

## Modal Personhood and Moral Status: A Reply to Kagan's Proposal

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**ABSTRACT** *Kagan argues that human beings who are neither persons nor even potential persons — if their impairment is independent of genetic constitution — are modal persons: individuals who might have been persons. Moreover, he proposes a view according to which both (actual) personhood and modal personhood are sufficient for counting more, morally, than nonhuman animals. In response to this proposal, I raise one relatively minor concern about Kagan's reasoning — that he judges too quickly that insentient beings can have interests — before engaging the appeal to modal personhood. I challenge the thesis that modal personhood is relevant to one's moral status, first, by way of analogy to a kicker who misses a field goal though he might have made it; second, by casting doubt on implications for two impaired infants (only one of whom might have been a person); and, finally, by examining implications for dogs who would count as modal persons when genetic enhancements are capable of transforming them into persons.*

Shelly Kagan pulls off the improbable feat of saying something original about moral status that is not subject to easy refutation. In paving the way for his proposal, he challenges Peter Singer's thesis that most people are speciesist in the sense of having an *unjustified* bias against nonhuman animals. Whether or not Kagan's challenge is ultimately successful, it deserves careful consideration.

The position at which Kagan tentatively arrives maintains that sentient animals count morally, or have moral status, whereas persons count more, or have higher moral status. At this first approximation, the view is a form of 'personism': it is persons, rather than human beings *per se*, who are special. The overall account as Kagan envisions it, however, is a relatively strong animal-protection view; he remarks several times that most of our harmful treatment of animals is unjustified. But persons' lives and even their pains, he suggests, count more than animals' lives and their pains of similar intensity and duration. In other words, persons count more than animals — even if animals count a lot. What most distinguishes Kagan's approach is his response to the problem of nonparadigm humans: the challenge of accounting coherently and plausibly for the moral status of those human beings who are not persons. The challenge is especially acute in the case of those humans who *never have been and cannot become* persons due to substantial cognitive impairment. Kagan argues that such nonparadigm humans — or, more precisely, those whose impairment is not due to genetic anomalies (a qualification motivated by the idea that one's genetic constitution is essential to one) — are *modal persons*: individuals who *might have been* persons. Moreover, he proposes, just as personhood is sufficient for counting more, morally, than nonhuman animals, modal personhood is also sufficient for

counting more than animals (at least those animals whose cognitive capacities are not much higher than those of a given human modal person). This thesis addresses the problem of nonparadigm humans in a novel way while completing his sketch of the moral status of humans and animals. In response to this proposal, I will raise one relatively minor concern about Kagan's reasoning before challenging the appeal to modal personhood.

In contending that Singer does not give equal consideration to all beings with interests, Kagan asserts too quickly that plants have interests and can be harmed or benefited. He finds it obvious that a plant has an interest in being watered or, at least, would be harmed if deprived of water. Accordingly, he holds that Singer's sentience-based view reflects a judgment that 'harms and benefits should count only when they accrue to sentient beings', a judgment that seems to Kagan to have no justification other than an appeal to intuition.

As someone who doubts that plants (or insentient animals) have interests and can be harmed — as opposed to *damaged* — I find this discussion inadequate. We can all agree, presumably, that neither cars nor paintings can be harmed, though they can be damaged, and it may be that the most defensible view implies that insentient life-forms cannot be harmed. Some will reply that the latter are *living things* and therefore have a sort of natural *telos* that supplies the conceptual basis for attributing interests. But I am uncertain that there is such a thing as a natural *telos* and submit that artificial things such as cars may have *functions* — artificial *teloi*, as it were — that furnish equally (im)plausible bases for attributing interests to them (e.g. a car's interest in being oiled and well-maintained). Moreover, one might resist attributing interests to plants not on the basis of a few intuitions but on the strength of a well-supported account of prudential value such as a version of mental statism. It would beg the question of the nature of wellbeing to assume, without argument, that no such theory is adequate.

Now for my critique of Kagan's thesis and the broader view of moral status of which it is a part. Kagan holds that just as personhood confers higher moral status than animals possess, so does modal personhood because modal persons *might have been* persons. Here is a logically parallel assertion: Just as sentience confers moral status (a premise Kagan accepts), so does modal sentience because modal sentient beings *might have been* sentient beings. Consider a foetal mouse whose cerebrum is rendered nonfunctional *in utero* before sentience can develop, and is later born alive with a functioning brainstem. The present view suggests that the nonparadigm insentient mouse has moral status just as a typical sentient mouse has. I find the idea that an insentient animal has moral status somewhat strange. First, what does it mean to say this? It can't mean that its pain and suffering matter morally, because the creature is incapable of conscious experience. Perhaps attributing moral status to such a being means that it should not be gratuitously killed or deprived of such biological needs as food and water. But if this judgment is plausible, I wonder whether modal sentience actually plays any role in supporting it.

This brings me to the more fundamental matter of the relevance of modality to moral status. Returning to persons, why should the fact that one — who is not and cannot become a person — *might have been* a person a basis for higher moral status than one would otherwise have had? Without pretending to have supplied an adequate answer, Kagan mentions the possibility that 'we will discover that an appeal to modal personhood can be defended as part of a more general account of modal goods'. Providing a bit of motivation, he notes that 'when one regrets the fact that a conceivable good did not

actually occur, the amount of regret it is rational to have may depend on whether the good *could* have occurred, and on how *remote* the possibility was.' There is something to this. If my favourite football team loses because the kicker misses a field goal on the final play, my regret is typically more acute if the ball bounces off an upright than if the kicker misses by a wide margin from a distance at which he has never before successfully kicked. Yet, if the kicker misses a kick that he clearly *could* have made — and would have made were he kicking as well as he usually does — the fact that he could have made the field goal has no relevance to how many points the team should get for his attempt. He missed, so the team gets — and deserves — no points. If a human being is not a person but would have been if not for some improbable accident that occurred when he was an infant, we may rationally regret his lack of personhood. But it is much less clear that the fact that he could have been a person constitutes a reason to regard him as having higher moral status than he enjoys just on the basis of his categorical (as opposed to modal) properties.

Now consider the two infants who lack cerebral hemispheres. Neither can become a person. According to Kagan's understanding, the anencephalic infant's neural anomaly is due to a defect that originates *in utero* and not as a consequence of genetic endowment. The other infant similarly lacks the capacity for consciousness, but his deficit is due to genetic endowment, which — Kagan suggests — we may assume is essential to an individual in the sense that he could not have existed with a different genetic endowment. It follows that the first infant could have been a person whereas the second could not have been a person. Modal personism entails that the first infant has greater moral status than the second, who (being insentient) may have no moral status at all. The *prima facie* implausibility of this pair of judgments should not be lost on us. I suggest that we take the odd conjunction of implications as indicating a flaw in modal personism unless the latter receives very strong theoretical support. So far, I would say, it has not. It is simply not clear that the fact that one might have been a person is any more relevant to one's moral status than one's species.

A final set of reflections concerns the relationships among genetic endowment, identity, modality, and moral status. One's genome is determined, at a first approximation, by the genetic endowment with which one is conceived and, at a second approximation, by one's original genome plus the effects on it of any spontaneous mutations that accrue over time as one ages. With gene therapy partly in hand and genetic enhancement visible on the horizon, we should recognise that one's genetic constitution can change significantly. (Although it may be true that one could not have *come into existence* with a different genome than the one with which one actually came into existence, it does not follow that one could not *exist at any time* without one's original genome; the fact of our continued existence through spontaneous genetic mutations belies such a mistaken inference.) We may even envision genetic enhancements — perhaps involving the infusion of neural stem cells derived from a person — that cause a nonparadigm human or an animal to transform into a person.

Before addressing the importance of this theoretical possibility, let me head off an objection. One might object to my claim that, say, a dog could become a person as a result of genetic enhancement by contending that such a change would be *identity-disrupting*: the resulting person would be a different individual from the dog. Although I believe many philosophers would be inclined to advance this objection, I think they can easily be shown to be mistaken. To be sure, the enhanced dog-person would be very

different, qualitatively, from the pre-enhancement dog. But numerical identity is what's at issue, and no plausible account of numerical identity implies that a nonperson cannot transform into (as opposed to being replaced by) a person. An account that did imply this would imply that you, the person, did not exist as a newborn — who lacked the capacities that constitute personhood — a truly absurd implication. You and the earlier newborn share a single biological life; and the 'two' of you share the same basic capacity for consciousness, making you the same sentient being. Similarly, an ordinary dog who lived a portion of her life before being genetically enhanced could become a person, continuing both the biological life and the sentient life of the pre-enhanced dog.

The reason it matters that, in principle, a dog could become a person via major genetic enhancement is that, once such a technology became available, it would be undeniable that any normal dog, although not a person, *might have become (been) a person* and is therefore a modal person. Dogs would then have higher moral status than any animals incapable of becoming persons through genetic or other interventions — and presumably any animals for whom transformation into persons is a *more remote* possibility (in keeping with Kagan's idea that modal personhood comes in degrees). Dogs, or at least those dogs constitutionally capable of such a transformation given available technologies, would also have higher moral status than any human beings whose original genetic constitution was so compromised that it was not true of them that they might have been, or might be transformed into, persons. Maybe Kagan would accept these results. But they do suggest that membership in our species plays less of a role than he thinks it does via the metaphysics of modality. And they raise, at least to my mind, further doubt that the fact that a given nonperson might have been a person is relevant to the individual's moral status.<sup>1</sup>

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