects interact in “complex and dynamic ways”, and this interaction is what unifies the whole lives; produces the unity of a life. The unity of a life therefore comes from the social infrastructure in which it is located, and it is therefore not possible to consider such a life outside of that social infrastructure because there is no source of unity in the life itself.

I propose, then, that Schechtman’s appeal to the unclear “complex and dynamic ways” of interaction to unify a single life under the PLV – or at least, that is the clearest explanation that I can find – disables us from abstracting a conception of the person needed to construct a just political arrangement. If we are able to say exactly what it is that unifies these different aspects we would be in a better position to abstract the unified life under

PLV for the purposes of setting up a political arrangement. But at present, such unity comes from its location in social infrastructure which rules out abstraction.

#### 4.2.4.2 The Question of the Moral

We have seen that Schechtman has worked hard to separate *the moral unit* from *the forensic unit*, which she has accused many of the current theories of running together, so that it is understood that the practical aspects of personhood are not only taken into account, but also expanded. All of this hinged on the separation of the moral and the forensic which took place at the beginning. Considering whether or not Schechtman succeeds in separating the moral and the forensic adequately, the question arises as to what becomes of the moral aspect of personhood if we are to accept the PLV. I will deal with the question of moral responsibility first, as there seems to be an answer to this question. I will then move on to the second question of moral rights, which has greater implications for the political arrangement.



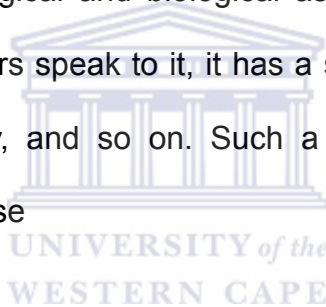
Schechtman, it appears, answers the question of moral responsibility in terms of the actual/potential distinction. Most of the theories of personal identity thus far have said that actual moral responsibility is necessary for personhood. Those beings that are not capable of moral responsibility are not deemed to be persons. Schechtman starts her project by noting that most neo-Lockeans thought that this is what Locke meant, but she argues that it is not, and proceeds to show that mere potential moral responsibility is sufficient to establish personhood because a forensic unit is the sort of thing to which responsibility can apply, *if* it applies. In the case of Carla, responsibility does not apply, but we still have a forensic unit. Contrast this with a cat which, by virtue of the kind of thing that it is, could never be considered potentially morally responsible. Human beings are the only kind of earthly creature that can be the subject of moral responsibility, and in this sense, all human

beings are potentially morally responsible, regardless of whether there is actual moral responsibility.

In assigning the moral/political value attached to personhood though, things become a little more complicated. There appears to be a credible suspicion that the PLV would be committed to assigning personhood to obviously non-person creatures. There are many people who target pet animals with what she lists as person-activities. In a paper entitled *Personhood and the Practical* (2010), Schechtman tackles the issue of conferring personhood on intuitively non-persons, such as pets.

Many humans are deeply attached to their pets; they bring them into their families, play with them, take walks with them, make playdates for them, buy clothes for them, etc. If Carla's personhood is secured by the way she is treated and viewed, why shouldn't the same be true of a pampered poodle? PLV's answer to this challenge is that in fact we do not treat even the most pampered pets as persons in the same way that Carla is treated as a person. It is a feature of PLV that person-lives are continuous with animal lives since our animal nature does not simply disappear when we gain new capacities but, instead, takes new forms. For this reason it is undoubtedly possible to have important relationships with other animals that are not entirely unlike our relationships with other people. But no one thinks it is the same thing for family to have a poodle that will never be able to talk, feed itself, or hold a job as it is to have a human infant who will never be able to talk, feed itself, or hold a job. Interactions with humans in this condition and dogs in this condition are thus importantly different (2010:281).

The paper in question lays some groundwork for the book she will later publish. She discusses Carla, Lindeman's sister, in the same way in this paper as she does in the book, for instance. According to the PLV, human beings, by virtue of having a unified life consisting in dynamic and complex interactions between one or more of sociological, psychological and biological aspects, occupy person-space and are therefore considered persons. This makes them forensic units, and depending on whether or not they possess further capacities, they may be subjects of judgments of moral responsibility. Consider however the scenario in which the human is replaced with a non-human animal such as a poodle. Such an animal may not have the advanced cognitive capacity needed for reason, but it nevertheless is a subject of a unified life consisting in dynamic and complex interactions between the sociological and biological aspects of its existence because it occupies person-space. Its owners speak to it, it has a special bed, is dressed in a warm jersey on a typical winter's day, and so on. Such a poodle is not a person though, according to Schechtman, because



no one thinks it is the same thing for a family to have a poodle that will never be able to talk, feed itself, or hold a job as it is to have a human infant who will never be able to talk, feed itself, or hold a job (2010:281).

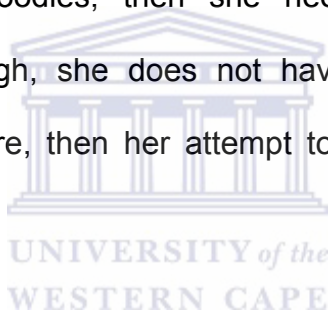
She adds that

this is not a simple convention or species prejudice; it is based on differences between the ways in which humans usually develop and poodles never do. Nor is it to say that if a mutant poodle developed reflective self-consciousness and language, it would be in principle impossible to include him in person-space. The fact is,

however, that no poodle ever has developed in this way, and we have good reason to suspect none ever will (2010:281).

From all of this it should be clear that non-human species such as mutant poodles need “reflective self-consciousness and language” in order to be considered persons. Merely being in person-space is not enough for non-human species such as poodles. When it comes to human beings, however, “reflective self-consciousness and language” is not a requirement: being located in person-space is enough, as in the case of Carla.

If Schechtman and the PLV is going to make a distinction between persons and intuitively non-person beings such as poodles, then she needs a principle that can apply consistently. As it stands, though, she does not have any such principle. If I have succeeded in my arguments here, then her attempt to provide one has failed and her distinction is arbitrary.



### **4.3 Conclusion**

In this section we have considered Marya Schechtman’s account of the person in her book *Staying Alive*. The modern-day political arrangement recognises the personhood of the severely cognitively disabled in recognising its complete citizenship. This has other implications for our thinking, such as in the law of persons, which recognises legal subjectivity, and thus legal personhood, from the moment of birth. And as Schechtman has showed, ordinary people treat the severely cognitively disabled, i.e. what would be considered non-persons by mainstream secular metaphysics today, as persons. Schechtman’s work, while there is no doubt that it is going to be the subject of considerable debate in the coming years, is a step in the right direction.



In this sense, Rawls's work must also be seen to be attenuated significantly. The work of Marx will be studied for centuries to come, but this does not mean that we can seriously pursue the actualisation of a purely Marxist state today and in the future. Similarly, Rawls has produced a significant work in *A Theory of Justice* which, in my sincere view, at least *must* be studied five hundred years hence. But this does not mean we must continuously pursue Rawlsian conceptions of justice in the way that we do, pretending that Rawls's conception of the person is the conception of the person that we use, not at the high level of metaphysical discourse, but in the everyday organism that is the political arrangement. The centrality of the rational approach to justice in Rawls's system is what weakens it. Schechtman's account of the person, as we have seen, does not save it. Rawls's reliance on rationality to set up the thought experiment that would lead to the principles of justice has been undermined by the severely cognitively disabled.

Turning to Schechtman, and while acknowledging that she is not primarily concerned with the implications which her system has for political arrangements, we note that there are at least two questions which need to be answered. Firstly, I have said why I find difficulty in using Schechtman's conception of the person on which to build a political arrangement because it is not possible to abstract her conception of the person in the way that is possible in, say, Rawls's case. Secondly, while Schechtman's is much more inclusive than say Rawls, perhaps it is too inclusive in not being able to cordon off who personhood is recognised in and who it is not in a way that accommodates our intuitions about obviously non-person beings, as described with reference to the poodle that occupies person-space. I proposed that Schechtman's exclusion of intuitively non-person creatures from the fold of person is arbitrary and unacceptable.

In the next section I use what I have said in the past few chapters to offer a basis for the modern political arrangement.



## Chapter 5

### An Arrangement for Persons

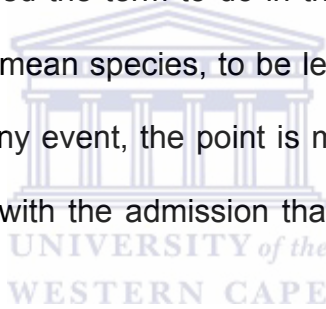
#### 5.1 Introduction

The political arrangement is an arrangement for persons. One objective in this project has been to compare and show a disparity between two conceptions of person: one in metaphysics, and one in everyday life. The one is formulated in the ivory tower when we employ the methods of analysis, leading to a conception of the person based on thought-experiments involving things such as teleportation - thought-experiments which have their place and are logical, but on the whole remain largely unrealistic. And yet when we come down the ladder and we have to formulate a conception of the person to employ in real life we seem to be disregarding a key tenet of the conception of the person in the ivory tower. If we are going to go for one or the other, we need to say why, and as I have already shown, the ivory tower version has costs which we are not willing to accept in real life. In short, we are not prepared to accept that the severely cognitively disabled are lesser citizens. The reference to Nussbaum in this project has mainly performed two important tasks. Firstly, she has correctly said that there is a problem in political arrangements that do not accommodate the severely cognitively disabled. Such systems must be deemed unacceptable. But secondly, even though she provided an account of how the severely cognitively disabled should be accommodated, we are not satisfied that her system establishes why they should be so accommodated, despite her intentions.

The objective of this chapter is to propose a metaphysical conception of the person that fits the requirements of the political arrangement. To this end I intend to say that a person is

- i. the type of thing that meets the psychological requirement in the PCV;
- ii. the subject of rights first, responsibilities second;

I intend to argue for this in the following manner. First I will say that mere membership of a species is complete membership of that species, even if one does not display some of the typical features and characteristics of that species. I will use this to argue that membership of the human species, as a species that meets the psychological requirements of personhood in the current view of personhood, is enough to constitute personhood. Nussbaum (2006) uses the notion *species* to argue for her position, but the philosophy of biology has shown that *species* is not a problematic concept<sup>26</sup>. And in that sense, considering the kind of work I need the term to do in this project, I need to point this out and say that while I probably do mean *species*, to be less tendentious I will use the word ‘*type*’ or term ‘*type of thing*’. In any event, the point is merely to highlight the issues from the philosophy of biology, along with the admission that there is simply no place to deal with those issues here.



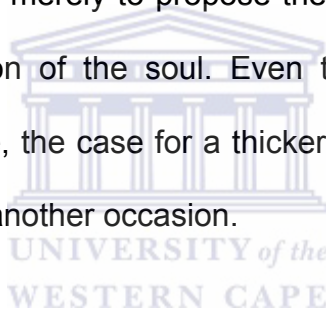
It is no secret and should therefore come as no surprise that the objective of this project is to bring the severely cognitively disabled into the fold of personhood, but in including subjects who cannot reasonably be held accountable for their actions, and since responsibility has been key to personhood debates until now, I will have to say, secondly, how we are to deal with the issue of rights and responsibilities of persons under the proposed schema.

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<sup>26</sup> See Ereshefsky's (2010) discussion on the ontology of species.

## 5.2 The Soul Reconsidered

In this section I argue that Modernity created a flawed but influential conception of the soul, and that an option for the current age is to return to the pre-Modern, Aristotelian conception of the soul. I am aware that Aristotle's account of the soul may push me in the direction of a non-reductionist account of the person, and by appealing to it I open myself up to all sorts of powerful objections from reductionists which go beyond the scope of this project<sup>27</sup>. My intention is simply therefore to take from Aristotle what I need, that being that the soul is the unifying principle of a single life, not the immaterial substance it is conceived to be in most soul-views of the present day. That being said, my use of the soul as a thin concept here should not in principle be subject to any of the objections raised by reductionists. At this stage I wish merely to propose the abandonment of what can rightly be called the Modern conception of the soul. Even though I consider myself a non-reductionist, I will make this case, the case for a thicker concept of the soul, and address the concerns of reductionists on another occasion.



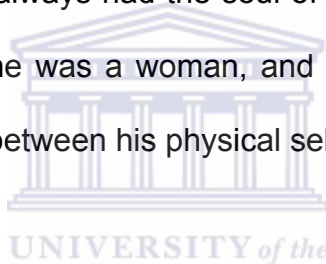
### 5.2.1 The Poor Soul

The word *soul* is used in Western culture today in what has become a very superficial way. We often hear people talking about “soul food”, and this refers to an activity such as listening to particular music or walking in nature, that has a specific effect on how the subject feels. Soul food makes you feel good, and therefore feeds your soul. Or think of Bruce Jenner who recently went public with his desire to undergo gender-reassignment. Here you have a man who was an Olympic hero in 1976, winning gold in the decathlon, a physically gruelling event. At the end of the event, while the rest of his opponents suffer excruciating exhaustion from this most enervating event, Jenner, the clear victor, proceeds to complete a victory lap. He was declared the greatest athlete in the world. He then

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<sup>27</sup> Parfit's (1984) *My Division* thought experiment is a good argument in this regard.

proceeds to marry three times, having six biological children and raising a number of others: playing a fatherly figure in the lives of many individuals. From his participation in the television series *Keeping Up with the Kardashians*, Bruce's character is depicted as masculine: a masculinity contrasting the almost all-female rest of the cast. He participates in all kinds of sporty and physical activities such as rally-racing, flying model-helicopters and playing golf while the rest of the cast walks around in designer-clothes. In a show that leverages the sex-appeal of these family members, Bruce is a stark contrast. There is one episode in which he is eventually convinced to go for a make-over for instance. The shock and interest on the part of the public at Bruce's announcement that he intends to undergo gender reassignment therefore came as no surprise. Bruce's explanation in an interview with Diane Sawyer was that he "always had the soul of a woman". His explanation is that deep inside he always felt that he was a woman, and that his achievements in his past came as a result of this struggle between his physical self and his "true" self.



There has been much criticism over the last few centuries of the concept of the soul. Much of the argument, however, has concerned a conception of the soul which is akin to a ghost in a machine: an inner, immaterial entity pulling levers and pushing buttons to control the physical, material body of the subject individual. The idea is therefore that while Jenner's physical self was the epitome of masculinity and virility, his inner "ghost in the machine" soul, pulling and pushing levers, was female. This conception of the soul has its roots in Cartesian substance dualism. Perhaps the central theme to Cartesian dualism is that human beings consist in two substances, and that the directing, causal, immaterial substance, i.e. the mind, exists in addition to the mechanistic, extended-in-space, physical body, which is the material substance. Descartes identified the causal substance as the self. Having therefore already been programmed by some reading in the philosophy of mind, my initial reaction to Bruce Jenner's claim to have "*always had the soul of a woman*"

was *what exactly does that mean?* What does it mean for one to have the soul of a woman? One need not harass Jenner any much more because this conception of the soul is quite common, even in philosophical circles. But there is good reason for this conception of the soul, and, as I have said, it can be traced at least to no greater thinker than Descartes who thought that the soul – me; the thinking thing that I am – is somehow intermingled with the thing that is extended in space – my body<sup>28</sup>. This idea though that there is another immaterial entity, somewhere out there or inside of the human being, whatever the case may be, has been subject to all kinds of objections at first, but what can really only be characterised as ridicule by the time Gilbert Ryle wrote his famous book, *The Concept of Mind* in 1949. Ryle ultimately went on to argue that talk of mind is really just a way of talking in that, despite what their surface grammar suggests, mental terms do not pick out things, all resulting in the popular view that Ryle was a logical behaviourist. But what Ryle does in the early stages of his text is show that the idea that there is an otherworldly entity inside the human body; pulling and pushing levers to control the mechanism that is the human body, is quite absurd. Ryle's overall project is more specifically in the philosophy of mind, and he does not deal directly with personhood and souls; but what he says in the first few pages (2009:12), worth quoting directly, is most significant as a starting point for our reflection on the Aristotelian conception of the soul:

If my argument is successful, there will follow some interesting consequences. First, the hallowed contrast between Mind and Matter will be dissipated, but dissipated not by either of the equally hallowed absorptions of Mind by Matter or of Matter by Mind, but in a quite different way. For the seeming contrast of the two will be shown to be

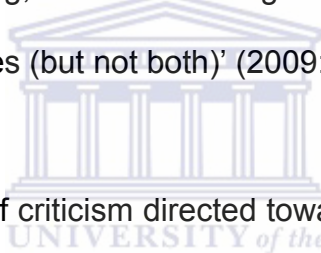
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<sup>28</sup> In a televised debate between the atheist evolutionary biologist Prof. Richard Dawkins and Cardinal George Pell, there is a point at which Dawkins asks Pell, "at which point during the evolutionary process was the soul inserted into human beings?" I reference this not for Dawkins' philosophical prowess, but rather to show the widespread use of this conception of the soul.

as illegitimate as would be the contrast of 'she came home in a flood of tears' and 'she came home in a sedan-chair'. The belief that there is a polar opposition between Mind and Matter is the belief that they are terms of the same logical type.

Perhaps more simply put, Ryle's point is that

[b]oth Idealism and Materialism are answers to an improper question. The 'reduction' of the material world to mental states and processes, as well as the 'reduction' of mental states and processes to physical states and processes, presuppose the legitimacy of the disjunction 'Either there exist minds or there exist bodies (but not both)'. It would be like saying, 'Either she bought a left-hand and a right-hand glove or she bought a pair of gloves (but not both)' (2009:12).



There has, no doubt, been a lot of criticism directed towards Ryle since he wrote his book, perhaps even specifically of his characterisations of idealism and materialism. Nevertheless, as alluded to earlier, he provides an excellent starting point for our reflection on how the Modern spirit has created and then refuted its own problematic conception of the soul. The central target of Ryle's project was what at times he referred to as "the two-worlds myth", with Descartes as its most prominent representative. This two-worlds myth was the characterisation of Descartes' immaterial mind or soul world on the one hand, and the material, extended-in-space world on the other. And it is precisely the conception of the soul within the framework of the two-worlds myth that has led to the demise of the soul. The statement that "*deep inside I am a woman*" presupposes that there is an inner world containing a separate self with its own identity, and *that* identity has been attributed to the poor soul. But thanks to Ryle, we are alerted to questions which may arise in our dealing with the material and the non-material. This allows us to be more careful about how we



approach questions of the soul. It doesn't have to be a ghost in the machine. And it is on this basis we therefore turn to Aristotle's conception of the soul.

### 5.2.2 Aristotle's Soul and Type Membership

Ryle argued that the two-world myth was based on a category mistake, or confusion of different types. His were logical categories, but Aristotle had his own categories, brought together in his text *Categories*<sup>29</sup>. Aristotle's *Categories* "provides a framework of inquiry for a wide variety of Aristotle's philosophical investigations" (Studtmann, 2013). Two of Aristotle's categories are *substance* and *quality*, and Aristotle distinguishes between the two in the following way. Substance is the most fundamental of all categories (Studtman, 2013), and according to Robinson (2014) it "is the concept of *object* or *thing* when this is contrasted with properties or events". Aristotle, furthermore, distinguished between *primary substances* on the one hand, and *secondary substances* and all predicables on the other. I have a dog called Johnny, for example, and Johnny is a muscular, black and white pit-bull. *Johnny* is the primary substance, while *dog* is the secondary substance. I will return to the importance of the contrast between primary and secondary substances later. It will suffice to notice now the distinction between the primary substance – Johnny – and predicables such as muscular and black and white. Quality, the other Aristotelian category which we are thinking about here, is a predicable: it is *applicable* to the substance. On the Aristotelian picture, it is absurd to think of substance and quality to be two different things, such that when looking at Johnny one would say "I see two things: Johnny and something white and black".

Notice then that there exists a disparity between the Modern and present-day conception of the soul, thanks largely to the two-worlds myth on the one hand, and the Aristotelian

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<sup>29</sup> I use the online edition from Internet Classics Archive, Massachusetts Institute of Technology.

conception of the soul on the other; and this disparity is erroneous on the basis of its confusion of the Aristotelian categories of substance (1) and quality (3). In brief, the present day sees the soul as a substance, just as it sees the body as a substance; whereas Aristotle sees the soul as a kind of quality, applicable to the substance. Drawing largely from Aristotle's text *On the Soul*<sup>30</sup>, the next few paragraphs will be spent spelling this out and then this important clarification will be put to use in my own conception of the person.

We start with matter – commonly viewed as anything that takes up space and has mass. The known universe is full of “stuff” that takes up space and has mass. But rather than just see everything as matter, which everything is, it is important to be sensitive to the conceptual nature of matter, in that it represents the most basic form of everything and anything that takes up space. Matter is not static: things change and move all the time. Aristotle noted matter as the kind of fundamental building block of everything, but distinguished between matter and form, where form is the becoming of. Matter has the potential to become x, while form is the actualising of x. To provide an example, a seed is matter, and under the right conditions it will actualise a plant, which is form. As such, matter and form are relative, for just as *plant* is the form of *seed*, *plant* may be matter which actualises a giant tree.

At this stage it would also be beneficial to say something about Aristotle's notion *ergon*. *Ergon* can be loosely translated into function, but a more general and useful interpretation of *ergon* is the form of activity that is characteristic of a thing. Aristotle therefore defines *the good* in terms of that which enables a thing to realise its *ergon*; that which enables a thing to perform the activity which is characteristic of that sort of thing. Sharpness is therefore a

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<sup>30</sup> I use the online edition from Internet Classics Archive, Massachusetts Institute of Technology.

virtue in a knife, for the activity characteristic – the *ergon* – of a knife is cutting, and sharpness enables a knife to perform this function well. Good, then, is where form realises its *ergon*.

That accounts for all of the things that have mass and are extended in space. To narrow the discussion, then, we focus on the distinction between living things and non-living things. Both these sub-categories of matter are subject to potential change, but there is something unique about living things in their ability to change on their own in a particular direction; ever-becoming and changing, but remaining particular, identical things. A dog and a brick both consist in matter and both possess the potential to form. But the dog alone is able to change autonomously without external or extrinsic assistance. For a pile of bricks to move from matter to form it would require some being to come along and use it to build a wall or something similar. In addition to the autonomous change possessed by living things, within this category of living things, different types of creature change in a particular direction. A dog and a cat are both subject to this autonomous change, for they are both living things, but the change is not going to cross types so that I may greet my Johnny before embarking on a journey to a foreign land to pursue a PhD, and upon returning some years later find that I now have a cat to greet because the living thing – Johnny – has changed from one type to another. Johnny remains a dog. The autonomous change in living things occurs along a particular path, that being the path defined by its type.

For Aristotle, the guidance in this autonomous change which living things enjoy is the soul. According to Lorenz (2009),

The soul of an animate organism, in [the Aristotelian] framework, is nothing other than its system of active abilities to perform the vital functions that organisms of its kind naturally perform, so that when an organism engages in the relevant activities (e.g. nutrition, movement or thought) it does so in virtue of the system of abilities that is its soul.

All living things, from plants to creatures, therefore have a soul. It is the soul that guarantees that matter, which is potential, actualises a puppy, and later a fully grown dog, as opposed to actualising from a puppy to a cat. The soul is the principle that guarantees the continuous and on-going actualisation of matter within the confines of a single type; so that a puppy never goes on to actualise a cat. This is the system of abilities that is the soul. The matter of a puppy has the ability only to actualise a fully grown dog<sup>31</sup>; it lacks ability, or is *unable* to actualise a cat. Each lump of matter making up living things requires development in a certain direction, and for this reason each living thing has an individual soul. But as each individual living thing has its own individual soul, the soul is also that principle that guarantees the identity of living things, so that the puppy that actualises the dog over time is one and the same living thing.

To take yet another step, within the category of living things we distinguish between things with sufficient psychological capacity to satisfy the psychological requirements in traditional debates about personhood (“sufficient psychological capacity”), what Aristotle called intellect (*On the Soul*), and those that lack this capacity. By now we have established that the soul is that principle that guarantees<sup>32</sup> and distinguishes types of living

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<sup>31</sup> It is important to note that *abilities* doesn't refer to the ability of performing type-specific activities, such as barking in the case of a dog. If this were the case it would mean that a dog that is born without the ability to bark is not a dog as this dog would be unable to perform a function that should typically be within the purview of its system of abilities. This is, to be sure, precisely not what this paper wishes to argue.

<sup>32</sup> in the sense that Johnny's soul guarantees that he is a dog.

things, and so we can say that within the category of living things which all possess souls, we distinguish between those types with sufficient psychological capacity, and those types that lack this capacity.

At this point it is appropriate to say something about actualisation. Form in living things, which is actualisation, doesn't refer to a single, cast-in-stone shape, such that matter does not realise the form if it does not fit specific measurements. Form in living things, rather, refers to the ever-continuing change which takes place in living things. As certain cells die and new ones are generated, I am continuously actualising (I form) as I sit and type this. There are various degrees of actualisation therefore, but it is the soul that ensures that this actualisation takes place on a specific path, within the confines of a specific type. And since the soul applies to the matter of living things at the earliest moment when the type of the living thing is decided, membership of type is what counts, and not particular degrees of actualisation in that type. A dog born without a tail is therefore still a dog, even though dogs typically have tails. Nobody would say of a living thing born of a bitch that it is not a dog merely because it has no tail. It is indeed a dog born without a tail.

This is significant because it means that members of a type actualise as that type, regardless of whether or not they possess all of the typical features of that type. And this seems consistent with our intuitions about types of living things because individual members of such types differ greatly from one another. Within the type *human being*, for instance, who can measure the actual amount of variations, both physical and non-physical, of individual members when they are compared to one another? And yet it is clear that human beings and vervet monkeys are two different types of living thing. What is important is membership of type, not degrees to which members of that type actualise as

that type<sup>33</sup>. And the soul performs this type-defining function. Members therefore of a type of living thing that typically enjoys sufficient psychological capacity actualise as that type of thing, actualising characteristics and features typical to that type of thing to varying degrees, even if not to the degree that they actualise psychological capacity typical of that type. In the same way that a member of the type which typically possesses tails may be born without a tail yet still be considered a member of that type of living thing, so too a member of the type which typically enjoys sufficient psychological capacity may be born without sufficient psychological capacity, and still be a member of that type. Where a soul starts guiding the ever-actualising matter along the path of a type that typically enjoys psychological capacity sufficient for personhood, an individual without the psychological capacities is still the kind of thing that typically enjoys such psychological capacity, even if the matter of that particular living thing never actualises sufficient psychological capacity. In other words, human beings with severe cognitive disability are the same kind of thing that cognitively normal human beings are, and therefore it makes no sense to think of the severely cognitively disabled as anything other than persons.

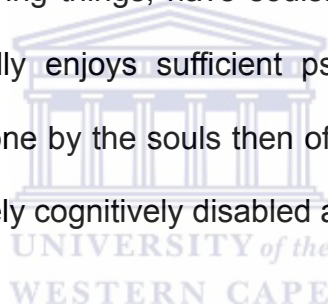
To make clear what all this has been leading to, if my arguments succeed here then it is most valuable for the overall reflection on the political value and personhood of the severely cognitively disabled. It would provide a metaphysical substantiation that Nussbaum could use to substantiate her intuition, widely shared, that the political system that does not include the severely cognitively disabled is an inadequate system. But it would also plug the hole created by Schechtman's arbitrary appeal to the human species to cordon off the concept *person* so that it doesn't include our non-human pets who participate in person lives. The severely cognitively disabled are persons by virtue of their

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<sup>33</sup> It is actually quite absurd to think of degrees of actualising as a type. Is it possible for one human being to be more of a human being than another? I hardly think so. What is important, rather, is the extent to which the capabilities typical of a type are actualised, but this is quite different to actualising as the type of thing.

membership to a type of living thing that typically actualises sufficient psychological capacity, even if they, as individual members of that type, do not actualise sufficient psychological capacity.

This then is the satisfaction of the first requirement of personhood, on my account. The soul is, once more, brought into the debate and does the important work of organising matter into different categories: first living and non-living things, where living things have souls and non-living things do not; then within living things, into animals and non-animals, so as to include plants; and finally within animals, persons and non-persons, depending on whether a soul-defined type typically has sufficient cognitive capacity. Severely cognitively disabled human beings, being living things, have souls. These souls include them in the human type, which type typically enjoys sufficient psychological capacity needed for personhood. By virtue of work done by the souls then of including the severely cognitively disabled into this type, the severely cognitively disabled are therefore persons.



Before moving on to the second requirement of personhood on my account, I must make clear my use in this project of the concept of the soul, a very controversial concept in the philosophy of mind and personhood, and make clear what my commitments are. To my mind, I need to address two frameworks, namely substance dualism and materialism. Both frameworks can be addressed in the broad sense because I will admit that this is not an exhaustive dealing with the valid issues raised against the soul, but rather a form of appeal to a lifeline until I deal with the soul in a future project. The soul, as I have attempted to use it here, is not a substance, but rather a unifying principle, and therefore within the Aristotelian category of quality. This should exonerate me from any objections raised against dualist uses of the term which posit the soul as a separate entity existing either inside or outside of the human body as an immaterial substance. It should therefore be

clear that I reject Jenner's use of the term when he says "I always had a female soul". It is not possible to consider the conception of the soul employed here as possessing qualities contrasting the qualities of the substance which it unifies for the soul is, in a sense, the qualities of the substance it unifies. Rather than being a substance, in this project at least, the concept of the soul is used as a unifying principle of life, closely attached and therefore conceptually dependent on the physical nature of the life to which the particular soul applies; and in that sense even the materialist should be satisfied because this principle of life, a unified life, posits no more than material properties. Not being a separate, immaterial substance capable of characteristics distinct from the physical life it applies to, it is the principle which unifies a life and which guides and distinguishes that life from other lives, in terms of both kind and identity. The human soul, indeed, is attached to the quality of intellect which non-human animals and plants do not possess, but Aristotle seems to take the view that the activity of human intellect always involves some activity of the perceptual apparatus, and hence requires the presence, and proper arrangement, of suitable bodily parts and organs; for he seems to think that sensory impressions [*phantasmata*] are somehow involved in every occurrent act of thought, at least as far as human beings are concerned. If so, Aristotle seems to be committed to the view that, contrary to the Platonic position, even human souls are not capable of existence and (perhaps as importantly) activity apart from the body (Lorenz, 2009).

I therefore see no reason why materialists should have an objection to the use of this conception of the soul, as presented here. Any such objection would have to be equivalent to the rejection of any (materialist) theory of the mind, for the conception of the soul employed in this project is at least as reducible to matter as any materialist conception of mind is.



Having thus set out the satisfaction of the first requirement, with appeal to Aristotle's theory of the soul, I now turn to the second element of personhood.

### **5.3 Rights First, Responsibilities Second**

If my arguments have succeeded thus far, we should at least be willing to entertain the idea that mere membership of the human type renders the severely cognitively disabled *persons* by virtue of their status as human beings. This should bring our metaphysical thinking in the ivory tower closer to the practical use of the concept *person* on the ground, even if some apprehensions remain. But there is another important step that needs to be taken. Responsibility, and particularly moral responsibility, has played and continues to play a significant role in discussions about personhood thus far. The psychological capacity that is typical of human beings is precisely what makes human beings capable of being moral units, to use Schechtman's terminology. And it is precisely this moral capacity that makes personhood interesting. But if members of the human type who lack the typical psychological capacity are to be considered complete human beings, how are we to deal with the question of attributing moral responsibility to such individuals? For sure, it would not be reasonable to attribute moral responsibility to severely cognitively disabled individuals. As mentioned earlier, the traditional view placed a great deal of weight on sufficient psychological capacity precisely because *person* was posited as a term appropriating moral blameworthiness. And moral responsibility only reasonably applies to individuals with sufficient psychological capacity. Part of our task is to reconcile this with the common sense view that the severely cognitively disabled cannot be held morally blameworthy, yet they possess moral rights appropriate to persons. This will be the focus of this next section.

With Schechtman's work playing such an important role in this project, it bears mention that Schechtman took pains to point out that much of the debate has been obscured because theorists have tended to run questions of responsibility and personhood together. Her objective was to show that responsibility was one question amongst many in the personhood debate. In this section I bear what she says in mind. I do however pay close attention to the issue of responsibility because of the role it has played in excluding the severely cognitively disabled from personhood in the past. In other words, the other questions of personhood have not played much of a role in excluding the severely cognitively disabled, but questions of responsibility have. This is why responsibility gets special mention in this project.

In brief, my proposition is to look to the positive law in South Africa to deal with the tension created by extending personhood to those who are unable to take moral responsibility. While it is inappropriate to hold them morally responsible, they nevertheless possess moral rights. Hence, persons are subjects of rights first, responsibility second.

We start with a few fictional cases to introduce some questions about personhood and responsibility, particularly with reference to the psychological continuity view.

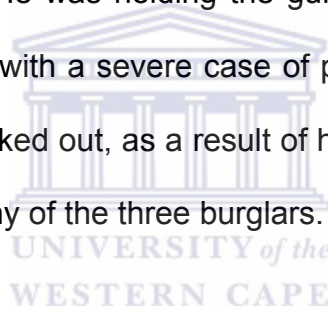
### *Case 1*

Rudolph is a young boy who was born with cerebral palsy. He is four years old already but is still unable to walk, talk, chew, swallow or do many of the other things typical of a four year old boy. In fact, Rudolph has trouble sleeping at night. He is in pain for most of the time and cries incessantly. It has also been established that Rudolph's condition affects his ability to think and reason. His parents cannot afford private medical treatment and have to

make do with public health facilities, which usually involves hours of waiting in paediatric wards. Whatever his life-expectancy is, Rudolph's family is in for testing times.

### Case 2

When Hank was a young boy, his home was burgled and he witnessed both his parents being murdered by the burglars. He grew up with his grandmother and managed to complete various qualifications and become a successful accountant. A few months ago, however, Hank was sleeping and woke up to three men in his home. Having been arrested for murder, Hank says that after waking up that night he realised that there were intruders in his home and the next thing he knew he was standing over their dead bodies, which had gun-shot wounds to the heads. He was holding the gun he legally owned in his hand. A psychologist has diagnosed him with a severe case of post-traumatic stress disorder and says that in all likelihood, he blacked out, as a result of his condition, and therefore has no memory of shooting and killing any of the three burglars.



### Case 3

Jack has just been declared a prodigal by the court on account of his spending habits. He is unable to control himself when he walks into any kind of deal. Just last week he bought a 1987 Fender Stratocaster for what he believed was a very good price: R45 000. Jack doesn't play guitar, but this Jack considered a minor detail. It is now technically illegal for Jack to deal with any of his financial affairs, even though he is a high-earning professional. The court is in the process of appointing a curator to manage his affairs on his behalf.

Recall the table used in section 3.3.2 in which we distinguished the different kinds of moral and political value involved in setting up a political arrangement. We said that the person has Kind 1 value: a fundamental kind of moral value. It is on the basis of Kind 1 value that

we say a political arrangement is an arrangement for persons. In each of these three cases above, the subjects are considered to be persons by the positive law and possessive of Kind 1 value, but only Hank and Jack are considered persons in terms of the conventional metaphysical view. Kant – like Rawls – does not see Rudolph as a target in his second formulation of the categorical imperative which requires that we treat all of humanity never just as a means to an end, but always as an end as well. Rudolph has no psychological functioning that could serve as the basis for the kind of continuity required on the conventional view. But, to emphasise once more what has been a central theme in this project, the intuition is that for his parents to suffocate him until he is dead so as to put him and them out of what in a certain sense is pure misery is both morally and politically or legally problematic. In terms of the law Rudolph is entitled to person rights, perhaps the most basic of which being the right to life. This right to life – a Kind 3 right, to be sure, is not a lesser kind of right than the right that Rudolph's cognitively typical father enjoys. Killing either would amount to murder. The Kind 3 right which Rudolph enjoys, furthermore, is different to the Kind 3 right which an animal may enjoy which disallows the killing of animals for fun. Rudolph's right to life is the same as his father's right to life because it flows from the Kind 1 value human dignity which they both enjoy. And it is this intuition which interests us, for it seems right that Rudolph be the subject of this person right, even though there is a certain validity to the conventional view that Rudolph is not entitled to person rights because he is not a person, because he cannot be the subject of personal responsibilities. And responsibility has been a central feature of the personhood debate.

Hank's is an interesting case because it provides the material for much discussion in the ivory tower. Locke, for instance, would have said that since Hank cannot remember shooting the intruders, Hank the person did not shoot them and therefore he cannot be held accountable, even though Hank the man probably did. And various positions in the

conventional framework would give differing views on whether or not Hank the person actually murdered those intruders and should be held accountable. In short, part of the objective of the conventional view was to accommodate breaks in the chain of memory, an issue to which Locke's view was subject. I will have more to say about Hank below.

Turn in the meantime to Jack, the prodigal. This is an interesting case in which Locke and the conventional view would certainly see Jack as a person when purchasing that guitar, even though he has a psychological condition leading him to inappropriate spending. It is not a giant leap to say that this kind of prodigality is a mental disorder of sorts, but not the kind that negates personhood on the conventional view, as in the case of Rudolph. For all intents and purposes, and even under Locke's basic memory view, Jack the person spends his money recklessly and uncontrollably. The positive law would say that Jack cannot be held accountable or responsible for the transactions he makes, and in my view this seems intuitively right. But this positive law view, to my mind, is at odds with the conventional view of personhood. There is certainly no break in Jack's psychological continuity and the psychological continuity that exists has the right kind of cause. And this is an important hole in the conventional view picture. There exists, on the one hand, a category of mental disorder that makes psychological continuity impossible, such as in the case of Rudolph. Here psychological connectedness, which is really just a development of Locke's memory theory, is impossible. And on this basis, the conventional view rules out Rudolph from personhood and he will not be held responsible for anything he does. On the other hand, this category of mental defect is different to the category of mental defect where psychological connectedness is present. There is indeed a category of mental disorder that does not entail psychological disconnectedness. In practical terms and even in terms of the conventional view, it is hard to see how it is not Jack, the person, making the purchase of the guitar, even though he does so on account of a psychological disorder.

But the conventional view which locates personhood in psychological continuity is unable to accommodate the intuition that Jack is not responsible for his reckless financial escapades on account of his psychological disorder. And if some form of the psychological continuity view is able to say that Jack the person subsists through psychological connectedness, how or whether or not Jack should be held responsible is not clear.

We move, then, closer to the view I wish to propose. I start with the role of the capacity for reason. It has always struck me as odd that the capacity for reason is what underlies person rights. But this is the view that dominates in conventional debates. For Rawls, for example, the fact that Rudolph is incapable of the capacity to make rational choices excludes him from the Kind 1 value in the Original Position. And, recall, a key tenet of the Original Position is that every person who participates in the political arrangement is included in the decision making process. That Rudolph is excluded is therefore not a small omission: it is central to the Rawlsian picture. But this is exactly what is wrong with the Rawlsian picture. Somehow it is possible that a group of human beings is excluded for lacking a particular feature, the capacity for reason. And in the way that Rawls's structure is set up, with choice playing so a big a role, the lack of a capacity for reason excludes Rudolph of person rights. That this is unacceptable, by this stage, needs no further emphasis.

The capacity to make choices, which presupposes the capacity for reason, is what constitutes the moral unit, to use Schechtman's language. For it is also within this capacity for reason that the subject is able to make choices on the basis of what is best for him or herself. It seems reasonable enough to construct complex debates about the moral unit, but the debate will never fit with the requirements of the political arrangement of the current age precisely because the foundation of the dominant views is that the capacity for

reason is what gives persons rights. My intuition is that the capacity for reason is what gives persons responsibilities. Reason and the contingent capacity to make choices is more naturally suited to the requirement that reasonable creatures take responsibility for their actions, for only reasonable creatures can be held responsible for their actions. According to Schechtman, we should shift away from attaching personhood to the moral unit, which in itself is attached to the capacity to take moral responsibility. Recall that she says we should rather speak of forensic units, where forensic units are only potentially moral units. What determines whether or not forensic units are moral units is precisely whether or not those forensic units have the capacity for reason; the capacity to make choices.

The capacity to make choices in itself, therefore, cannot be what constitutes personhood. We see this most clearly in the case of a severely cognitively disabled individual like Rudolph who lacks the capacity to make choices and yet is considered a person outside of the ivory tower. And, the view outside of the ivory tower is something we want. Rudolph will never be required to sleep in a kennel. If it is discovered that Rudolph was forced to sleep in a kennel it would be cause for outrage. In fact, as much effort as possible is exerted to ensure that Rudolph lives a life that is as humanly normal as possible. Building on what Schechtman has already said, while it is the case that some animals may live person lives to varying degrees, where owners of such pets treat their animals as persons, they do not do so in an attempt to make human beings out of their pets. They may insist that their pet only eat cooked chicken, as opposed to dog food, out of a clean bowl; but they will never insist that their pet sits at the dinner table and holds the knife in the right paw: ways of eating typical of a human person. They may well speak to their dogs in ways that they speak to other persons, but they will truly be startled if the dog were to respond to them in ways typical of a person, as opposed to a lick or a bark or so on. Personhood is therefore

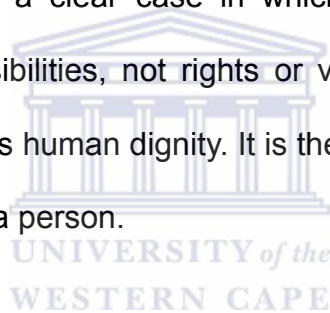
closely tied to type of living thing: in our case, the human being. We intuit that person is applicable to human beings, despite the fact that we may from time to time personify members of other types of living thing. Person is therefore much more complex and dynamic than a single feature which any type may or may not possess, such as the capacity to make choices and the underlying required psychological capacity which makes making choices possible.

But the point that personhood is much more than the capacity to make choices which arises out of the necessary psychological capacity, as in the conventional view, is also made by the likes of Jack who have the necessary psychological capacity in terms of the conventional view to make choices but who nevertheless cannot be held morally responsible for those choices. For one, if Jack's son Adam was with him at the time of purchasing that guitar, Adam would have spoken to his father while Jack was making the purchase; the same father who was present at Adam's birth some years earlier. The psychological continuity view accommodates this because there is a psychological link between the Jack who was present when Adam was born, Jack who bought the guitar, and Jack who was later declared a prodigal by the court. But as responsibility is so crucial in what makes personhood interesting, it is unclear as to how the psychological continuity view would treat the responsibility of buying that guitar, which comes as a result of his mental disorder. Intuitively, as a result of the mental disorder, Jack cannot be held accountable for his actions, but whether or not he is a person is no question: he is. At this stage, I find it difficult to see how the PCV would respond to this without appeal to an arbitrary rule.

The other question that arises from the case of Jack is the effect that his prodigality has on his person rights. If Jack<sup>A</sup> is Jack not yet declared a prodigal and Jack<sup>B</sup> is Jack declared a



prodigal, it would be as much of a crime and unjustified infringement on the rights of Jack<sup>B</sup> to kill Jack<sup>B</sup> as it would be to kill Jack<sup>A</sup>. On the other hand, refusing to acknowledge Jack<sup>B</sup> in some financial transaction would not be considered an unjustified infringement on the person rights of Jack<sup>B</sup> if Hank refused to deal directly with Jack<sup>B</sup>, and only dealt with the court-appointed curator. The reason for this is because Jack's mental disorder, rendering him a prodigal, disables Jack in a very specific way: dealing with his financial affairs. In other words, his prodigality only affects his ability to make choices when it comes to him having to make choices about his money. When the court therefore rules that he is not able to act reasonably when it comes to his financial affairs, his inability to take responsibility for his actions is recognised on account of his inability to act reasonably in regards to his finances. This is a clear case in which his capacity to act reasonably activates or deactivates responsibilities, not rights or values of other kinds. His person rights remain intact because of his human dignity. It is therefore nevertheless a crime to kill Jack<sup>B</sup> on the basis that he is still a person.



Finally, let us consider more carefully the case of Hank, who now stands accused of murder. Locke's answer to the question of whether Hank committed that crime would have been that Hank did not, as Hank has no memory of so doing. One of the major criticisms against Locke was the Brave Officer case, which is the story of the little boy who steals an apple from an orchard; grows up to be a brave soldier who fights in a war; and who then retires as a general in his later years. As Shoemaker (2012) explains, Thomas Reid points out that if the general does not remember stealing the apple then (on Locke's view) he is not the young boy. But if he remembers the war as a young soldier; and if the young soldier remembers stealing the apple, it would mean that the general is the same person as the young boy. This transitivity of identity makes Locke's view incoherent.

Now one of the objectives of the psychological continuity view was to respond to the problem posed by transitivity, along with other problems with Locke's memory theory (Shoemaker, 2012), which we will leave to one side. It does this by saying that if there is psychological continuity between the general and the boy, and the links have the right kind of cause, then the general is the same person as the boy. In other words, the general has a strong link to the soldier, who in turn has a strong link to the boy, and therefore the general is the same person as the boy. To return to the case of Hank, the psychological continuity view would hold that Hank is the same person who went to bed that night; the same person who shot those burglars; and the same person who came to his senses while standing over the dead bodies in the kitchen. Whether or not Hank can be held responsible for killing those burglars, however, presents an interesting question. But instead of listing different positions within the psychological continuity view, we look, once more, to the very practical positive law position that says Hank, the person, is not responsible for killing those burglars. This positive law position is not incompatible with a psychological continuity view that sees a separation between personhood and actual responsibility. It is not incompatible with Schechtman's view, a self-proclaimed neo-Lockean view, that personhood is a forensic notion which appropriates potential responsibility: if anybody is to be held morally responsible for action X, then person Y should be so held responsible. So, if anybody is to be held responsible for killing those burglars, then that somebody will be Hank. That Hank has remained the same person throughout though is no question. Schechtman's view of potential responsibility is therefore remarkably close to the way in which the positive law deals with the question of responsibility and personhood, and for this she should be commended.

To put all of what has been said up until now in simpler terms, the person is the target of responsibility only secondarily. Primarily, a person is a target of certain kinds of rights first:

person rights. The phrasing is important: responsibility must be a requirement because persons must be members of the species that could potentially be held responsible in the right kind of way, but the requirement is only secondary because it does not in itself constitute personhood. Membership of that type primarily entitles the person to certain rights. This formulation can accommodate the intuitions of the common sense view. What follows is a theoretical justification.

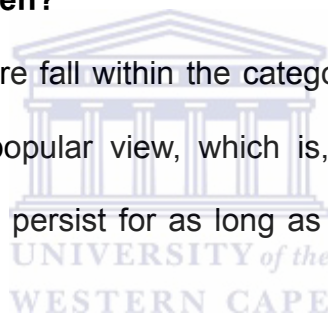
As referred to above, this is similar to the view espoused by Schechtman, but significantly different as well. For Schechtman, potential moral responsibility is enough to constitute personhood. In that sense, moral responsibility in Schechtman's view is similar to my formulation of it as a secondary requirement. And we have seen Schechtman acknowledge this when she emphasised that questions about forensic concerns is only one kind of question among many. Furthermore, my view can also benefit from the work on the unity of life found both in Schechtman and in Locke. Locke, remember, pointed out that a life is individuated by the organisation of particles, which organisation contributes to the survival of the life, not the particles themselves. It is not a giant leap to say that the guiding principle in the organisation of those particles, as explained above, is the soul as conceived by Aristotle – specifically, not the soul as conceived by Locke, who employs a conception of the soul closer to the Cartesian one; and *that* life, therefore, is the target of rights first on my view. Whether or not that life is the target of responsibilities is determined by whether or not that life also contains a certain feature: the capacity for reason.

Schechtman's Person Life View, of course, builds on a similar reading of Locke. But my view differs from Schechtman's in that it attaches personhood to a type of living thing: humanity. Schechtman cordons off persons from non-persons by the employment of her cluster concept in person-space. But her use of the cluster concept, as explained earlier

(4.2.4.2), raises the problem of arbitrariness because we are unsatisfied as to a clear reason why intuitively non-persons such as poodles cannot be brought into the fold of personhood through the cluster concept approach without an arbitrary rule. Instead of therefore cordoning off personhood in something like her cluster concept, I propose that personhood is cordoned off with reference to the type of living thing that has the potential capacity for reason as espoused in traditional personhood debates. And the reason why we should cordon off personhood (at least) at the human type of living thing is because individual human beings are all members of a type of thing that typically has the kind of rational capacity which makes potential responsibility possible.

#### **5.4 Is this an Animalist View, then?**

Does the view I espouse therefore fall within the category of the psychological continuity view or within the other, less popular view, which is, broadly, the animalist view, i.e. persons are physical beings and persist for as long as the physical organism persists? I attend to this question now.



It is easy to see how the view in this project could be seen as an animalist view, in that it looks to the physical unity of life that is the subject of person rights first, and secondarily, depending on whether or not the subject possesses sufficient reason, the subject of responsibility. The fact that this view is also able to so easily accommodate the severely cognitively disabled would also further substantiate the suggestion that this is an animalist view. There is no psychological requirement per se. Rather, what is required is that there is a being that is a member of the type of living thing that typically enjoys the psychological capacity for which it is appropriate to attach responsibility. The member itself doesn't actually have to possess such a capacity. In fact, in so far as establishing whether an actual being is a person or not the question of psychological capacity of the actual being is

irrelevant. The psychological question only has secondary importance, in so far as determining whether or not the already-identified person is the subject of responsibility. But even if the person is not a subject of responsibility, this does not reduce the personhood of the subject. We are therefore left with a physical unit, and the view might therefore be seen as animalist.

Further substantiating this view is my appeal to the soul. Animalist theories generally subscribe to some guiding principle. In my view, the soul is the guiding principle that ensures the development of a clump of matter along the line of a particular type of living organism, and along the line of a particular member of a species. It is the soul that does the work of including a clump of matter into a type of living thing the members of which typically enjoy the psychological capacity appropriate of persons. It is also the soul that ensures that this particular member of this living thing is this particular member and not that particular member. Identity and persistence are therefore also functions of the soul. The soul therefore distinguishes types of living things as persons or not: if a particular organism is a member of a type that typically has advanced cognitive capacity, then such organisms are complete members of that type. All members of that type would therefore be persons. But personhood is not merely a phase in the life of certain organisms, as Olson's animalism would have. Persons are persons from the moment the very first cells appear as the cells of the type of thing that typically enjoys advanced cognitive capacity. All members of the type *human being* are therefore persons by virtue of the soul for as long as they persist.

## **5.5 Conclusion**

In this section I have attempted to do two things. First, I attempted to reintroduce the concept of the soul into the mainstream personhood discussion. Before I could do that

though I've had to first address many of the problems which have been sent the way of the soul since the Modern era, and I've attempted to do that by tackling the conception of the soul employed in the Modern era. In doing so I've pointed to the Aristotelian notion of the soul, something very different to the Cartesian notion of the soul. The purpose of the soul is to individuate living organisms as members of particular types of living thing, and in individuating the severely cognitively disabled as members of a type of living thing that typically has the psychological capacity necessary for personhood as espoused by the conventional psychological continuity view, I hope to have shown that the severely cognitively disabled, by virtue of their membership to this type of living thing, are to be considered persons.

But taking heed of the forensic nature of the concept *person*, particularly in terms of the Lockean influence on the Modern and post discussion; and furthermore, the fact that it would be unreasonable to appropriate responsibility to the severely cognitively disabled, I've had to address the tension which exists in the relationship between the severely cognitively disabled and the appropriation of responsibility to person. I've attempted to do so, as Schechtman has in *Staying Alive*, but in a way that sidesteps a major issue which she encounters. I've attempted to argue that by appealing to the principle that the severely cognitively disabled are persons by virtue of their membership to the appropriate type of living thing, they are primarily the targets of rights first. This means that the question of responsibility is a secondary question, which arises only after personhood has been established. To treat personhood as so closely attached to responsibility so that they are indistinguishable is to put the cart before the horse. This, though, in light of *Staying Alive*, is nothing new, for *Staying Alive* argued that responsibility is one question amongst many when it comes to personhood. What makes this approach significantly different, rather, is the approach to view responsibility, with its secondary status, as playing a significant role

in determining who is included in the fold. In addition, therefore, to the principle of potentiality that if anybody is to be held responsible, it should be me; this section as placed a clear limit on “anybody” that *Staying Alive* does not: *anybody* has to first refer to a kind of thing that can potentially be held responsible, i.e. be part of a type of living thing that typically has the psychological capacity necessary to be held responsible.



## Conclusion

### The Groundwork for An Arrangement for Person

#### 6.1 Introduction

This essay has been an attempt at a meditation on personhood in a rather unusual way. I attempted to offer a critique of the conventional conception of the person as it is employed in professional philosophy circles by looking to how everyday people view the same concept. John Rawls's political philosophy, a masterpiece which has solidified his place among the greats, provided the space in which to do just that because he uses the conventional conception of the person in his political arrangement and his arrangement is used as a model by human rights culture political arrangements of the present day. There can be no doubt as to Rawls's influence.

In this the concluding chapter I wish to state clearly what I think I have achieved here. After substantiating this, I will then say what is left undone, and what I hope to pursue in the future.

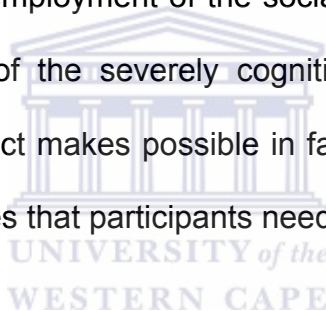
#### 6.2 The Argument

There is a disparity between the conventional conception of the person in professional philosophy and the common sense view of the person as captured in the use of the term *person* in the positive law. Little argument was required to show this; the work done here was more descriptive. For this I pointed to the PCV in the predominant personhood debates and to the constitutional law and law of persons of South Africa post-1994 to show the different views on the concept person.



My hypothesis was that the conception of person in the positive law was the preferred one, specifically because of its inclusion of the severely cognitively disabled. I appealed to our intuitions about acceptable ways of treating severely cognitively disabled human beings, and appealed to Martha Nussbaum's view that a political arrangement that does not cater for the entitlements of the severely cognitively disabled is an unacceptable system. Nussbaum's serious philosophic credentials weights our intuitions about how the severely cognitively disabled are to be treated.

I showed that the social contract tradition employs a conception of the person that requires advanced cognitive capacity from human beings, making them capable of reason and rational decision-making. While employment of the social contract by theorists gave them a principle to justify exclusion of the severely cognitively disabled, I argued that the exclusion which the social contract makes possible in fact points to the unacceptability of the social contract when it requires that participants need to be rational.



I also said that the way in which principles of justice are formulated is important. Rights and entitlements in the political arrangement should be based on our nature. The question as to what rights and entitlements citizens should have should be asked within the context of a philosophical anthropology question that asks *what is Man?* To this extent I questioned Nussbaum's capabilities approach, and specifically her list of capabilities. She sets out with the best of intentions to include the severely cognitively disabled, but I attempted to show that even so, she fails to meet the standard set by the positive law that the severely cognitively disabled are equal citizens. I therefore wonder if her list of capabilities remains intact once she has committed to an adequate conception of Man.

Schechtman has provided a conception of the person that accommodates the severely cognitively disabled. I thought about whether her conception is able to save Rawls but concluded that it is not. I also then looked at whether her conception can be used as the basis for a theory of justice that speaks to the standards of the modern political arrangement. I said it is not able to because it is not possible to abstract her conception of the person in the way that, say, Rawls is able to abstract his. I also raised an issue about the political value attached to personhood and whether or not Schechtman is able to cordon off person appropriately so that intuitively non-animals such as pets are not targets of political rights and responsibilities which are properly suited to persons.

Finally, I offered my own conception of the person that drew from the positive points raised and addressed the negative points raised. I believe that the groundwork for my conception of the person is laid in two requirements of the person, i.e. (i) that persons are members of a type of being that typically enjoys the psychological capacity requirement in conventional personhood debates, and; (ii) that persons are the targets of rights first, responsibilities second. I have used a conception of the Aristotelian soul to perform the function of unifying the life of a person within the bounds of the type of thing that typically enjoys advanced cognitive capacity, and as a specific member of such a type, answering the persistence question as well. I have also spoken about the importance of moral responsibility, but that it is not necessary for personhood, as has been the view in predominating conventional views.

### **6.3 Two Things that May Come...**

Without being too ambitious, the most important task that lay ahead in terms of completing the picture which I have started to paint here rests in the soul. The precise nature and function of the soul, which performs a crucially important task, needs to be set out, based

on the foundation which has been laid in this essay. We know empirically that the matter of a human being forms as a particular member of the type human being. In this essay, I have proposed the soul to pick out precisely this reality. I have also severed ties between the soul and its Modern variations. I have therefore said what the soul is not and what it picks out. I therefore hope, in future, to say what the soul is.

An arrangement, as I have said before, is an arrangement for persons. I have offered the groundwork for an account of the person that I believe can form the basis of a political philosophy which can explain the intuitions in our modern political arrangements about the severely cognitively disabled. It remains to be seen, then, what such a political arrangement will look like. If it is in the line of Locke, recognising the pre-contract moral value of persons and making choices with the added constraints of the entitlements of the severely cognitively disabled who are unable to make such choices. If it is in the line of Nussbaum, it would have to form a list of capabilities based on an appropriate philosophical anthropology, which accounts for the most fundamental features of human dignity; properly defining a truly human life.

This remains to be seen.

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