Critical Review of International Social and Political Philosophy
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/fcri20

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Alasdair Cochrane[a]
[a] Department of Politics, University of Sheffield, Sheffield, UK.
Published online: 10 Jul 2012.

To cite this article: Alasdair Cochrane (2013) From human rights to sentient rights, Critical Review of International Social and Political Philosophy, 16:5, 655-675, DOI: 10.1080/13698230.2012.691235

To link to this article: http://dx.doi.org/10.1080/13698230.2012.691235

Critical Review of International Social and Political Philosophy, 2013
Vol. 16, No. 5, 655–675, http://dx.doi.org/10.1080/13698230.2012.691235

From human rights to sentient rights

Alasdair Cochrane*

Department of Politics, University of Sheffield, Sheffield, UK

This article calls for a paradigm shift in the language, theory and practice of human rights: it calls for human rights to be reconceptualized as sentient rights. It argues that human rights are not qualitatively distinct from the basic entitlements of other sentient creatures, and that attempts to differentiate human rights by appealing to something distinctive about humanity, their unique political function or their universality ultimately fail. Finally, the article claims that moving to sentient rights will not lead to intractable conflicts between rights, but to a more inclusive, fair and rationally defensible normative enterprise.

Keywords: human rights; animal rights; sentient rights; interests; personhood; welfare; universality

Introduction

One of the most appealing features of human rights is their inclusiveness. The contemporary idea of human rights is unlike previous notions of the 'rights of man' or the 'rights of the citizen', because human rights refer to those rights that *all* humans possess simply in virtue of their membership of the species *Homo sapiens*. But while human rights eschew exclusions based on nationality, gender, ethnicity, religion, age, ability, and so on, it would be quite wrong to think that the contemporary idea of human rights does not have exclusions of its own. After all, human rights are for humans only: they exclude each and every entity that does not belong to the human species. Interestingly, the exclusive nature of human rights is rarely remarked upon.[1] Human rights theorists and practitioners focus most of their energy on discussions concerning the foundations of human rights, their appropriate content, the types of duties that are entailed by human rights, and how they are best protected and promoted. Whether the human species constitutes a plausible and justified boundary for basic universal entitlements is almost never commented upon. This paper interrupts that silence and challenges the exclusivity of human rights. In particular, it argues that basic universal entitlements cannot justifiably be limited to the

*Email: a.cochrane@sheffield.ac.uk

human species, for such entitlements are possessed by all sentient non-human creatures. Moreover, it claims that the basic rights of sentient non-humans are not qualitatively distinct from human rights. As such, it argues that in language, theory and practice, human rights should be reconceptualized as 'sentient rights'.

Note, then, that the aim of this paper is not simply to defend the familiar claim that sentient animals are legitimate possessors of rights. Obviously, arguments for animal rights have a long history and are by now well-established (Regan 2004). No, the purpose of this paper is to show that the current exclusion of non-human sentient beings from *human rights thinking and practice* is arbitrary and unjustified. The paper argues that the basic rights of sentient humans and non-humans are neither conceptually nor ethically distinct. It claims that they are part of the same normative enterprise.

So why should human rights be reconceptualized as sentient rights? The argument presented here proceeds in five stages. First, a case is made for the very idea of sentient rights. This involves showing that all sentient creatures possess certain basic rights because they have interests. Since all sentient creatures – including human beings – possess such basic entitlements in virtue of their shared sentience and their shared possession of interests, we have a *prima facie* reason for moving to the more inclusive notion of sentient rights. However, three objections to such a move are then considered, each of which claims that human rights are qualitatively distinct from the rights of all other sentient creatures. Firstly, the claim that human rights protect something which is distinctively human is examined and shown to be untrue. Secondly, the idea that human rights possess a unique function in international politics is considered and debunked. And thirdly, the notion that human rights are universal while the rights of sentient creatures are differentiated is discussed and shown to be false. In the final section, the objection that the move to sentient rights would lead to an inflated set of rights characterized by endless conflicts is evaluated. This section argues that a properly constructed notion of sentient rights need not have any such effect, but would instead lead to a more inclusive, fair and rationally defensible normative enterprise.

The case for sentient rights

It would obviously be quite wrong to reconceptualize human rights as sentient rights if non-human sentient creatures were not even able to possess rights. As such, this section aims to make the case that all sentient creatures can and do possess some basic rights. This case is made in four steps: first, a *prima facie* case for acknowledging that all sentient creatures possess rights is briefly outlined, and then three objections to this case are examined and dismissed.

The *prima facie* case for viewing all sentient creatures as right-holders is extremely simple and draws upon two conventional ideas in moral and political philosophy. The first idea is that interests are the necessary and sufficient conditions for the possession of rights (MacCormick 1977, Raz 1988, Kramer 1998). As such, on this view, all and only interest-holders possess rights. The second conventional idea is that sentience is the necessary and sufficient condition for the possession of interests (Feinberg 1974, Singer 1979, Sumner 1996, p. 21). As such, on this view, all and only sentient creatures possess interests. When these two conventional views are combined then, the *prima facie* case is complete: all sentient creatures, as possessors of interests, are possessors of rights. The rest of this section examines three possible problems with this case.

The first objection to the *prima facie* case for sentient rights denies the link between interests and rights. For according to so-called 'choice theories' of rights, in order to hold rights it is necessary to have more than mere interests: one also needs the capacity to claim or waive one's rights for oneself (Hart 1967, Sumner 1987, Simmonds 1998, Steiner 1998). Crucially, this is a capacity which not all sentient creatures possess. However, Joel Feinberg has persuasively argued against the necessity of such a capacity for the possession of rights (Feinberg 1974). After all, even if one accepts the choice-based idea that rights are essentially claims, it is unclear why right-holders have to claim their rights for themselves. Feinberg pointed out that it is perfectly possible to have one's rights claimed or waived by a representative. This, after all, is how the rights of young infants, the seriously mentally disabled and others who are incapacitated for whatever reason are demanded in most legal systems. For Feinberg, then, the crucial criterion is not whether one can claim one's rights for oneself, but whether one can have one's rights claimed by a representative.

But there is, of course, a powerful objection to the idea that representatives can demand or waive rights on behalf of others: it seems to provide no criteria whatsoever for limiting rights possession. For if rights can legitimately be claimed or waived by representatives on the behalf of right-holders, then what is to stop representatives from claiming the rights of such inanimate entities as rocks, traffic lights and electricity pylons? Feinberg's theory might seem to lead to the implausible conclusion that absolutely anyone and anything can possess rights.

On closer inspection, however, this objection can be shown to be unfair. After all, when representatives claim rights on behalf of others they are claiming (or waiving) the performance of a duty to the right-holder. Hence, right-holders have to be the types of entities that it is meaningful for others to have duties towards. And Feinberg suggests – quite rightly in my view – that the only types of entities we can have duties towards are those who possess interests – those who can themselves be benefitted or harmed by the actions or inactions of others. Since entities such as rocks, traffic lights and

electricity pylons do not have interests and cannot themselves be benefitted or harmed, they cannot be the recipients of moral duties (Feinberg 1974, p. 50). Note, of course, that the claim is not that it is nonsense to speak of duties *regarding* rocks and the like. Rather, it is that the duties in respect of such entities can only be indirect, based solely on the duties we have towards others, such as the individuals who own them.

The second objection to the *prima facie* case for sentient rights denies the link between sentience and interests. For not all thinkers have subscribed to the link between sentience and interests described above. For example, a number of environmental ethicists have claimed that interests are also possessed by entities that lack conscious experience (Taylor 1986, Varner 1998, Johnson 1991, Attfield 1981, Regan 1976). These thinkers usually see interests as intrinsically linked to biological flourishing as opposed to conscious experience. After all, many human and animal interests are not related to conscious desire, but to simple biological goods – take, for example, a newborn baby's interest in breathing clean air. Some environmental ethicists have thus pointed out that we ought to recognize that all organisms with a biological good can possess interests.

However, it is one thing to identify what makes an entity a better example of its kind, it is another to identify what makes an entity's life go better for that entity itself (Sumner 1996, p. 78). Interests are conventionally understood to be components of well-being, and as a prudential value, well-being relates to how life goes *for the individual whose life it is* (Crisp 2008). Clearly, in order to experience how one's own life is going, a level of conscious experience is necessary. In other words, consciousness is necessary for the possession of interests. Moreover, while it is true that sentient creatures have interests in biological goods which they do not consciously desire – such as a newborn's interest in clean air – conscious experience still grounds that interest. After all, by breathing clean air newborns experience better lives *for those individuals themselves*. Clean air can have no such effect for non-conscious organisms like plants.

The third objection to the *prima facie* case for sentient rights points out that *being able* to hold rights is not the same as actually *possessing* rights. It may be true that all sentient creatures can possess rights, but perhaps as a matter of fact, not all of them do. For example, Joseph Raz has famously described rights in the following way:

> 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.
>
> (Raz 1988, p. 166)

Under this Razian account, rights are not self-evident truths, fundamental to morality, but instead require justification from a more basic moral assessment of interests – an assessment to see if they are 'sufficient' to ground duties on the part of others (Raz 1989). As such, it might be objected that while sentient non-human creatures do possess interests, they do not possess any that are sufficient to establish a right.

However, I do not believe that this objection holds much weight. For it is surely only sensible to recognize that *all* sentient creatures have at least *some* very basic interests which are sufficiently strong, all things considered, to ground *some* duties on the part of others. To take just one example to illustrate, it is clearly true that all sentient beings have an interest in not being inflicted with excruciating pain simply for the amusement of others. And this interest must also be considered sufficiently strong to impose a duty on us not to inflict pain on them in such ways. After all, the interest in avoiding excruciating pain is clearly weighty, the interest in being amused is only trivial, and the burdens imposed by living up to the duty not to inflict such pain are obviously weak. At the very least then, we can confidently claim that all sentient creatures possess the basic right not to be inflicted with excruciating pain simply for the amusement of others. Of course, when it comes to assigning other types of rights to sentient creatures – to liberty, to life, and so on – there will be reasonable disagreements. But disagreements over the precise content of the rights of sentient creatures should not stand in the way of recognizing that some such rights exist. We can reasonably agree that all sentient creatures possess at least some interests which impose duties on us. As such, we can also reasonably agree that all sentient creatures possess at least some basic rights.

The aim of this section has not been to provide and defend a comprehensive list of sentient rights. It has simply been to show that sentient beings can meaningfully be said to possess at least some basic rights. Moreover, if *all* sentient creatures, including humans, possess some rights and possess them for the same reasons, we also have a *prima facie* case for thinking of them as part of a shared scheme of 'sentient rights'. In other words, there are reasonable grounds to question the legitimacy of having a list of basic rights – human rights – exclusive to one species. The next three sections of the paper look at arguments which attempt to justify keeping a distinctive and exclusive category of human rights.

Do human rights protect something distinctive about human beings?

The first way in which human rights might be claimed to be different from the basic entitlements of other sentient creatures is through showing that human rights protect something distinctive about human beings. For human rights do not protect each and every interest that humans have, or even

each and every interest that is sufficient to impose a duty on another. Instead, it is frequently claimed that human rights protect a special class of interests: those related to 'human dignity'. The whole point of human rights, it is sometimes claimed, is that they identify and protect something special and unique about humanity. For example, John Locke famously grounded his theory of natural rights in our special relationship with God (Locke 1988). And while few contemporary theorists currently consider human rights to be linked to the divine in this way, many nonetheless maintain that they derive from some other form of human uniqueness.

For example, a popular claim is that human rights protect our 'personhood'. Personhood is a moral category which is usually used to identify a cluster of characteristics. While the particular cluster and name given to those characteristics can vary from theory to theory – autonomy, rational agency, moral agency, the possession of a conception of the good, etc. – the most important aspect of personhood is that it represents *agency*: our capacity to pursue goals rationally and reflectively (Rawls 1993). For many human rights theorists, what makes human rights distinctive from other forms of right is that they protect our capacities of personhood. That is to say, human rights protect those interests that enable us to lead our lives *as persons*. A typical example of this kind of personhood theory of human rights has recently been offered by James Griffin:

> Human life is different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be – often, it is true, only on a small scale, but occasionally also on a large scale. And we try to realize these pictures. This is what we mean by a distinctively *human* existence – distinctive as far as we know.
>
> (Griffin 2008, p. 32)

For personhood theorists of human rights like Griffin, it is this ability to reflect on and pursue a good life for oneself which is claimed to make human lives different from the lives of other creatures, thus providing human rights with a distinctive foundation and nature.

However, there are two devastating problems with personhood theories of human rights. In the first place, it is clear that personhood theories cannot assign human rights to all humans. Quite simply, not all human beings possess the characteristics of personhood: young infants and the severely mentally disabled are obvious examples of individuals without the capacity to frame, revise and pursue their own conceptions of the good. This objection is somewhat obvious, and theorists have usually employed two strategies to deal with it. The first, and the one employed by Griffin, is to simply deny that that these human non-persons possess human rights (Griffin 2008, p. 95). Of course, this move does not mean that such individuals are excluded from wider moral concern, and personhood theorists

are keen to point out that we still have stringent obligations to young infants and the severely mentally disabled. But because they lack the capacities of personhood, these thinkers claim that they are not meaningful bearers of human rights. The grave problem with this strategy, however, is that it is so at odds with the ordinary understanding and practice of human rights. For most human rights campaigners and practitioners, there is no question at all that these individuals are the legitimate bearers of human rights. Indeed, given the fact that these individuals are often particularly vulnerable, many practitioners would argue that it is vital that they are protected by the powerful normative category of human rights. So if we want our theory of human rights to have a reasonable resemblance to how human rights are conceived and used in the real world – as Griffin himself endorses (Griffin 2008, p. 29) – surely it must include young infants and the severely mentally disabled.

The second strategy some personhood theorists have used to try and deal with this problem is to maintain that all humans possess human rights, even while acknowledging that some lack the usual qualifying capacities. For example, it has been claimed that while all humans are not persons, they all at least have the potential to be persons, or were once persons in the past. The problem with this response, however, is that assigning rights on the basis of what people might become, or once were, is notoriously problematic. For example, it would be absurd to grant me the rights of a Supreme Court Judge on the basis that I have the potential to become one at some point in my future (Boonin 2003, pp. 45–49). Moreover, it is simply not true that all humans have the potential to be persons, or were once persons in the past: there are many human beings with permanent disabilities for whom the capacities of personhood are not temporarily switched off.

Another means by which all humans might be included within a personhood account of human rights is by saying that human non-persons qualify for human rights because they belong to a wider group – the human species – who *do* hold the capacities for personhood. But the great problem with this response is that it fails to tell us why the characteristics of a wider group should be relevant to an individual's proper entitlements. And even if we leave this issue aside and assume that such wider group characteristics are indeed relevant to an individual's rights, it is unclear why the relevant wider group we refer to should be the species. After all, human non-persons belong to many other wider groups, such as mammals, living organisms, and so on, many of which do *not* necessarily hold such capacities. Picking species membership as the relevant wider group is entirely arbitrary (Nobis 2004, pp. 50–51).

The second reason why personhood theories of human rights are problematic comes down to their justification of human rights. For as John Tasioulas has argued, many uncontroversial human rights protect interests that are not related to our capacities of personhood (Tasioulas 2002, pp. 91–93).

For example, it seems much more plausible to ground the right not to be tortured not on the basis that torture undermines our ability to frame, revise and pursue a conception of the good, but on the simple basis that it causes us to suffer in terrible and horrific ways. Similarly, the right to security of the person, and many of our economic and social rights, can be justified much more simply and effectively by referring to the human interest in leading a tolerable life without suffering.

Because of these problems associated with personhood theories of human rights, many human rights scholars have proposed and defended so-called 'welfarist' theories of human rights (Buchanan 2004, Tasioulas 2002, Caney 2007, Nussbaum 1998).[2] These theories of human rights claim that human rights protect our basic interests. Importantly, those basic interests are not exhausted by our capacities of personhood: under a welfarist theory, human rights protect all goods that allow us to lead minimally decent lives. Welfarist theories also have no problem in assigning human rights to non-persons such as young infants and the severely mentally disabled, who obviously do possess basic interests. Importantly for our concerns, however, once a welfarist theory of human rights is adopted, the idea that human rights protect anything special or distinctive about human beings becomes questionable. After all, *all* sentient creatures possess basic interests, and *all* sentient creatures can lead minimally decent lives. As such, if we follow a welfarist understanding of human rights, it remains unclear why the distinction between human rights and the basic rights of other sentient creatures should be maintained.

Do human rights have a distinctive political function?

Perhaps the distinction between human rights and the basic rights of other sentient creatures derives not from what those rights protect, but from what those rights do. Indeed, the second objection to reconceptualizing human rights as sentient rights claims that human rights are qualitatively different from the basic rights of other sentient creatures because human rights have a distinctive political function. To explain, an increasing number of theorists have recently advocated 'political theories' of human rights (Rawls 1999, Cohen 2004, 2008, Raz 2010, Sangiovanni 2008, Beitz 2009). A political theory of human rights starts not with some account of what is of value to human beings, such as basic interests or personhood, but with an account of the political function of human rights in the real world. Following Rawls, all of the proponents of the political understanding of human rights see their primary function as placing limits on the sovereignty of states. In other words, they claim that human rights specify when it is permissible for outsiders to intervene in the affairs of another state. For political theories then, not all of our universal moral rights can properly be called human rights. Rather, human rights are a subset of those moral

rights: a narrower set of rights which when violated by states warrant international intervention. Of course, international intervention does not necessarily mean *military* intervention; for diplomatic pressure, legal condemnation, economic sanctions and so on are also types of intervention (Rawls 1999, p. 81). But whatever its particular form, for political theories of human rights, the distinctive feature of human rights is that they act as triggers for intervention. When such an understanding of human rights is adopted, the difference between human rights and the basic rights of other sentient creatures becomes evident. After all, animal rights do not have this same political function: when animal rights are violated that does not lead to the intervention of foreign and international agents in the affairs of an individual state. Put simply, because of the different functions of the two rights, there is a qualitative difference between, for example, the human right not to be tortured, and a bear's right not to be baited.

But there are two damning problems with this argument. In the first place, we have good reason to be sceptical about these political understandings of human rights. Such political accounts face several potential problems. For example, even the most superficial of glances at the way in which human rights are used in real world politics reveals that they serve functions which extend well beyond limiting sovereignty and specifying legitimate intervention by the international community. For instance, political theories of human rights completely neglect the important *domestic* function that human rights play in real world politics. It is quite wrong to view human rights as something which exist and have meaning only in international affairs. Human rights are not mere foreign policy concerns, to measure the legitimacy of 'them' 'out there'. Human rights have real bite and meaning for domestic politics too. For many states, the rights provided by their constitutions, bills of rights, or legislative acts, are classed as 'human rights', and mirror closely or incorporate the human rights of international law. As such, human rights in countries as diverse as South Africa, India, Canada and the UK, to name just a tiny handful, function so as to protect the basic interests of individuals within that state. Seeking redress in constitutional and human rights courts is not carried out in order to reduce the sovereignty of the state, by demanding assistance from external agents. Quite the contrary, such practices can be seen as *expressions* of the sovereignty of states, by finding domestic remedies for domestic human rights violations. And even in international politics, human rights do more than act as triggers for international intervention (Tasioulas 2009). They certainly have an important aspirational role. Moreover, they also act as qualifications for entry into international organizations like the European Council or the North Atlantic Treaty Organization (NATO) (Buchanan 2006, p. 165).

Of course, in response to such points, it might be conceded that the role of triggering intervention is not all that human rights do, but it might

nevertheless be pointed out that this function makes them distinctive from other forms of right. Still then, it might be maintained that on this basis human rights are qualitatively distinct from the basic rights of other sentient creatures. However, this argument does not work either, because human rights are not the only types of right which serve to justify international intervention. For as a matter of fact, the basic entitlements of non-human sentient animals can be and are used as triggers for international intervention. For remember that international interference does not necessarily mean military action, but also includes diplomatic and other forms of political pressure. As such, it is clear that states can and do intervene in the affairs of others for the sake of the basic interests of non-human sentient creatures. The most obvious recent example of such an effort has been the European Union's ban on the import of and trade in seal products. This ban is by no means a policy for internal consumption alone, but strikes directly at the seal culling policies of such states as Canada, Norway and Namibia, and does so explicitly because of concerns about the animal welfare implications of the culls. Indeed, the ban has caused a good deal of diplomatic wrangling amongst the relevant states (BBC News Online 2009). A different example of a case where concern for the basic entitlements of sentient creatures has led to international intervention and diplomatic efforts is in the area of farm animal welfare. For example, due to serious concerns about the treatment of exported Australian sheep and cattle, the Australian government has negotiated 'Memoranda of Understanding' with eight countries in the Middle East and Egypt to ensure improved animal welfare and slaughter methods in importing countries (Australian Government Department of Agriculture, Fisheries and Forestry 2006).[3]

Now, it will of course be objected that these efforts at international intervention for the sake of the rights of sentient creatures are rather paltry and isolated. Indeed, they are. But the same can of course be said in relation to intervention for the sake of human rights! In any case, the point of this argument is not to show that states are living up to whatever obligations they have to intervene for the sake of the rights of sentient non-humans. Rather, the point is simply to show that states purport to and are able to intervene in the name of sentient rights. In other words, intervening in the affairs of another state on the grounds that basic entitlements have been violated is not something which is distinctive to human rights. As such, there is nothing about the political understanding of human rights which undermines their reconceptualization as sentient rights.

Are human rights universal?

One very important reason why many would want to continue to argue that human rights are qualitatively distinct from the rights of other sentient creatures is simply because they have a different content. Indeed, the whole

point of human rights, it might be argued, and what makes them distinctive, is that they are universal: they are the rights shared by *all* humans. By reconceptualizing human rights as sentient rights, that universality is immediately lost. After all, while there are some human rights which might also be reasonably assigned to certain non-human sentient creatures – such as the right not to be tortured, the right to basic health, or the right to life – it is plainly clear that human and animal rights cannot be identical in content. For example, it would be absurd to assign to sentient non-humans the right to a fair trial, the right to a nationality, or the right to freedom of thought, conscience and religion.[4] Given this obvious difference in content, it might well be argued that human rights and the rights of other sentient creatures are distinct and should not be subsumed under an overarching notion of sentient rights.

But while the core of this objection cannot be denied – obviously human and animal rights do differ in content – that is no good reason to maintain that human rights are qualitatively different from the basic rights of other sentient creatures. After all, human rights also differ in content, and yet we do not ordinarily consider that to be a sufficient reason to deny their universality. In fact, human rights are far more differentiated than is usually acknowledged. Adults possess certain human rights that young children do not possess, such as the right to marry (Universal Declaration of Human Rights 1948, Article 16). Children possess certain human rights which adults do not possess, such as the right to be protected by the state when deprived of a family environment (United Nations Convention on the Rights of the Child 1989, Article 20). Women possess certain human rights which men do not possess, such as basic health care in pregnancy (Convention on the Elimination of All Forms of Discrimination against Women 1979, Article 12). Disabled individuals possess certain human rights which able-bodied individuals do not possess, such as the right to the assistance necessary for them to be personally mobile (Convention on the Rights of Persons with Disabilities 2006, Article 20).

Recognizing the differentiated nature of human rights can lead us in one of two directions. Firstly, we might abandon the idea that human rights are universal and simply acknowledge that humans possess different fundamental rights to one another – much in the same way that humans have different rights to non-human animals, and non-human animals have different rights to one another. Of course, if this line of thought is followed, we would be giving up on the idea that there is a distinctive category of entitlements universally shared by all humans. Instead, we would have to acknowledge that fundamental rights are much more diffuse in nature – and stretch beyond the human species. Clearly then, this move would lend a good deal of support to the idea of reconceptualizing human rights as sentient rights.

Alternatively, we might try to retain the universality of human rights by developing a more complex understanding of universalism which can cope with the differentiated nature of human rights. Such an understanding might then allow us to keep hold of the idea that human rights are distinct from the basic rights of other sentient creatures. The remainder of this section will pursue this latter task. It argues that there are two potential ways of reconceptualizing universality so as to accommodate the differentiated nature of human rights. Importantly, however, it also claims that both of these methods undermine rather than support the idea that human rights are qualitatively distinct from the basic rights of other sentient creatures.

The first way in which the universality of differentiated human rights might be explained is through regarding them as 'derivative rights' (Schaefer 2005, p. 29). Thinkers adopting this explanation have argued that it does not matter that different humans possess different human rights, so long as their particular rights are derived from more fundamental human rights that are indeed shared by all humans. In other words, the claim is that the differential rights of adults, children, women and the disabled are simply specific derivations of more general human rights which are truly universal. But what might these more general universal rights be? Perhaps the most plausible candidates have been provided by Henry Shue in his classic work *Basic Rights* (1996). Shue defines basic rights in a more precise way than I have been using the term in this paper: for Shue, basic rights are those rights which are essential to the enjoyment of all other rights (p. 19). For Shue, there are three basic rights – to physical security, subsistence and liberty – and these are the rights which all other rights depend upon. For our purposes, we might draw on Shue's formulation and claim that the rights to security, subsistence and liberty are the truly universal rights, from which all differentiated human rights derive.

And yet, this more nuanced understanding of universality does nothing to support the notion that human rights are qualitatively distinct from the rights of all other sentient creatures. After all, these basic rights – to security, subsistence and liberty – protect those interests that are sufficiently general to attribute to *all* sentient creatures. In other words, Shue's basic rights are precisely the types of general right which it is at least plausible to suggest sentient non-humans also possess. As such, if we follow this way of understanding the universality of human rights, the distinction between human rights and the rights of other sentient creatures breaks down. For it becomes plausible to argue that there are a few general and basic rights which *all* sentient beings possess, which form the basis of the differentiated rights that *all* sentient creatures enjoy.

However, there could be a problem with this line of argument. After all, it might be objected that while it is plausible to attribute to sentient non-human creatures the basic rights to security and subsistence, it is not plausible to attribute to them the basic right to liberty. For while it is clear

that many forms of confinement and interference cause non-human animals to suffer in a variety of ways, it is less clear that restrictions on freedom are *intrinsically* harmful to them. Owning a pet cat, for example, seems manifestly different to owning a human slave. This is because most non-human animals lack personhood. That is, they lack the kinds of capacities necessary to frame, revise, and pursue goals and life-plans of their own choosing. Given this fact, it is difficult to see why interfering in the lives of most non-human animals is intrinsically harmful in the same way as it is for most humans (Cochrane 2009). Perhaps then we might also conclude that liberty cannot be a basic right of non-human sentient creatures. Indeed, the case for a basic animal right to liberty is further undermined when one thinks of the kinds of rights that derive from it. After all, the usual bundle of liberty rights – to freedom of association, to political participation, to freedom of thought, conscience and religion – are the types of rights that do not seem meaningfully attributable to non-human sentient creatures. Given these doubts about the possibility of non-humans possessing this basic right to liberty, perhaps it is only proper to maintain that human rights are qualitatively distinct from the rights of all other sentient creatures.

But such a conclusion is too quick. After all, we saw earlier in the paper that young infants and the severely mentally disabled also lack the capacities for autonomous agency referred to above. Moreover, such human non-persons are also usually denied the civil and political liberties that are derivative of this basic right. We therefore have good reason to question whether liberty is a basic right of all humans. As such, possession of the basic right to liberty cannot be used to establish a qualitative distinction between human rights and the right of all other sentient creatures.

An alternative means to explain the universality of differentiated human rights is not to claim that they are derived from more general basic rights, but to claim that they are derived from universal foundations. For example, the simplest way to explain why the human right to marry, the human right to basic healthcare in pregnancy, and so on, are universal, is by pointing to the fact that each of these rights protects a basic interest of the individual in question. The universality of these rights derives from the idea that each one of them is justified and exists because the interest it protects allows their possessor to lead a minimally decent life.

But if we follow this way of explaining the universality of differentiated human rights, the claim that there is some important distinction between human rights and the rights of other sentient creatures once again breaks down. For it can be argued, as it already has, that all sentient rights protect basic interests. And because different sentient beings have different basic interests – because they require different things to lead a minimally decent life – they have differentiated sentient rights. For example: a chicken has different basic interests and rights to a chimpanzee; a chimpanzee has

different basic interests and rights to a newborn human baby; a newborn human baby has different basic interests and rights to an adult male; an adult male has different basic interests and rights to a pregnant woman; and so on. The differentiated nature of sentient rights does not undermine their universality, on this understanding of universality, quite simply because all sentient creatures possess their basic rights on the same grounds: to protect those basic interests necessary to lead a minimally decent life.

And yet, it still might be maintained that the entitlements enjoyed by humans and non-humans are qualitatively distinct. After all, what constitutes a minimally decent life for a human being is radically different to what constitutes one for a non-human. Compare, by way of example, humans and frogs. Surely it is only sensible to recognize that a decent life for a human is of a totally different order to a decent life for a frog![5] However, while it is obviously true that humans and frogs require different things to lead decent lives, it is hard to see why that should translate into a difference *in kind* between the two sets of rights they enjoy. For as has been discussed above, different *humans* also require radically different goods to lead minimally decent lives. Indeed, the basic interests of a human newborn may be closer to those of non-human sentient newborns than they are to the interests of an adult human. In other words, there is no clear and marked division between what constitutes a minimally decent life for human beings and what constitutes one for all other sentient non-human creatures. As such, if the universality of human rights derives from their universal foundations – the protection of a minimally decent life – the case for reconceptualizing human rights as sentient rights is compelling.

Would sentient rights be inflationary?

The final problem with reconceptualizing human rights as sentient rights relates to the issue of rights inflation. For imagine if human rights were reconceptualized as sentient rights in the law, policy and norms of states and international society. Such a shift, it might well be claimed, would surely lead to a massively inflated amount of basic rights, endless conflicts between them, an erosion of the normative power of rights, and perhaps most tellingly, attention and resources being diverted away from the important business of protecting and promoting the rights of human beings. Such a vision is enough, so it might be argued, to count against reconceptualizing human rights as sentient rights. What is to be made of such a claim?

In response to this objection, it is worth making clear that while the proposal in this paper would certainly expand the amount of recognized basic rights, those rights would not be *absurdly* inflated. For it must be remembered that moving to a notion of sentient rights does not mean that all sentient creatures have rights to all things (Machan 2002). To establish

a sentient right, under the Razian framework endorsed in this paper, a good deal of argumentation needs to be done: an interest needs to be identified; its strength and importance needs to be measured; and that strength needs to be balanced against other competing interests in order to determine whether it justifiably imposes a duty on another. This fact alone limits the inflationary potential of reconceptualizing human rights as sentient rights.

And yet, just because the inflationary potential of sentient rights is limited, that does not mean that clashes of rights will be avoided. Quite clearly, clashes of sentient rights will be inevitable under the kind of theory proposed in this paper. This might be considered problematic because it seems to undermine the 'peremptory force' of rights (Raz 1988, p. 192). That is to say, rights theorists often maintain that rights are unlike other moral concepts which can be weighed against each other; instead, rights delineate what finally ought to be done. Clashes of rights seem to require weighing, which undoubtedly limits their normative power. However, while it is true that conflicts of rights are inevitable under the scheme proposed in this article, that is no reason to do away with it. For in practice and theory, clashes of rights *are* inevitable. Moreover, this truth does not make a nonsense of rights. Indeed, it is quite possible to recognize that rights have peremptory force, while also acknowledging that rights inevitably clash. Many rights theorists make sense of clashes of rights by distinguishing between '*prima facie* rights' and 'concrete rights' (Vlastos 1962, Dworkin 1977). *Prima facie* rights are those rights that exist at a general level and outside of specific circumstances. Importantly, such *prima facie* rights can meaningfully conflict without eroding the normative power of rights. So, to take an example, it can legitimately be argued that both you and I have a *prima facie* right to healthcare: after all, in general terms we both have an interest in healthcare that is ordinarily sufficient to impose a corresponding duty on others. Given scarce resources it is clear that *prima facie* rights to goods such as healthcare can conflict. However, once we examine the specific details of a situation, *prima facie* rights might not always translate into concrete rights: that is, the actual assignation of rights, all things considered. Thus, if it transpires that the pill I need to cure my mild illness is astronomically expensive, and that the resources to provide me with that pill could be used to treat your much more serious condition, it is plausible to state that I have no concrete right to the pill, all things considered. In other words, in these specific circumstances, my interest would not be sufficient to ground a concrete right to healthcare, but my *prima facie* entitlement remains intact. Hence, *prima facie* rights might clash, but concrete rights do not. This kind of analysis allows us to acknowledge the fact that rights inevitably clash, while retaining their peremptory force.

Importantly, this analysis is not some kind of philosophical sleight of hand, but accords with how rights function in most legal regimes. Rights to such things as healthcare, privacy, freedom of speech, freedom of association

and so on, simply cannot make sense unless viewed as *prima facie*. Such rights can obviously be written into the law in general terms, but in order to determine our concrete rights, legislatures, courts and committees need to make important decisions with respect to competing rights, interests and values.[6] All rights regimes in practice require political and legal procedures to adjudicate between clashes of rights, and to work out precisely what the protection and promotion of our *prima facie* rights actually entails. The fact then that reconceptualizing human rights as sentient rights will lead to conflicts of rights is not a problem. Or rather, the fact that the reconceptualization will lead to conflicts of rights creates no *new* problems. Sentient rights – just like human rights and all other rights – inevitably clash, but we do possess the means by which to resolve those conflicts.

However, if sentient rights are going to clash, then it is inevitable that in the resolution of those clashes, the rights of humans will sometimes lose out to the rights of sentient non-human animals. For many, it will be this simple point that makes them reject the idea of shifting from human rights to sentient rights. For these thinkers, in a world of scarce resources, humans and their rights simply have to come first. On reflection, however, the idea of awarding absolute priority to humans and their entitlements is absurd. For example, take the human right to free association. Such a right cannot and should not take absolute priority over the rights of other sentient creatures. After all, some human beings associate to enjoy such things as dog-fighting, where dogs are set upon each other in pits to fight to the death. Just because the interest that the right to free association protects belongs to humans, that does not mean that it must be prioritized over the important interests of other sentient creatures. And the moral and legal regimes of most societies recognize this. They recognize this because the human interest in dog-fighting is obviously extremely trivial compared to the real and important interest of dogs in not suffering and dying in these kinds of fights. We can justifiably say that when all things are considered, dogs' interests in not being forced to fight in these ways are sufficient to impose duties on humans to refrain from associating to arrange dog-fights. To say that human rights must always have priority over the rights of non-humans is clearly indefensible.

Of course, dog-fighting is a fairly extreme example. Almost everyone would be happy to admit that dogs' rights should win out against the competing rights of humans in this context. But how are other types of rights clashes to be resolved, especially when more pressing human interests are at stake? The simple answer is that these clashes should be resolved in exactly the same way that theorists, politicians, and lawyers ought to resolve conflicts of rights between humans. That is to say, the interests which the competing rights protect must be identified and weighed against one another – and if all else is equal, the stronger and more important interests must win out over the weaker and less important interests. What is of crucial and

utmost importance in this method is that the interests are judged on their own merits, and not on the basis of the characteristics of the individuals to whom they belong. This, of course, is Peter Singer's point in his famous principle of 'equal consideration of interests': all interests must be considered equally and impartially, with no extra weight being granted on the grounds of factors such as age, race, social class, occupation, geographical location, gender, ethnicity – and also, species (Singer 1986, pp. 220–221). Of course, Singer plugs this principle of equal consideration into his utilitarian ethics, where the ultimate goal is to maximize interest satisfaction. But the principle can be separated from that utilitarian goal and used fruitfully in the theory of rights developed in this paper; for it provides a means of resolving clashes of rights which is both systematic and fair.

It should be noted as well that this principle does not mean that all sentient creatures possess the same rights; nor does it mean that sentient creatures possess rights of the same strength. After all, different creatures have different interests and different strengths of interest. To take an example, imagine a situation in which the *prima facie* right to life of a human being comes into conflict with the *prima facie* right to life of a rat. Under a principle of equal consideration, would we just have to toss a coin to see who wins out? Certainly not. The interests of both should be weighed fairly and equitably against each other. Since human beings have a mental complexity and an emotional life that far outstrips that of rats, and since human beings also have the ability to make plans for and have desires about the future, it is perfectly reasonable to state that the human interest in continued life is ordinarily much stronger than that of rats (Singer 1993, pp. 119–131, McMahan 2003, pp. 198–199). If this is correct, then in the case of such a clash, and all else being equal, the right of the human would certainly win out. But it would win out not because it belongs to a member of a particular species that must always take priority, but because it protects an interest that is stronger and more compelling.

In sum, it has to be acknowledged that calling for human rights to be reconceptualized as sentient rights would indeed lead to an increased amount of basic universal entitlements. However, theorists, lawyers and politicians possess the means to deal with that extended number. When rights conflict, societies are used to balancing the interests that rights protect. And they can apply those same methods to sentient rights. Crucially, of course, the resolution of clashes of sentient rights must not be discriminatory. The interests that the rights protect must be weighed on their own merits, and not on the basis of the characteristics of the individuals to whom they belong.

Conclusion

This article has argued for human rights to be reconceptualized as sentient rights. It has argued that all sentient creatures possess certain basic rights

on the basis that they possess interests. This gives an initial reason to think that the rights of all sentient creatures are to some extent alike. However, a number of objections to reconceptualizing human rights as sentient rights have been examined, each of which claims that human rights are qualitatively different from the basic rights of other sentient creatures: that they protect something distinctively human; that they serve a unique political function; and that they are universal. All of these objections have been shown to be without basis: human rights and the basic rights of other sentient creatures are not different in kind. Finally, the article has considered the objection that the move to sentient rights would be inflationary and impractical, and has shown it to be unfair. Rights conflicts are always inevitable, and there are reasonable ways of resolving them that can be applied consistently to sentient rights.

Obviously, the article has said little about the precise content of sentient rights, or indeed the types of legal and political institutions that would best protect them. These are crucial questions, which there has not been the space to address here. The aim of this paper has been to show that these are questions that *human rights* theorists and practitioners should be addressing. The human rights movement cannot consistently turn its eyes away from the suffering and rights violations of non-human sentient creatures. These creatures are sentient like us; these creatures suffer like us; these creatures have interests like us; and these creatures have basic rights like us. To acknowledge these simple points, human rights should be reconceptualized as sentient rights.

Acknowledgements

The idea for this paper came about following several fascinating conversations with Conor Gearty on the relationship between human rights and animal rights – and I would like to thank him for those. For invaluable comments on previous drafts of this paper, many thanks to the following: Alejandro Chehtman, Katrin Flikschuh, John Hadley, Kai Moller, Siobhan O'Sullivan, Laura Valentini, Kerri Woods; two anonymous journal reviewers; the participants at the animal rights group of Manchester Metropolitan University's Political Theory Workshops, 2010; and the participants at the Human Rights Seminar, Centre for the Study of Human Rights, LSE.

Notes

1. Those rare human rights scholars who have acknowledged and taken seriously the exclusivity of human rights include: Dershowitz (2005, pp. 198–199), Douzinas (2000, pp. 184–186), and Gearty (2009, pp. 175–183). Animal rights scholars who have considered the exclusivity of human rights include Cavalieri (2001).
2. The 'welfarist' moniker is borrowed from Allen Buchanan (Buchanan 2004, pp. 132–133). The welfarist understanding of rights obviously has its roots in J. S. Mill's theory of rights; for a discussion, see Hart (1982).

3. Thanks to Siobhan O'Sullivan for alerting me to this case.
4. Although it has not always been considered absurd to grant animals a right to a fair trial (Evans 1906).
5. Thanks to an anonymous referee for raising and pressing me on this issue.
6. The issue of whether these decisions are best made by expert judges or elected representatives I leave aside. For a valuable discussion of this issue, see Dworkin (1996, pp. 15–35).

Note on contributor

Alasdair Cochrane is Lecturer in Political Theory at the University of Sheffield. His research interests include the philosophical justification of rights, contemporary political theory, environmentalism, animal ethics and bioethics. His books include *Animal Rights without Liberation* (Columbia University Press, 2012) and *An Introduction to Animals and Political Theory* (Palgrave, 2010). He has also recently published in *Ethical Theory and Moral Practice* (2012), *Bioethics* (2010), *Utilitas* (2009), *Political Studies* (2009), and *Res Publica* (2007).

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