

Chapter 7

Justified Species Partiality



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Abstract A core question in practical ethics is ‘which entities do we need to consider in our decision-making?’ In this chapter we evaluate the justifications and motivations for defending species-membership views of human moral status. These are views on which human beings have a distinctive type of moral status grounded in their being human or possessing some property that almost perfectly correlates with being human. Many ethicists endorse species-membership views on moral status because they believe that moral status differences are needed to support widely held and purportedly well-justified beliefs about species differentiation in consideration and treatment. We argue against the need to adopt a species-membership or human-privilege view on moral status in order to justify species partiality in consideration and treatment. The sort of partiality with respect to consideration and treatment that motivates species-membership views is largely consistent with more egalitarian views about moral status, according to which an entity’s moral status depends on its own features, not the biological group to which it belongs. Given the traditional objections to species-membership views, to the extent that justified species partiality is consistent with alternative views of moral status, there is reason to reject the moral status significance of being human.

7.1 Introduction

A core questions in practical ethics—in trying to figure out what we ought to do in a situation—is ‘which entities do we need to consider in our decision-making?’ If we need to take nonhuman animals into consideration, for example, there are implications for everything from what we ought to eat to whether we ought to have pets (and if so, which ones). In ethical theory this question is often referred to as the question of moral status. If something has moral status, then it needs to be taken into

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consideration regarding actions, practices, and policies that could impact it. So, if we want a theory that accurately depicts the ethically relevant features of the world, then we need to determine which entities have moral status as well as the properties in virtue of which they have it.

In this chapter we evaluate both the justifications and motivations for defending species-membership views of human moral status. These are views on which human beings have a distinctive type of moral status that is grounded in their being human or possessing some property that almost perfectly correlates with being human, such as having the biological basis for moral agency. Species-membership views have been challenged by animal and environmental ethicists as being unsupported, ad hoc, arbitrary, and speciesist—i.e. unjustifiably biased against nonhumans. However, species-membership views persist, especially in the bioethics and disability ethics literatures. Part of what motivates species-membership views is that the criteria or principles that guide ethical treatment of humans and nonhuman animals vary widely. For example, standards and protocols for conducting research on human subjects are quite different from those for conducting research on nonhuman animals. Many ethicists endorse species-membership views on moral status because they believe that moral status differences are needed to support widely held and purportedly well-justified beliefs about species differentiation in consideration and treatment.

In this paper we argue against the need to adopt a species-membership or human-privilege view on moral status in order to justify (contextual) species partiality in consideration and treatment. The sort of partiality with respect to consideration and treatment that motivates species-membership views is largely consistent with more egalitarian views about moral status. We discuss several strategies for justifying favorable consideration and treatment of humans over non-human animals—*justified species partiality*—that do not depend on species-membership or some proxy to ground a distinctive type of moral status. Given the traditional objections to species-membership views, to the extent that justified species partiality is consistent with alternative views of moral status, there is reason to reject the moral status significance of being human.

Here, then, is a summary of our core argument:

1. One of the primary motivations for species membership accounts of human moral status is the need to justify differential consideration and treatment between humans and nonhuman animals.
2. If differential consideration and treatment can be justified on other (i.e. non-species-membership) accounts of human moral status, then this motivation for species membership accounts of human moral status is undermined.
3. Differential consideration and treatment between humans and nonhuman animals can be justified on other accounts of human moral status (e.g. species-egalitarian accounts).
4. Therefore, this primary motivation for species membership accounts of human moral status is undermined.

We begin by reviewing the debate over species-membership views, with an emphasis on recent work by disability ethicists critical of species-egalitarian views on moral

status. The aim is not to evaluate the legitimacy of the concerns or the validity of the arguments, but to identify their motivations for supporting a species-membership approach to human moral status. We then discuss three strategies for grounding justified species partiality that do not depend on giving special moral significance to species boundaries. One strategy is to show that a highly egalitarian view of moral status and pluralistic conception of moral considerability can support justified partiality. A second strategy is to show that there can be grounds for species partiality within law and policy even if humans and nonhuman animals have equal moral status. A third strategy is to show that the fact that we are in a better epistemic position with respect to understanding human interests than non-human interests justifies considering them differently in some contexts.

These strategies are not mutually exclusive or collectively exhaustive. Partiality can be justified in different contexts for entirely different reasons, though there are limits to the amount, forms, and situations in which species partiality is justified. To the extent that these strategies, and potentially others as well, can support justified (though not unlimited) species partiality, the case for adopting a species-membership view of moral status is undermined. Furthermore, they provide those that are motivated to justify species partiality with new avenues to defend their view, changing the landscape of debates over these issues in, hopefully, productive ways.

7.2 Species-Membership Views of Moral Status

Biological group membership views of moral status are those on which the moral status of an individual is explained at least in part or in some cases entirely by its *biological* features and/or relationships. The view that human beings have a special, unique or differential moral status (or dignity) is a biological group membership account of moral status. It asserts either that (1) being a member of the species *homo sapiens* is itself morally significant (and explains why members of the species have greater worth or are due greater/special consideration), or (2) that the species boundary accurately tracks something that is morally significant (and explains why members of the species have greater moral worth or are due greater/special consideration).

The primary argument against species membership views of moral status is that they are arbitrary and question begging, and that as a result they either unjustifiably exclude individuals from the scope of ethical concern or else unjustifiably reduce the amount of concern due to them (Singer 1989, 1975; Taylor 1986; McMahan 2005, 2008; Rachels 1999). The answer to “why should only humans be regarded as having moral status?” or “why do humans have a special or unique status?” cannot be “because they are human” (Singer 1989; McMahan 2005, 2008). But it is exceedingly difficult to provide any other justification. The reason for this is that *Homo sapiens* species boundaries do not track anything ethically significant—for example, moral agency, autonomy, language, types (or range) of interests, or ability to participate in social relationships. Some human beings are moral agents, highly autonomous,

capable of reciprocal concern, and able to participate in complex cooperative arrangements, but not all are. Moreover, some individuals of some nonhuman species—for example, orangutans and dolphins—are as capable of these as are some humans. Similarly, some nonhuman animals have equal or greater psychological capacities in some respects than do some humans, and so have equally or more complex and diverse interests.

Proponents of the greater moral status of all humans might argue that the fact that all healthy or “species-typical” members of *Homo sapiens* have comparable interests and capacities—e.g. moral agency—justifies treating membership in the species as morally special. However, why should co-membership in a group confer the moral status associated with some members of the group to all members, even those that lack the relevant capacities? There are a lot of possible biological groups—e.g. vertebrates, eukaryotes, and mammals. Why should we prioritize one grouping over another when determining moral status? To privilege one biological grouping over others seems arbitrary and question begging. In response, proponents of the moral relevance of the *Homo sapiens* species boundary sometimes appeal to conspecificity (Kittay 2005, 2017). It is not that the species boundary of *Homo sapiens* is itself morally significant or marks something morally significant. It is the fact that it is *our species*. But this response also begs the question. We are part of a lot of possible biological groups—e.g. mammals, vertebrates, and eukaryotes. Why is co-membership in one biological grouping privileged over all the others in moral status determinations, particularly when that grouping does not track anything that is ethically significant, such as interests or capacities? If we found out that what we currently think of as *Homo sapiens* were really two distinct species with indistinguishable capacities—*Homo napiens* and *Homo mapiens*—we would not have any new reason not to consider the individuals of the other species. Or, at least, no non-question begging and arbitrary one, since the distinction would not track anything other than one among many possible (and often imperfect) biological groupings.

The alternative to a biological grouping account of moral status is an *individualist and capacities-based account*. According to such accounts, what matters to whether and how we should consider something’s interests is what the individual is capable of, what its interests are, how it can be harmed and benefited, and the relationships that it can have—i.e. its capacities (McMahan 2002, 2005, 2008; Singer 1975, 1989; Regan 1983, 1985; DeGrazia 1996, 2007, 2014; Rachels 1999; Taylor 1986; Sandler 2013). What these views share, qua individualist capacities based view, is that: (1) ascriptions of moral status difference must be explained (in the sense of being justified); (2) they can only be adequately justified by appeal to something about the entities themselves; and (3) the only thing about the entities themselves that could justify a moral status difference is their having differential capacities and interests—e.g. whether they are moral agents, can have positive and negative experiences, can be benefited or harmed, can participate in certain types of relationships, or can set their own ends.

Individualist capacities-based views of moral status have come in for criticism in recent years from some ethicists working in disability ethics because the views deny that all human beings necessarily (or *qua* human being) have equal moral status greater than that of all nonhuman animals. They believe that the views thereby

allow that some people—e.g. those with permanent and severe cognitive impairments (hereafter PSCI)—could have less moral status (or be due lesser consideration) than other people, and some psychologically complex nonhuman animals could have the same or even greater moral status (or be due greater consideration) than some people with PSCIs (Kittay 2017; Carlson 2009; Curtis and Vehmas 2016; Jaworska and Tannenbaum 2014). This is troubling to disability ethicists for several reasons. (As discussed above, our purpose here is not to assess either (1) whether capacities based views actually have the implication that some human beings could have lesser worth or be due less consideration than other human beings or some nonhumans, or (2) whether the concerns below are warranted if they do have that implication. Our aim is to establish the first premise in our overarching argument, which is that the belief that capacities-based views have these implications and give rise to these concerns are a primary motivation for proponents of species-membership approaches to human moral status.)

One reason that it is seen as troubling is that it is offensive to assert that someone's child or loved-one are not due full and equal respect because of their impairments or condition, as well as to compare them to (sometimes unfavorably or as having less status or being due less consideration than) dogs and pigs (Kittay 2005).

Another is that it is problematic to hold that the presumption against harming or exploiting someone is weaker because they are more vulnerable, more dependent, due to their condition or disability. This seems to have things backward. Those who are dependent are due greater protection, not less. We have special responsibilities to consider their interests and needs, precisely because of their vulnerabilities. Therefore, any account of moral status on which people with PSCIs have less presumption against harm and exploitation is seen as problematic.

A third concern is that giving up the idea that all human beings have the same moral status is likely to lead to further exclusions and mistreatment. As Eva Kittay (2017, 31) puts it, "The claim that humans are not equal threatens to plunge us backward. The idea that 'all men were created equal' was hard won and it has taken centuries to make all 'men' include women, racial, ethnic, and sexual minorities, and people with disabilities. To claim that any humans are of unequal value is to let the camel's nose inside the tent. The Nazi's first victims were those with mental disabilities."

A fourth concern is to do with the empirical inadequacy of comparisons between people with PSCIs and psychologically complex nonhuman animals, and the ways in which those inaccurate comparisons are pernicious. The lives, emotions, preferences, perspectives and abilities of people with PSCIs are various and nothing like those of pigs and apes. As Kittay (2017, 25) puts it: "Respectable contemporary philosophers have, for instance, spoken of the radically or severely mentally impaired as unable to recognize familiar people in their lives, as having cognitive abilities comparable to those of a dog, as always remaining at the mental age of an infant, although it is often unclear whether they are speaking of actual people or a hypothetical case."

Kittay has been particularly critical of the way in which "marginal cases"—human beings who lack the "full set" of cognitive capacities of healthy adult humans—have been used in arguments for elevating the moral status of nonhuman animals. When animal ethicists engage in "leveling by intrinsic properties" (Kittay 2017), they are

not only elevating nonhumans, in her view they are often diminishing the moral status of people with PSCIs “to the level of the raised status of those nonhuman animals possessing such putatively comparable intrinsic properties” (Kittay 2017, 30).

Perhaps the most influential positive argument in support of the view that all human beings have equal and full moral status, without respect to their individual capacities, is a *reductio ad absurdum* from cases. Proponents offer a range of intuitively objectionable, or downright repulsive things, that they believe would be permitted to do to people with PSCIs if one accepts the individualist and capacities based approach—for example, that it would be permissible to sacrifice them for their organs, do invasive and harmful experiments on them, or euthanize them if resources could be better used elsewhere. If people with PSCIs lack full moral status because of their different capacities, they either do not have as great of protections against these sorts of things or their interests are not weighed as heavily as non-impaired people (and nonhumans with full status). Therefore, to avoid these unacceptable implications, it is necessary to locate people with PSCIs in the category of entities with full and equal status. On their view, this means rejecting the view that individual capacities are fully determinative of moral status, and it leads theorists to try to bring species membership back into the moral status picture (Grau 2010; Kittay 2005, 2017; Curtis and Vehmas 2016; Rothhaar 2019; Kipke 2019).

For example, Grau (2010, 2016) suggests that intuitions about such cases and that all humans have full moral status are sufficient to motivate the ‘speciesist’ option. Curtis and Vehmas (2016) argue that confidence in the belief that all human beings have equal moral status greater than that of all nonhumans is itself sufficient to warrant belief. And that this is so even in the absence of a positive argument for the view and the absence of counterarguments against views (such as capacities based individualism) that entail that the equal and greater moral status view is false. Kittay (2005, 2017) argues that there are relationships we can enter into with members of our own species and not members of other species (2005), and that “*We have moral obligations to other human beings for the simple reason that we find ourselves in relation to them. We cannot be the sorts of creatures we are except by being in relation to other human beings*” (2017, 36, emphasis original).

But none of these is satisfactory. They amount to just asserting that a view is warranted or else are based on false differences. For example, we cannot be the sorts of creatures we are except by being in relation to a lot of other things, nonhumans included. We can enter into many of the sorts of (nonbiological) relationships with individuals of other species that Kittay highlights as being so important and valuable among humans, including people with PSCIs (Townley 2010). As a result, the discourse seems to be at something of an impasse. On the one hand, there are what seem to be strong philosophical arguments in favor of individualist capacities-based views of moral status and against group membership views. On the other hand, there are strong concerns about the ways in which those views have been developed and presented, as well as about some of their implications.

Both animal ethicists and disability ethicists have the aim of expanding our moral horizons beyond (and removing the prejudices in our ethical theories in favor of) “paradigm” moral subjects—i.e. healthy adult humans. Is it possible to hold that

species membership is not a morally relevant property and accept an individualist capacities based approach to moral status—thereby bringing nonhumans more fully into the domain of ethical concern—without giving rise to the worries about the marginalization of and implications for people with PSCIs? That is to ask, is it possible to defend a view of justified species partiality even given moral status egalitarianism? In what follows we argue that it is possible.

7.3 Strategy One: Moral Status Equality and Moral Considerability Diversity

One concern raised by disability ethicists against proponents of leveling moral status by intrinsic properties (or capacities) is that the strategy is empirically inadequate. It fails to recognize how very different are the capacities, interests, desires, perspectives and lives of people with PSCIs and those of nonhuman animals like dogs, pigs and dolphins, which are themselves very different from each other. They do not seem comparable or “like” in the ways that leveling arguments suppose. Another concern is that the focus on intrinsic properties as the basis for moral status excludes other important ethical considerations, such as familial and care relationships (Kittay 2005, 2017; Francis and Norman 1978; Gunnarsson 2008).

Emphasizing the moral significance of relationships and the moral importance of attending to difference have strong analogs in environmental and animal ethics. The core idea is that moral considerability is underdetermined by an entity’s capacities. To take an example from Clare Palmer (2010), compare a pet dog and a wild coyote. They have similar cognitive capacities. However, how one should consider their interests is very differently. There is a responsibility to promote the interests of our own pets—to feed them and give them medical care—that we do not have to wild animals. The reason is not that they have different interests (though they sometimes do). It is because there is a history of dependency, shared experiences and emotional engagement with one’s pet. Wild animals, in contrast, should not be harmed unnecessarily, but there is not a positive responsibility of beneficence to them. On many environmental ethics, trying to help wild animals is even *prima facie* ethically problematic (Taylor 1986; Palmer 2010; Sandler 2007; Everett 2001). The reason for this is that it fails to appreciate the significance of their wildness and their relationships within ecological systems. If this is right, then the capacities a nonhuman animal has might tell us something about their moral status, but there is a lot that it does not tell us, particularly regarding consideration and treatment.

The same is true with respect to the moral considerability of human beings. Capacities based accounts of moral status might convey some information about consideration, but it is not the whole or even most important part of the story. Familial relationship, being part of a community, having a shared history, being in a particular role/position, and forms of dependency and vulnerability are, among many other things, also crucial to consideration and treatment (Hursthouse 2006). To be clear, the

claim here is not that relationships and contextual factors change an entity's moral status. The view is that they change how we ought to consider and respond to entities with moral status. The fact that a parent's child is their child is an ethically relevant property. It justifies relating to her in ways, taking responsibility in ways, prioritizing her in ways, and being emotionally invested in her wellbeing in ways that it would not be appropriate for them to do with other children or for other adults to do with their child (Williams 2012). But this does not mean that their child has a moral status that other children do not have, or greater or different moral status from them. The same is true of wild coyotes and domesticated basset hounds.

Suppose now that an inclusive egalitarian account of moral status is correct, and that people with PSCIs, cognitively complex nonhuman animals, and healthy adult humans all have equal moral status. This would tell us some very general things about the need to take their interests fully into account or treat them as an end and not a mere means, for example. However, it would not tell us very much about what their interests are, how we should consider them, and how we should treat them. After all, they are the same with respect to having full status, but they are different with respect to consideration, interests and treatment (Singer 2009). Getting from knowledge that something has moral status to a meaningful account of how we ought to take them into consideration, let alone treat them, requires being attentive to their lives, their capacities, their perspectives, their experiences, and their relationships. The more things that are included as having moral status—the more diversity and variety there is within the group—the less moral status ascription can substantively convey about the morally salient features of the individuals and their lives, and about how we ought to respond to them (Hursthouse 2006; Sandler 2013).

Given this, if ethical theory is ultimately about mapping the normative terrain—i.e. the features of the world that are relevant to how we ought to consider others and make decisions about what we ought to do—then moral status must play a more minor role within ethical theory than is often supposed. Moreover, adopting a minimalist conception of moral status helps move beyond the impasse described earlier between disability ethicists and those who advocate for capacities based individualism. It becomes possible to agree that everything with certain intrinsic capacities has equal or full moral status, while recognizing that what is owed to those that have equal or full moral status varies widely. This is possible because we can distinguish between *moral status* (which things have interests that we ought to care about), *moral considerability* (how we ought to consider them), and *treatment* (how we ought to act regarding them). It enables a view on which all human beings and nonhuman animals have the same or full moral status, such that their interests are fully considerable in all the ways that are appropriate to them. But the ways that are appropriate to them differ on the basis of their capacities and relationships. That is, they are differentially considerable. Compassion is due to sentient animals, but not to nonsentient ones. Respect (in the hands-off sense) is due to wild animals but not household pets. Friends and family are due reciprocity and loyalty, strangers are not. All of this can be made sense of in ways that do not involve status differentiation. Indeed, as we have seen, status differentiation does not explain the differential consideration and treatment—the relevant relationships and capacities do.

Moreover, things are only obscured by introducing degrees or levels of status. As already mentioned, the problem is one of inclusion and differentiation. The more inclusive an account of moral status, the more it has to be possible to differentiate the implications of having moral status. Wild animals, household pets, children, people with PSCIs, family members, and strangers can all have moral status, but we should consider and respond to them and their interests in different ways. We certainly should not treat them the same. So ‘having moral status’ under-explains how we should consider and treat anyone. And the issue here is not one of prioritization. The issue is not how should we rank people and nonhuman animals in some ordering of who to harm first (or how much justification we need to harm them). The ways of responding to them are different in kind. Respect for autonomy is appropriate to other adults, but not to infants. Loyalty is appropriate to friends, but not to wild animals. This is why appeals to degrees or levels of moral status are theoretically and practically unhelpful. Is respect or loyalty a “higher” degree of moral status? The question does not make sense. It looks for a scalar comparison where there is none. There is a plurality of forms or ways of appropriately responding to the interests of individuals—e.g. respecting, promoting, prioritizing, and acknowledging—and there is no strict ordering among them (Hursthouse 1999, 2006; Sandler 2007; Warren 1997).

What generates the controversy over moral status between animal and disability ethicists is the belief that moral status ascriptions convey significant information regarding consideration and treatment. However, when moral status ascriptions are made for a wide range of types of entities the ascriptions can do little practical work, since consideration and treatment are enormously informed by not only whatever the qualifying capacities are for moral status, but also by other capacities that an entity has, as well as by its relationships and the relevant contextual features (Bovenkerk and Meijboom 2012). (For example, a parent-daughter relationship might justify favoritism in some contexts but not others.) Moreover, there are diverse ways of taking individuals with moral status into consideration and responding to them. Therefore, we ought to adopt a minimalist conception of moral status—to have moral status is just to have directly considerable interests—and embrace (non-lexically ordered) pluralism in forms of consideration. On this view, there are not paradigm cases or marginal cases, just cases.

Furthermore, on this view, people with PSCIs are no more or less like dogs or pigs with respect to moral status than are any other people. Each has full moral status. However, context-specific partiality is justified in some cases. Just as Kittay argues, the fact that a person with PSCIs is someone’s child and stands in social relationships within a community are justifications for partiality—i.e. differential consideration and treatment. Moreover, the view is sensitive to the differences in capacities among people and nonhuman animals with moral status, so is not empirically inadequate. Getting consideration and treatment right requires being attentive to an individual’s particular relationships and capacities.

7.4 Strategy Two: Equal Moral Status Without Equal Political Status

Even if we accept that different individuals are due different forms of consideration and treatment despite having equal moral status, there are cases where it seems difficult to reconcile claims of equal moral status and radical asymmetries in how humans and nonhumans are treated or considered. For example, consider the protections afforded to human research subjects compared to those afforded to nonhuman research subjects. Research involving human subjects is constrained by principles that we typically associate with deontological normative theories, such as respect for persons, which is operationalized in terms of requirements of informed consent and special protections for the vulnerable. Research involving nonhuman animals is subject to entirely different ethical standards. In the US, for example, research on vertebrate animals is constrained by principles that are associated with consequentialism. Animals are not to be used in a wasteful manner and they are not to be caused unnecessary harm, although what constitutes a ‘necessary’ harm is given by the aims of the research project. If an experiment promises to generate sufficiently useful knowledge, then the harms necessary to animals to complete the experiment are sanctioned.

It might seem as if this asymmetry in the consideration and treatment of humans and nonhuman animals in research (not to mention, in food production) is inconsistent with an individualist capacity-based view of moral status, even given significant differences in their capacities and relationships. If humans and nonhuman animals have full and equal moral status, how can anything like this be justified? (Of course, many proponents of individualist capacity-based views of moral status have been concerned that non-human animals used in research are not considered or treated in a way that is commensurate with their moral status (Singer 2009; Francione 2009; Gruen 2011; Donaldson and Kymlicka 2011; Engel 2012)).

One possibility is that there are important differences in the criteria used to assess whether some action, practice, or institution is unethical and whether some law or regulation that allows for those actions, practices, or institutions are *legitimate* (Cohen 1997; Basl and Schouten 2018). For example, while being unfaithful to one’s partner is unethical, it doesn’t follow that laws that coerced fidelity would be legitimate. The distinction between ethics, on the one hand, and political legitimacy on the other opens up the possibility that even if humans and nonhuman animals have the same moral status, the laws and regulations that govern animal use in research may be legitimate even though they differ radically from the laws and regulations that govern the use of human subjects. In other words, there is a potential basis for justified species partiality in law that does not track a difference in moral status.

On the basis of this distinction, Basl and Schouten (2018) have suggested that proponents of individualist capacity-based views of moral status make a mistake when they claim, for example, that animal experimentation should be legally abolished on grounds that it is inconsistent with the moral status of nonhuman animals. In order to establish that these practices should be abolished, it must be shown that such

legal intervention would be legitimate (and that the current practices are illegitimate), that it would constitute a justified use of the coercive power of the state to prohibit or restrict animal use and experimentation in those ways. On their view, justifying the coercive power of the state requires showing either that it is “authorized by citizens through democratic or majoritarian processes” (Basl and Schouten 2018, 635) or that it is necessary to protect a “political interest”, which is an interest necessary to allow citizens to form their conception of their good (Basl and Schouten 2018, 638).

While there has been debate about whether and how to bring animals into the political fold (see, e.g., Nussbaum 2009; Abbey 2007, 2016, Cochrane 2009, 2012; Donaldson and Kymlicka 2011, 2012; Garner 2012, 2013; Meijer 2016), the “political turn in animal ethics” has primarily focused on whether animals are properly subjects of justice, whether they are citizens in the sense they are owed duties of a special class. However, just as we can and should recognize that questions of justice are distinct from questions about other sorts of duties, so too should we recognize that questions of legitimacy are distinctive. The question of whether we, collectively, have duties of fair treatment or distribution toward animals is distinct from whether the state may legitimately coerce compliance with those duties.

Basl and Schouten argue that neither of the above conditions for legitimacy are met with respect to nonhuman animal research. For example, while there is a trend of increasing concern for nonhuman animals among the US public (Gallup 2015), there is little evidence that the public at large is opposed to current practices and policies that govern the use of nonhuman animals in research, or that they are willing to give up the goods that these practices make possible (Donaldson and Kymlicka 2011; Basl and Schouten 2018). This could change, and there are perhaps modifications that could be made to existing animal care and use policies that would be legitimate. However, the fact that there are changes to the current oversight regime that would be authorized by democratic processes does not show that the current oversight regime is illegitimate. Moreover, citizens that are opposed to nonhuman animal research on ethical grounds do not have a political interest in ending the practice. The existence of nonhuman animal research as currently practiced does not limit their ability to form and live according to their conception of the good. Nor does it disrespect their status as a full and equal citizen. Furthermore, nonhuman animals do not themselves meet the criteria for having political interests. They lack the capacities such that they are to be recognized as citizens to whom justifications for coercive interventions are owed.

In order to deploy this strategy in defense of an asymmetry in the consideration of humans and non-human animals, two things must be established. First, as discussed above, it must be shown that there *is not* a legitimate basis for extending certain protections to non-human animals. Second, it must be shown that there *is* a legitimate basis for extending those protections to *all* humans. What are the prospects for defending this second claim?

There are at least three approaches available to defend the extension of certain protections to all humans as politically legitimate in the sense discussed above. First, it is possible to argue that there exists a majoritarian consensus or other democratic process that licenses the extension of those protections. So long as there is broad

general support for equal protections of all humans (and assuming that such protections don't conflict with fundamental political interests), then there is a legitimate basis for protections for all humans. Even absent broad public support for a specific policy extending certain legal protections to all humans, there might be other democratically licensed processes by which such protections are extended in this way. For example, there might be broad public support for extending the relevant protections to nearly all humans coupled with a recognition that it will be difficult, in terms of writing a law or policy, or due to concerns about a slippery slope, to distinguish between those for which there is support and those for which there is not. This could serve as the basis for extending legal protections to all humans.

This approach faces some difficulties. Even though there now may be a majoritarian consensus about the scope of, for example, protections for all human research subjects, this might not always have been the case. Those seeking to justify species partiality are likely to want a less contingent basis for such partiality. The second and third approaches avoid this sort of contingency by showing that extending some protections to all humans is essential to protecting the political interests of citizens.

The second approach is to show that all humans, though not all animals, are or should be seen as citizens, individuals with political interests. On the traditional Rawlsian account of citizenship, citizens are those that have the capacity (or potential capacity) to form and revise their conception of the good and be held responsible or accountable for the way they go about acting according to their conception of the good (Basl and Schouten 2018, 639). Non-human animals fail to meet this standard (though see Meijer 2013, 2017 for a dissenting view). It seems that at least some humans will fail to meet these conditions as well. However, as we discuss in the next section, in conditions of uncertainty it might be that we should, in the case of humans, err in favor of ascribing them capacities or interests even if we aren't sure they have them. This leaves open the possibility of arguing that all humans should be seen as citizens.

The third approach, and perhaps the most promising for justifying species partiality, is to argue that even if only a subset of humans are citizens in the sense relevant to legitimacy, extending legal protections to all humans is essential to protecting the political interests of those that are citizens. Basl and Schouten consider this as a route to justifying some legal protections of animals that would otherwise not be legitimate. For example, it could be that while abolishing factory farming would be otherwise illegitimate, given the role that this practice plays in anthropogenic climate change, abolition is justified on the grounds that it contributes to protecting the political interests of citizens (640, fn. 23).

In the context of thinking about differential treatment and consideration of humans and nonhuman animal research subjects, there are differences between humans and nonhuman animals that might be used to justify species partiality. This is because humans stand in different relationships to one another than do humans to animals. Every human, whether or not they meet the technical conditions for Rawlsian citizenship, is a relative of some that do. This is not true of nonhuman animals, in particular the animals used in animal research. Given the nature of these relationships, there is room to make the case that extending equal consideration and treatment to all

humans, in certain contexts, is important to protecting the political interests of citizens. For example, perhaps it is the most efficient mechanism available to protect citizens from certain forms of abuse in scientific research.

The above are overviews of how one might justify species partiality in a particular context by appeal to political legitimacy. They are intended to indicate spaces for proponents of justified species partiality to make their case without a commitment to species membership views of moral status. All the pieces of the above argument are subject to challenge. For example, while the view of political legitimacy used in support of the above argument draws from a fairly standard and widely-held conception of political liberalism (for defense and discussion see Rawls 2005; Ackerman 1980, 1994; Larmore 1987, 1996; Quong 2011; Schouten 2019), it is not uncontroversial. Furthermore, the conditions for legitimacy discussed above are necessary but not sufficient conditions for justifying the coercive intervention of the state. It must also be shown that such interventions are, for example, an efficient use of power compared to other legitimate alternatives.

However, even if one disagrees about the details of the approaches described above, the general lesson still holds. The criteria for what is unethical or unjust, including when those involve moral status claims, are not the same as the criteria for what is politically legitimate or required. As a result, there is room for the proponent of species partiality to argue for limited species partiality without adopting a species-membership view. This is important because the above grounds for limited species partiality, while up for philosophical debate, may be less questionable than species-membership views.

7.5 Strategy Three: Differential Epistemic Position

A third strategy for justifying species partiality in some contexts, even given moral status egalitarianism, appeals to differential uncertainty about the relative capacities, and thereby interests and strength of those interests, between humans and nonhuman animals. Our epistemic state as it concerns inferences or knowledge about the preferences, desires, and other mental states of humans is substantially different than that concerning nonhuman animals. In particular, we often should be more confident in our judgments about the mental life of humans than that of nonhuman animals (Allen 2006; Allen and Bekoff 2007). The reason for this is that other humans are more physiologically and evolutionarily similar to us than are nonhuman animals.

As a result, we are not only in a better position to assess which capacities other humans have, but are in a *relatively* good position to simulate the mental life of other humans and make inferences about their desires and preferences given other information we have. With respect to nonhuman animals, our confidence in such inferences should diminish as we consider animals that are more evolutionarily and physiologically distant from us. This is not to say we should be skeptical that nonhuman

animals have a mental life. We can have good physiological, evolutionary, and behavioral evidence that they do (Varner 2002; Godfrey-Smith 2016), without being as confident about its content as we are for other humans.

This difference in epistemic position can have implications for consideration and treatment. For example, imagine having to make a decision about whether to continue life support for a family member that has not left explicit instructions about their desires as compared to making a similar decision about a family pet. In the case of the family member, we are likely to try to determine whether they would have a preference regarding being kept on life support. In the case of the pet, we are not likely to consider whether the pet has such preferences, since it is reasonable to believe that our pets either lack well-formed preferences about how they are to be treated when they are unconscious or that we could not infer with any confidence what their preferences would be if they did have them.

In the above case, the differential epistemic situation justifies or explains differential consideration and treatment of two individuals. This sort of strategy can be deployed to explain or justify common views about tradeoff cases. For example, lifeboat cases that force a tradeoff between a human and a non-human animal, where one or the other must be sacrificed, can be used to motivate species-membership views. If we think that we should, all else equal, favor humans in such cases, it seems that this must be simply *because* all humans have greater status than all nonhumans. However, even if, holding all else equal, on a capacity-based view such favoritism would be unjustified, it may be that in such choice contexts we would actually not be in a good position to judge that all is actually equal. Given the evidence we have available to us, it might be justified to favor humans because we are justified, for epistemic uncertainty reasons, in assuming they have capacities that in some cases it turns out they do not in fact have.

This epistemic uncertainty strategy also supports the second strategy based on the difference between what is ethical and what is politically legitimate. Some of the arguments deploying that strategy depend on being able to show that all or nearly all humans have some capacity or property that nonhuman animals lack. This is difficult, in part because it seems plausible that there are some humans very alike in terms of the relevant capacities to some nonhuman animals. For example, whatever capacities ground political interests or citizenship, it seems either that some humans will lack those capacities or some nonhuman animals will have them. However, when it comes to judging which humans lack those capacities, we might be in an epistemic position where it is most justified to make assumptions (or defining inclusion) on the basis of species membership—i.e. to assume that all humans (but not all nonhumans) have them.

Again, whether this strategy is ultimately successful depends on the details and context in which it is deployed. However, as with the other strategies, it opens up additional space to defend context-dependent partiality in a way that track species membership but does not commit one to thinking that species membership itself is a morally relevant property.

7.6 Conclusion

The primary justification in favor of the special moral status of humans—i.e. the view that all humans have equal moral status greater than that of all nonhumans—is that it is needed to support the differential consideration and treatment due to humans in comparison with nonhuman animals. We have argued that this justification fails. Differential consideration and treatment of humans, what we have called justified species partiality, is consistent with an egalitarian account of moral status. We have shown that (contextual and limited) justified species partiality can be warranted by pluralism in the forms and bases of moral considerability, the distinction between the considerations relevant to ethics and those relevant to policy, and our differential epistemic position with respect to humans and nonhumans.

Admittedly, our approach does not get proponents of species-membership accounts of human moral status everything they want either theoretically or practically. It is not the case that all human beings have equal moral status greater than that of all nonhuman beings. Nor is it the case that all human beings take priority over all nonhuman beings in every case. However, our approach avoids their primary concerns about devaluing human beings. It also allows for contextual and situational partiality in favor of humans (sometimes humans in generally, sometimes particular humans). Moreover, it does not allow that any human beings have lesser moral status or are due lesser consideration than any nonhumans. For these reasons, justified species partiality in consideration and treatment does not require rejecting capacities-based accounts of moral status.

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