ON RIGHTS, DUTIES AND VULNERABILITY: ASSESSING THE ROLE OF HUMAN RIGHTS IN THE CARE AND PROTECTION OF VULNERABLE PEOPLE

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I, Tony Schumacher Jones, declare that this thesis, submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Department of Politics and History, University of Wollongong, is wholly my own work unless otherwise referenced or acknowledged. The document has not been submitted for qualifications at any other academic institution.

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Abstract

When we are confronted with vulnerable people, with those groups and individuals who are impaired with respect to their ability to function as the rational, autonomous and moral agents that we typically take humans to be, we are encouraged to invoke notions of rights, and in particular notions of human rights, in order to secure their care and protection. Such an approach seeks not simply to reinforce the view that vulnerable people are the moral equivalents of us all and thus are entitled to an equal moral consideration, but also this approach recognises that to be vulnerable is often to be unable to assert and secure a standard of existence we think appropriate for all humans to enjoy. And whilst human rights may be regarded as having a variety of roles or purposes, nevertheless, the care and protection function, what I refer to as the task of moral rescue, is somehow crucial to the concept. Any notion of human rights that failed to offer protection to those in danger or to those at risk of harm or neglect or abuse, no matter what other benefits it promised or conferred, would be seen as both morally negligent and intellectually impoverished.

Yet in this thesis I assert that human rights have largely failed those who are vulnerable and in particular they have often failed those who are especially vulnerable. This failure of human rights is predicated upon three factors. First, human rights are based upon a view of the individual as a rational, autonomous, independent moral agent who at all times identifies and asserts her own best interests. In this thesis I suggest that such a view is misleading. In particular it fails to acknowledge that what often defines the vulnerable, and particularly those who are especially vulnerable, is their inability to act from a rationally, reflective agency. Second, human rights fail to address the different sorts of social and political contexts within which vulnerable people often find themselves. The world of the vulnerable is
frequently one of disempowerment, dependency and marginalisation, and this is particularly so with regard to those vulnerable I have identified within the course of this thesis; the frail aged within this country’s residential aged care facilities, many of whom suffer from dementia, and the chronically mentally ill. Finally, within human rights the emphasis has typically been upon the rights the vulnerable possess and has neglected the duties and obligations that relevant agents owe the vulnerable.

In this thesis I assert that the only way to engage the human rights of the vulnerable, in fact the only way to ‘operationalise’ human rights, is by a strong commitment to duty. In a society so consistently defined by rights, notions of duty all too often appear to be sidelined, yet it is only by an emphasis upon the duties and obligations of caregivers, whoever we take such caregivers to be (doctors, psychiatrists, psychologists, social workers, nurses, policy makers and bureaucrats), that human rights can be engaged and vulnerable people protected. Thus I argue for a notion of the duties and obligations of caregivers as a mean of enacting the human rights that all persons are said to possess.

My emphasis in this work is upon those whose vulnerability is extreme. This does not diminish its importance. Increasingly in the West, with the advancing incidence of chronic neurodegenerative disorders such as the dementias, we are forced to confront extreme vulnerability. How we engage such persons is crucial to the sorts of lives they lead and is crucial also to the sorts of people we become. We all begin life in an extreme state of vulnerability and there are many times throughout the course of our existence when we may be severely compromised, if only for brief periods. For those of us who suffer from dementia or chronic mental illness, our vulnerability will be persistent and permanent. Thus this perspective recognises that the vulnerable are not a group of people set apart from the rest of us. In many ways it is we who are the vulnerable.
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Introduction

In this thesis I argue that our current approach of seeking to protect vulnerable people by emphasising the human rights that individuals are entitled to is flawed. Much of the moral force of human rights is directed toward the care and protection of the vulnerable, and indeed the concept can be considered a philosophy of rescue for vulnerable groups and individuals – yet in this task it has consistently failed. This failure is due to three interrelated reasons. First, because an emphasis upon rights fundamentally misinterprets the sorts of beings that vulnerable humans are. Second, because such an emphasis fails to account for the sorts of situations and locations in which vulnerable individuals find themselves and through which they operate and engage others. Third, because within human rights the emphasis has typically been upon the rights of the individual, at the expense of duties and obligations which may be owed by others. In order to effectively engage human rights, and so offer security and protection for vulnerable people, I present an argument located within the concepts of duties or obligations. This argument derives not from the rights paradigm itself, rather, it reflects features of both virtue theory and Christian theology. In addition it also based upon what I refer to as ‘the narrative of everyday lives’, that is the characteristic way in which humans typically engage each other from the perspective of everyday moral discourse.

The context within which I place this argument is through a discussion of vulnerability. By using the term ‘vulnerable’ I am identifying those groups and individuals who are unable to act in order to secure their own best interests. This raises a well worn argument about ‘true’ interests and ‘false’ interests to be sure – but it also suggests that in order to identify and secure one’s interests one must be the sort of person who is able to act and engage others in a particular sort of way.
The sort of person who is capable of asserting and securing her interests is one who we typically recognise as a rational, autonomous and moral agent – independent, confident, self assured, assertive and reflective. To be able to identify, assert and realise our interests is a crucial part of being a fully developed person. For those whose capacity to act in this way is either diminished or absent, or indeed for those who are prevented from engaging in such typically human action, I apply the term ‘vulnerable’. Vulnerable people, as I define them, are those who are either incapable of acting out of a rational, reflective and autonomous agency or else they are those who are prevented from doing so.

As I have argued elsewhere, a central theme within the concept of human rights is the protection of vulnerable people.1 In chapter four, Vulnerability and the Promise of Rights, I acknowledge that there is more to human rights than the security of the vulnerable, yet it is clear that the ‘care and protection’ function is of fundamental importance. Some have tended to be absolutist about human rights, presenting the concept both as a supreme ethical position which in some way supersedes all other ethical discussion and to see the role and purpose of rights as being only ever the protection of the vulnerable. For example Baxi writes that ‘never before have the languages of human rights sought to supplant all other ethical languages’, and he describes the ‘historic mission’ of human rights as ‘to give voice to human suffering, to make it visible and to ameliorate it.’2 Such assertions are uncalled for and display more rhetoric than thoughtful analysis, yet they do reflect the importance of human rights as a vehicle whose purpose is in no small way to protect those who cannot protect themselves. In this regard and to this end human rights can be understood

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as normative moral claims often made by those who are vulnerable or by others on their behalf. When used in this way they seek to minimise the disadvantages (either personal, structural or situational) that confront vulnerable groups and individuals. Within this context the notion of human rights is seen as establishing some basic degree of care and protection for those people who are unable to secure, by their own efforts, an appropriate minimum standard of existence that we think all humans ought to enjoy. In such cases human rights are seen first, as establishing some basic level of access to goods and services for those who may be marginalised or in some way excluded from the social and political process, and second, as protecting the weak and powerless from others (institutions, organizations and individuals) who would do them harm.

It has, however, become increasingly apparent that an approach emphasising individual rights has consistently failed to protect the vulnerable. Whether these vulnerable are children, refugees, the homeless, the disabled, the frail aged or the mentally ill, it has become evident that the emphasis upon an individual’s rights are often irrelevant to their best interests, and as I have again argued elsewhere with respect to the mentally ill, it is potentially corrosive of their well-being. And if the practice of ascribing rights to vulnerable people has been unable to offer them any effective protection then we are entitled to be sceptical of this practice in its entirety. That is because the vulnerable are not a group that is in some way separate and distinct from the rest of us. Indeed it is we who are the vulnerable. Many of us are vulnerable in the present, most of us will be vulnerable at some time in the future and all of us have been vulnerable in the past. If the one thing that human rights cannot

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3 Anthony P. Butcher, ‘The Relative Irrelevance of Human Rights for the Care and Protection of the Mentally Ill’, *Australian Journal of Political Science*, Vol.35, No.1, 2000, pp 85-97. As part of my argument in this paper I maintain that once having ascribed rights to vulnerable people we tend to assume that we have done all that is necessary to care and protect – without realising that there is a vast difference between having rights in law and enjoying rights in reality.
do is to offer security and protection to people when they are vulnerable – when they are at risk of harm, or abuse, or violence, or neglect – then, arguably, and at least in the current application of the concept, it has failed us all.

There is of course a good deal of prima facie evidence that encourages us to be cynical about human rights as an effective form of moral rescue. For example, much of the recent history of psychiatry in Australia has revolved around the failure of the discipline to adequately protect those mentally ill individuals who have come into its care. Despite various appeals in both law and morals to ‘patients’ rights’, which are either contained within ethical professional statements or embedded within various mental health acts at both state and territory level, the recent history of the discipline is clouded by revelations of abuse and neglect of the mentally ill – and most often at the hands of those responsible for their care and protection.\(^4\) This abuse and neglect, as I point out in chapters four and five, has ranged from the failure of mental health services to respond to the needs of mentally ill persons [neglect], to physical and sometimes sexual assaults on the mentally ill by those charged with their care [abuse]. In some instances this abuse has led to the deaths of patients which mental health professionals have, it often appears, been at some pains to cover up.

A similar comment could be made with respect to the aged in this country's residential aged care facilities. Notions of ‘residents’ rights’ emerged against a backdrop of some horrific stories of the maltreatment of frail and elderly persons in institutional care during the early and middle years of the 1980s. Despite a much publicised commitment to the rights of the aged in residential facilities over recent

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years by, in particular, the federal government, numerous stories continue within the media that the frail aged are as a group, neglected, exploited and ill-treated. Stories abound of substandard facilities and untrained staff delivering ‘care’ that placed residents’ well being and even lives at risk, as well as rather more brutal reports of the frail aged being subjected to assaults (and some reported sexual assaults) by those who (again) were the very people charged with their care and protection.\(^5\) And whilst the Commonwealth has responded with a whole platform of ‘residents’ rights’, intentionally grafted onto human rights concepts and statements, professionals within the industry, particularly doctors, nurses and old age psychiatrists, remain uniformly unimpressed. In like fashion I refer to these developments in chapters four and five of this thesis.

Of course we need not limit ourselves to simply a consideration of the frail aged or the mentally ill. Over the past two years in Australia we have witnessed the increasingly distressing spectacle of asylum seekers and refugees (men, women and children) being detained in camps, for months and sometimes for years, whilst the long and drawn out process of their ‘assessment’ for legitimate and entitled entry into this country is determined. As the former federal Human Rights Commissioner, Chris Sidoti, has made clear, such detaining is in direct contravention of various articles of international human rights law of which Australia is a signatory, yet such law has been powerless to change the government’s position.\(^6\) And despite acknowledged research by health professionals of the distress and anxiety suffered by those


detained and resultant evidence of depression, post traumatic stress disorder, attempts at suicide and self harming behaviour,7 the government’s resolve has stood firm. Cries of ‘human rights’ have made little impact upon a political strategy that has, it seems, much support in the wider community.

In addition to the above we might also refer to the practice of the mandatory sentencing of young people and adults who have been convicted of certain property offences. Such provisions, often portrayed as unjustly discriminating against Australia’s indigenous population, were introduced into Northern Territory and Western Australian law in 1996 amid a good deal of criticism from the legal profession, indigenous advocacy groups and international human rights organizations. Yet despite widespread argument that these measures were in contravention (again) of a large body of international human rights law that Australia was (again) signatory to, the concept of human rights was powerless to protect those who sought sanctuary beneath its moral umbrella.8 The issues I have referred to above are local in nature, yet any brief or cursory observation of international politics would no doubt reveal many more instances where human rights have apparently been unable to secure the care and protection of ‘at risk’ peoples. Indeed it often seems as if human rights, rather than actually protecting vulnerable people, are mostly consigned to endless reports, conventions, international conferences and commissions of inquiry which are engaged well after murder and abuse have been committed and the perpetrators long gone. Human rights may generate much academic discourse and verbose pretentious baring of souls on appropriate

international forums, but with respect to the care and protection of vulnerable peoples
it is a philosophy that has, in the main, been spectacularly unsuccessful.

At this point I should make clear that my opposition in this thesis is not to the notion
of rights per se – either legal or moral. Indeed as I will make mention throughout,
and address in some detail in the final chapter, my intention is to give force and
authority to notions of rights which (I assert) can only be done through a
countervailing commitment to duty and obligation. I would make clear at this early
stage that I have no intention of replacing the rights paradigm with a duties paradigm.
My aim is not to supplant the idea of rights, whether moral rights in general or human
rights in particular. My intention is to supplement the idea of human rights or, to be
more precise, it is to engage or operationalise human rights. My assertion is that in
order to make human rights relevant, or effective, or accessible for vulnerable people
then we are necessarily drawn toward notions of duty and obligation – the duties and
obligations that we have toward the vulnerable.

Further, I am not suggesting that human rights have necessarily and in all cases
failed to achieve their ends of protecting and securing advantage for all vulnerable
people everywhere. For example Justice Michael Kirby recently outlined the role
played both by the International Labour Organization as well as various mechanisms
(state and federal courts and commissions of arbitration) in Australia charged with
resolving disputes and conflict within the area of industrial relations. Kirby sees a
nexus between the work of such organizations and the furtherance of social justice
principles and broader principles of human rights, and he cites areas such as; child
labour laws, workers’ rights and entitlements, the notion of equal work for equal value
(regardless of gender), the securing of the rights of trade unions and equal pay for
Aboriginal workers, as amongst those areas that have shown the success of the human rights paradigm.⁹

On the surface Kirby’s argument appears plausible but it does gloss over a number of issues specifically related to the role and influence of the rights paradigm. For a start, trade unions and workers in general can hardly be seen as examples of profound vulnerability. It is not that they are not vulnerable – surely it is an awareness of their own vulnerability that encourages them to band together to further their economic and social ends – but their vulnerability is not of the same order as those whom I am interested in within this thesis. Their vulnerability is not as profound as that which confronts the mentally ill or the frail aged, many of whom may suffer from some degree of cognitive impairment. Such association of workers are often well organised and powerful and have a great deal of access not simply to financial (and thus legal) resources but also to political decision makers, and their ability to engage and involve the media likewise gives them opportunity to further their aims. A similar point could be made with respect to Aboriginal workers whose cause has often been embraced by some powerful and influential forces on the left, particularly left wing unions and elements within the Australian Labour Party.

Certainly young children can be seen as vulnerable in the way that I use that term in this thesis, but the issue in this regard appears to be how much of the way we treat young children with respect to child labour is due to human rights and how much is due to our ethical objection to past practices – an objection we would have had even if we had no notion of human rights?

⁹ Michael Kirby, ‘Human Rights and Industrial Relations’, The Kingsley Laffer Industrial Relations Memorial Lecture, University of Sydney, Tuesday 23rd April 2002. As stated previously, it is one thing to have rights in law, it is another thing entirely to actually benefit from those rights. Kirby does not expand on the point of when Aboriginal workers received equal pay, how many of them still retained their jobs and how many were retrenched.
To continue with my comment on Kirby’s paper we could ask: did ‘human rights’ enable Aboriginal workers in rural and outback Australia to receive a fair wage, or was it the actions of the left and the very public battles Aboriginal activists had with conservative state and federal governments and equally conservative employers? A similar sort of point could be made about women’s right to equal pay for equal work and the influence again of the left in conjunction with feminist groups, both of whom, it may be argued, are well organised, politically astute and efficiently mobilised. Thus we might ask, with respect to Kirby’s position, how do we know that the concept of human rights has actually aided the groups in question? That is, how can we ‘factor out’ the influences of political lobbying, legal challenge, popular sympathy, and the threat of electoral damage, leaving only the measurable variable of ‘human rights’ – which is ultimately given credit for being a major force in the move to social justice? To assert that human rights is of benefit is one thing – to demonstrate it quite another.

In this thesis I specifically target the mentally ill and the aged in residential aged care facilities within Australia as two groups who not only do not have a voice, but when a voice is raised, however weakly on their behalf, it is all too easily ignored or put to one side. These two groups have no powerful friends or allies. They do not demonstrate, they do not march, they do not assert and seldom claim and they most certainly cannot bring electoral consequences to bear upon government. They are so often marginalised or excluded from participation in political debate. These groups are the vulnerable *par excellence* and for them human rights have mostly failed. In this thesis I maintain that the likelihood that human rights will fail the vulnerable is in direct proportion to the degree of vulnerability such groups demonstrate. The more vulnerable groups are, the more powerless, marginalised
and invisible they are, then the more likely it is that human rights will be largely irrelevant.¹⁰

I have cited Kirby's report at this early stage for it provides a focus for the different sorts of rights that people may be said to possess and encourages us to think on the mechanisms required by which people may enjoy their rights. Human rights are presented as universal moral entitlements to which people may appeal in order to achieve certain ends; just treatment, social equity, civil and political liberty, protection against unfair harm or injury and so on. The urge amongst rights theorists, of which Kirby is an example, is to have such rights encapsulated in law, the purpose of which is to facilitate people’s enjoyment of their rights and to provide a mechanism of appeal for rights owed but not recognised. Whether these rights are ‘claim rights’ (civil and political liberties) or ‘welfare rights’ (economic and social entitlements), what is crucial is that the law establishes the right and enables people to take advantage of its benefits. With both claim rights and welfare rights, what is required from the state is legislative action supported by social structures and institutions to facilitate people’s enjoyment of their rights.¹¹ But what of rights to care and protection – particularly when people are incapable of acting in their own interests and require others to either act for them or treat them in particular ways? Who speaks for those incapable of speaking for themselves? The problem with talking about rights in the way Kirby does is that; first, we are not sure that it is human rights that have actually provided the benefits (human rights as opposed to numerous other

¹⁰Thus we have the ‘rights paradox’, which broadly states that human rights are a benefit only in direct proportion to the other social, political, economic and legal influences a group can bring to bear in support of its claims. The subtext is that it is not ‘human rights’ that are securing advantage, rather it is these other variables and those groups who cannot muster these other variables will do very poorly indeed. Anthony P. Butcher, ‘Human Rights and the Vulnerable in our Midst’, op cit. [fn 1 at p 2]

¹¹Arguably of course much more is required than mere ‘structures and policy’. For example, we might identify an orientation or active engagement by the state that human rights are the sorts of social and ethical goods which are the reasonable and justifiable entitlements of each and every individual. This may require the state to actively validate notions of rights on a philosophical - cognitive level – but still, without ‘structures and policy’ such rights would be largely meaningless.
variables); and second, that this view says nothing to those who cannot actively claim or assert or demand, in other words it says nothing to those whose vulnerability is profound.

The question thus arises; why has the philosophy of human rights failed the vulnerable and, as suggested by my comments above, why is it that the more intensely vulnerable people are the more likely it is that human rights will fail? The answer is that human rights do not take into account the sorts of persons that vulnerable humans are and thus, and as a consequence, they fail to appreciate the degree of powerlessness and helplessness that often impacts upon vulnerable people within the social locations wherein such people live their lives. Whilst the rational, autonomous and moral agent who is intelligent, articulate and goal directed and who is best able to identify and assert his own self interest is a powerful image at the heart of the rights paradigm – such an image is an illusion. This rational individual, this maker of claims, this claimer of rights, this independent moral agent is a chimera at the heart of the Western liberal democratic tradition. He is more myth than reality. This is not to say that humans are not capable of being rational, autonomous and moral agents. Clearly they are. Neither am I denying that it is man’s rational and moral capacity that sets him apart from other creatures and in fact defines the sort of being that he is. Indeed I am quite prepared to accept that what is unique within humankind, as a species, is its general capacity for rational (goal directed and reflective) moral agency. Rather it is clear that despite our capacity for autonomous, self determining agency there are numerous times in our existence when we fall far short of that ideal and when we are particularly dependent on the actions of others not only for our well being but also for our very survival. In such instances human rights (claim rights, welfare rights or care and protection rights) offer us little protection, few guarantees and no effective security. And it is when we are at our most vulnerable that human rights are most likely to fail us.
Instances of marked or profound vulnerability are not rare occasions within the course of a human life. For example we begin life and spend our first dozen or so years totally dependent for our continued existence on the care and protection of others, most often our parents. Many of us who live into old age will in like fashion find ourselves similarly dependent upon our fellows for an increasing range of activities that we once competently undertook for ourselves. And even those of us who suffer little or no illness or infirmity throughout our adult years will still experience periods when our choices are constrained, our decision making ability compromised, and our rational and assertive capacities reduced or at the very least under threat. But what of those who can be described in some way as permanently vulnerable? What of those who suffer from chronic and incapacitating mental illness, those with dementia, with significant intellectual disabilities or those who are perfectly rational yet suffer from severely debilitating physical impairments and depend for their day-to-day well being or even existence on the good offices of others? If the emphasis upon individual rights cannot secure the well being of these people then it is clear that this approach has both limited moral force and instrumental value. In such cases the rights paradigm itself is called into question. What is required is a means of engaging vulnerable people that acknowledges both what it means to be a vulnerable person as well as reflects the sort of situations that vulnerable humans find themselves in.

As stated previously I am not attempting to replace the rights paradigm by an equivalent duties paradigm. My argument is that human rights have failed, in particular those who are profoundly vulnerable, because, as stated above, they cannot account for the sorts of lives that vulnerable people lead, nor for the sorts of contexts within which such lives are played out, and because the notion of duties has been increasingly discounted from the rights equation. But quite apart from these fundamental shortcomings human rights have a variety of practical and theoretical
difficulties. For example, there is little agreement about what goods are constitutive of human rights, about how to negotiate between competing or conflicting rights, about what to do when rights fail, or even, as stated previously, how we can effectively demonstrate that the rights paradigm is instrumentally beneficial over and above other possible explanations for social change. Further, rights tend to be vague and open-ended and whilst duties are generally held to be correlative of rights, often there is no clear way of identifying just who has the correlative duty, what that duty entails, nor (and most importantly) is there any way to force people who have duties correlative to rights to discharge those duties and be accountable for so doing. In fact in our rush to embrace human rights rhetoric we have tended to abandon notions of duty and obligation altogether. We may pay lip service to duty but we largely ignore any precise definitive statements. Duties often appear to be optional. Yet, and as I argue in the final chapter, the way to protect the vulnerable, to engage their human rights, is by recourse to a robust ethos of duty. I do not deny that we can (and do) conceptualise human beings as rights bearing creatures (whatever we take this to mean and to encompass), but I do assert that the way to ensure that the human rights of vulnerable people are protected is by an ethic of duty. If we wish to operationalise any notion of rights first we must talk about duty. In the final chapter I assert that in the mix of rights and duties (legal or moral) it is duties that are primary. Duties are antecedent to rights. It is only by engaging duties that rights can have an impact on the day to day lives of vulnerable people.

We may put the above dilemma in another way. Within the area of human rights much debate is centred upon the question of whether or not humans can be regarded as having such moral entitlements in the first place. Not all philosophers have answered in the affirmative. Some, such as Alasdair MacIntyre for example, are quite dismissive of the idea that fundamental moral entitlements accrue to people
simply and for no other reason than they are people.\textsuperscript{12} However let us assume (for arguments sake) that the question is settled and that humans do in fact possess such fundamental and inalienable rights. The issue then becomes – to what purpose are these rights directed? The answer is surely that they are in some way directed to the betterment of human life. If this is the case then human rights are a means to an end and not just an end in themselves. This suggests, and particularly if we acknowledge the failure of the rights approach to care and protect those who are particularly vulnerable, that there may be other means to the end we desire.

In this thesis I argue that the ‘other means’ lies with an emphasis upon duty. A problem with the rights perspective is that we tend to focus first, upon whether or not humans have rights; second, upon which particular philosophical justification is appropriate to anchor the ownership of such rights to; and third, what social, political, or economic goods can we describe as being part of the package of ‘human rights’. But the final aspect of this perspective, and it is surely the most important although (paradoxically) the least discussed is this: – how can we ensure that humans have an effective means of enjoying the rights they have? It may be true that rights inspire duties, but who owns these duties, and how (and this is most important) can we ensure that these duties lead to the effective enjoyment of the individual's rights? In and of themselves human rights guarantee nothing. The only way to operationalise rights is to talk about duties and until we can present some reasonably coherent notion of duties grounded in a particular philosophy of moral engagement then notions of rights are simply so much sterile assertion.

But what if (for arguments sake again) we all agree that humans have no fundamental or inalienable rights. Does that mean we may treat others as the whim

\textsuperscript{12} Alasdair MacIntyre, \textit{After Virtue: a study in moral theory}, London, Duckworth, 1981, p 69; where he likens the belief in human rights to a belief in witches and unicorns!
takes us? Of course not. If there were no human rights we would still be faced with
the question of ‘how ought we treat others’ for this is the most important question that
any human can ask of herself. Theories of rights, as with theories of duties, only
have meaning and purpose to the extent that they enrich human lives. This much is
known, as I argue in chapter four, at the level of the street. When I discuss ‘human
rights and street level philosophy’ it is to emphasize that people embrace theories
and perspectives of rights in order to achieve some specific end. They seek to
realise the ‘promise’ that human rights offers. In general, people embrace human
rights in order to make their lives better and so we may be assured that if it became
more prudent and advantageous to abandon human rights than to embrace them
then, at the level of the street at least, human rights would be jettisoned overnight. At
the level of the street people often lead desperate lives, and so they embrace the
human rights paradigm in any of its many and varied forms essentially because it
holds out a hope of an enriched human life. Yet simply emphasising ‘rights’ provides
no guarantee that rights will emerge. The way to engage rights is thus (and again) to
talk about duties.

There are three interrelated themes which run through this thesis. First is the notion
of vulnerability. Second is the relationship between rights and vulnerability and third
is the concept of duties and obligations. In chapters one to three I discuss
vulnerability, first as a philosophical construct, next as a personal experience and
finally as a social and political interpretation. In chapters four and five I focus on the
idea of rights and in particular human rights. My interest is in moral rights rather than
legal rights and in human rights as an outgrowth of the natural law tradition of, in
particular, Hobbes and Locke. This is because of the impact such views have had
not only upon the construction of liberal democratic society but also upon the sort of
person who is a fit subject for such a society. In the last chapter I consider how a
notion of duties and obligations offers a more effective means of securing the best
interests of the vulnerable than does a theory which emphasises individual rights. In this thesis I take as examples of vulnerability the mentally ill and the frail aged within this country’s residential care facilities, particularly those who suffer from dementia. Although at times I refer to other groups or individuals who are vulnerable it is these two populations that I employ, in general, as ‘metaphors of vulnerability.’

In chapter one, *Vulnerability – Philosophical*, I argue that one is vulnerable when one’s ability to act as a rational, autonomous and moral agent with regard to the securing of one’s own particular interests is in some way reduced or diminished or impaired. Vulnerability in its usual sense suggests notions primarily of ‘harm’ or ‘danger’ or even of ‘loss’. Thus it is a loss (or lack) of capacity or ability that I am identifying when I embrace the concept of vulnerability. If this is so then it is clear that humans can be vulnerable in a variety of situations and to varying degrees. But some forms of harm and some kinds of danger and some ways of experiencing loss are more important than others. Some kinds of harm, for example, impair our very ability to act as the rational reflective agents that we typically assume is characteristic of being human. Some types of loss rob us of our capacity to act autonomously and independently. When one’s ability to act in this way is impaired then I invoke the notion of vulnerability. Another way of describing this position is to say that we all have certain interests. Whilst interests can vary in their nature or function there are some interests that are crucial in order for us to act as rational agents and without which we could not be regarded as being a rational, independent actor or possessing a moral agency in any meaningful sense of those terms. These interests I refer to as ‘first order interests’ and define them as the ability to act as rational, autonomous and moral beings. It is from these first order interests that emerge our ability to engage in characteristically human sorts of endeavours and so it is when these first order interests are threatened or undermined or are in some way diminished (by either personal incapacity or outside interference) that I invoke the notion of vulnerability.
There are three features implicit in my view of vulnerability. First, as described above, is the reduction or impairment of an individual to act as a rational, autonomous and moral agent. Second, is that when we engage the concept of vulnerability we are implying a relationship between those who are vulnerable and others who stand in regard to them and have a duty or obligation to care and protect. One of the main reasons we have for identifying some as vulnerable is to consider how we ought to act towards them and this necessarily involves some form of relationship whether this relationship is defined in legal or in moral terms. Therefore in this chapter I consider also the sorts of relationships that exist between the vulnerable and certain others who may be seen as holding a duty of care towards them. Third, I argue that whatever the legal demands, there are good reasons for seeing the relationship between the vulnerable and those who stand in regard to them as crucially a moral relationship.

Beyond these considerations we may see vulnerability in either a strong or a weak sense, as well as inhabiting a variety of dimensions. With regard to the first point it is clear that not all people are vulnerable to the same degree. Some people can be ‘more or less’ vulnerable just as some can be ‘more or less’ rational, or ‘more or less’ autonomous, or ‘more or less’ independent, or ‘more or less’ reflective and so on. In this thesis I am concerned primarily with vulnerability at its most extreme and the failure of human rights to protect those individuals and groups who are particularly vulnerable. With regard to the second point I acknowledge that not all are vulnerable in the same way. We need to make distinctions between different sorts of vulnerability. Thus I propose vulnerability as ‘transitory’, ‘episodic’ and ‘permanent’. Whilst the type of vulnerability may vary this does not detract from its essential feature and that is; to be vulnerable is to have one’s ability to act as a rational, autonomous and moral agent in some way, and for some reason, impaired.
In the second chapter, *Vulnerability – Personal*, I go beyond the philosophical outline which sets the framework for talking about vulnerability and consider what it means to be vulnerable from the personal, experiential perspective. In the first part of this chapter I explore the difficult notion of ‘personhood’. To be a ‘person’, to display ‘personhood’, is often to be regarded as displaying a rational goal directed and self reflective moral agency. Whilst this rationally centred definition of personhood is not the only definition possible, it is fair to say that when we look for what is typically indicative of human persons we look first for a rational and reflective moral agent. And if these particular qualities are diminished or in some way under threat then notions of what constitute a person seem also often to be under threat. In the first part of this chapter therefore I discuss what we mean by the normal and everyday use of terms such as ‘rational’, ‘autonomous’ and ‘moral’, that is, what is often and typically regarded as the constituents of ‘personhood’.

But this is still not to appreciate the extent to which vulnerability represents a personal and individual experience. In the second part of this chapter I want to explore what we might reasonably identify as the lived reality of vulnerability. In ‘vulnerability and the personal encounter’ my focus is on the extent to which the subjective reality of vulnerability diminishes those aspects of human existence that we most usually take as being representative of a human life. That is I want to get away from discussions about vulnerability in the abstract and explore what it means to be vulnerable from the perspective not only of those who are vulnerable but also from the perspectives of those who are closest to them. My focus in this regard is on the experience of dementia – a metaphor for the vulnerable.

There are compelling arguments for introducing dementia as an example of vulnerability. The various forms of dementia provide a powerful instance when our ability to act as a rational, autonomous and moral agent is, to varying degrees,
impaired and we are forced to rely on the care and protection of others. This is vulnerability in its extreme sense – a far cry from the notion of those who may engage the rights paradigm to identify and assert their interests. Moreover this instance is not infrequently encountered by individuals within the context of the life span. In the 21st century, dementia will become a major public health issue within Western countries as the population inevitably ages. Alzheimer’s disease, the most common form of dementia, currently affects between 55,000 and 144,000 Australians and some 3.7 million people worldwide – a figure that is expected to double by the year 2011. Thus the problem of dementia will confront not simply individual sufferers and their families and carers but the whole community. Further, dementia goes to the heart of notions of ‘personhood’, indeed dementia can be (and has often been) described in terms of an erosion of personhood. In addition dementia unavoidably introduces a focus on rights, whether these are described in terms of ‘the rights of the elderly’, or ‘the rights of dementia sufferers’, or ‘the rights of residents in aged care facilities’, and so the focus is on how we perceive and act toward those whose ability to care for themselves and to make decisions in their own best interest is in some way diminished – and often profoundly so.

Within dementia we are confronted with individuals who are frequently unable to function as the rational, autonomous and moral agents that we regard (and value) as typical of human beings. Within dementia we are confronted with the reality that vulnerability is both a personal experience as well as a social commitment, a relationship between one who is vulnerable and others (carers, family, friends and professionals) who are engaged to care and protect. Dementia also reveals in sharp focus that what is crucial to establish well being and protection is not a theory of rights, for rights involve claims and assertions and demands and those with dementia

can engage in none of these practices. Dementia reminds us that the well being of
the dementia sufferer (her 'rights' if you like) can only be secured to the extent that
significant others maintain and act upon a strong sense of moral duty and moral
engagement. The image of the rational, assertive, autonomous actor is missing
within dementia. If we want to secure the best interests of those with dementia we
must look beyond traditional notions of rights and entitlements with their emphasis
upon claims, assertions and entitlements. We must look to the duties and obligations
of caregivers for it is only by responding to such duties and obligations that rights,
and thus the well being that rights promise, can have tangible meaning.

In chapter three, Vulnerability – Political, I explore another way of presenting
vulnerability. My suggestion in this chapter is that we can portray vulnerability as a
structure upon which civil society, and specifically the liberal democratic variant, is
founded. To this end I focus on the works of the contract theorists, Hobbes, Locke
and, to a lesser extent, Rawls. Despite obvious and well-documented criticisms of
these writers (particularly the first two) and their unique approach to human social
and political life, there are compelling reasons for a discussion of this sort. First,
within the work of each a notion of the innate vulnerability of the human individual
maintains an important though often unrecognised presence. Indeed vulnerability
may be portrayed as man’s natural state prior to his emergence within civil society.
Second, civil society itself is proposed by each writer as a response to this
vulnerability. It is only after his emergence into civil life that man can fully realise his
interests and develop his potential. Third, the concept of rights (human, natural or
rationally chosen) is employed by each writer, both as a means of protecting man
from the uncertainties of his naturally vulnerable state but also as a foundation upon
which modern liberal forms of political organization are structured. Finally, the notion
of the modern rights bearing individual (rational, autonomous and moral) who
powerfully identifies and asserts his own self interest is strategically juxtaposed to the inherently vulnerable picture of man beyond (or before) civil and political life.

Whatever one’s position on the intellectual veracity of the contract theorists, there are two crucially important concepts developed by these writers that are essential to any understanding of modern liberal society. First, from each came the idea that any government is legitimate only insofar as it is based on the consent of the governed. Second, is the allied notion that all individuals have certain fundamental rights which are held against all-comers (governments, institutions, individuals); rights which derive from and reflect the nature of the individual himself, with the protection of such rights being the very reason for the establishment of civil society. Added to these dual concepts of rights and legitimacy I would suggest a third. This is the idea of vulnerability. Whereas society is justified in no small way by recourse to the protection of rights, the reason we have both rights and society is to guard against the effects of vulnerability. Without society and without rights man is vulnerable. He is unable to develop his potential as a human individual; he is unable to function as a rational, autonomous and moral actor and he is inevitably at odds with his fellows. In this way one can understand vulnerability as a pivotal point in liberal democratic theory. It provides the intellectual rationale for the construction of civil society whilst also establishing the moral justification for the idea of human rights. Thus on this account of things both human rights and civil society are sustained by (and are a response to) man’s inherent vulnerability.

There is a final reason for a discussion of what we might refer to as ‘the political philosophy of human rights’. Encapsulated within the contract theorists is a view of man as a rational, autonomous, self assertive, reflective, choice driven individual. This is what I have referred to as ‘the human rights image of man’. Yet it is clear that when we engage the vulnerable, particularly the mentally ill and the elderly within
residential aged care facilities - many of whom suffer from the dual disabilities of mental illness and dementia, this image is more myth than reality. The paradox is that human rights are often directed at protecting those who are impaired in their ability to be rational, assertive individuals, yet the concept itself is in no small way dependent upon a view that defines humans precisely in terms of their rational reflective capacity. Human rights require from the vulnerable, particularly the most vulnerable, capacities that they often do not possess in order to enjoy the rights they are promised. This fact alone ought to alert us to the crucial role of duties in the care and protection of vulnerable people.

In chapter four, *Vulnerability and the Promise of Rights*, I consider what it is that we hope to achieve by conceptualising the problems that confront the vulnerable within the confines of a rights discourse. In other words, what does the ‘promise of rights’ hold for those who are vulnerable? Human rights themselves can be seen as normative claims addressing how people ought to be treated rather than being descriptive statements about how people actually are treated. In this regard they provide a moral framework which seeks to set a standard within which people can operate and engage others, as well as being an index against which the way we behave toward others can be measured. Human rights can thus be seen as a ‘promise’ to the vulnerable, a promise to ensure their care and protection. This is of course why we embrace notions of rights. We embark on a rights discourse because we see their essential role as the care and protection of the vulnerable. This is why we hear rather more about the human rights of the poor and oppressed, of the powerless and the impoverished, of children, the elderly, the mentally ill and so on and rather less about the rights of the rich and powerful, of bankers and bureaucrats, of media moguls and mining magnates. At their most basic level the task of human rights is to protect those who cannot protect themselves.
Certainly we may argue that human rights have other functions as well. For example we might plausibly suggest that human rights, in particular the civil and political variety, can be seen as a framework, (the rules of the game so to speak), upon which liberal democracy itself is founded. This argument might propose that if one wants to play the ‘game’ of liberal democracy then one of necessity must embrace certain basic rules. All games have rules that are fundamental to the way they are carried on and it is difficult to see liberal democracy being played without some rather extensive notion of civil and political rights. Yet the civil and political variety of human rights is only one small part of the whole picture. Essentially human rights are moral claims to certain ways of being treated and we would think very poorly of any theory of individual rights if it could be shown that the one thing such a theory could not do was to protect the vulnerable.

My general approach in this chapter is to propose and reflect upon some direct questions. For example; what specifically do we have in mind when we embark on a rights discussion with the point of view of achieving certain rather specific ends? This recognises that there is a difference between the idea of a right as a conceptual construct and the way that rights are actually employed by those that use them within the social and political marketplace, at ‘the level of the street’ as I call it. By invoking the spectre of the marketplace I acknowledge that there are at least two ways we can approach discussion on rights. One is from a stipulative perspective. In this instance we may seek some uniformity on how rights, as legal and moral constructs, ought to be used. However such debate is seldom overtly employed in marketplace situations. Rather the marketplace tends to approach rights from a strategic perspective. This considers how rights are actually used or employed. That is, the focus of rights is to achieve certain (strategic) ends or outcomes - the enrichment of human life as I earlier described it. An important question thus becomes: what is it
that we want rights to do for the vulnerable? As my comments above imply, one response is that a major purpose of human rights is to 'care and protect'.

Yet care and protect how, and in what way? The answer to this depends very much upon one’s position within the rights debate. Those who are vulnerable may have a quite different perspective on the way the rights discourse is structured and the particular ends toward which it ought to be directed than those who (or so they claim) speak for the vulnerable, or those who are responsible for the vulnerable in a legal or moral sense. This introduces a tension, for example, between the state and various professional bodies who are charged with the care and protection of dementia sufferers, and the family and friends of those who have dementia – not to mention the sufferers themselves. How have the rights documents themselves been ordered to reflect the interests of those groups and individuals who are vulnerable? This occasions an examination of various statements on rights. In this chapter my interest is on the Australian context. Specifically I will be focussing on relevant documents that claim to protect the well being of, in particular, the mentally ill and those residents in aged care facilities, both groups having been the focus of rights based attention in recent years in this country and both groups being amongst the most profoundly vulnerable.

If the promise of rights is, in large part, to protect the vulnerable then it is clear that they have so often failed this promise. In chapter five, *Vulnerability and the Failure of Rights*, I document the extent of this failure. Again my primary focus is on the mentally ill and the aged within residential aged care facilities within the Australian setting. My argument in this chapter is that human rights have failed the vulnerable because the image of man contained within so much of the rights paradigm is at odds with what it means to be vulnerable, and also, because as human rights are typically constructed they cannot effectively address the sorts of social and political
locations the vulnerable find themselves in. By using the term ‘typically constructed’ I am referring to the view of man contained within the idea of human rights that suggests a rationally constructed, assertive, self motivated, claiming individual. This is the image of man that lies at the heart of human rights, and it is this image that is both assumed and implied within Australian pronouncements on human rights, particularly with respect to the elderly and the mentally ill.

This chapter builds upon and develops many of the themes introduced in previous chapters. For example I return to consider what it means to be vulnerable and how this vulnerability, particularly in its more severe manifestation, is crucially opposed to the picture of the rights-bearing individual. To this end the often powerless, dependent, ‘other-reliant’ individual, the reality of man through the life-span, is counter posed to the rational, assertive, goal directed, independent and self-reliant individual. I consider what we expect of the rights paradigm – that is, to care for and protect the vulnerable – and show how many political, economic and social forces often conspire to undermine the benefits that the rights paradigm might hold for vulnerable people. Indeed, when we think of the vulnerable we often think of them as existing within particular settings or contexts, such as the family, the hospital, the psychiatric unit, the aged care facility and so on. Often conflicts arise between different actors within these institutional structures. If rights are regarded as expressing the interests of individuals and as a means by which those interests are protected, it is instructive to discover how rights fare when such interests are in conflict with forces that are frequently more powerful in a social and political sense.

In this chapter I argue that rights, in and of themselves, that is rights qua rights, are powerless when confronted with forces and interests hostile to the well being of the vulnerable. Throughout this chapter my focus is on the mentally ill and the aged within residential aged care facilities. In both instances rights per se are largely
irrelevant to their welfare and best interests. My conclusion is that the extent to which the concept of human rights emphasises the rational, assertive and independent individual, it is deeply flawed. Such a view of human rights offers little safeguard or protection to either those who are vulnerable or in fact to any of us, given that there are substantial periods in our lives when we will experience, to a greater or lesser degree, episodes of vulnerability. This chapter will set the scene for my finally chapter which will argue that, in order to engage human rights and to make them relevant and sustaining, we need first to address notions of duty and responsibility.

Finally in chapter six, *On Rights, Duties and the Image of the Vulnerable*, I suggest possible avenues for securing the welfare of vulnerable people, and by extension all people, through an emphatic commitment to notions of duty and obligation. Such a commitment seeks to both engage rights and to realise their promise. I begin this chapter by considering the relationship between rights and duties. I suggest that within the discourse of everyday lives and the sorts of moral talk we embrace within such contexts there are good reasons for regarding rights as secondary to duties. Generally, I argue, we approach moral discussion from the perspective of oughts rather than from the perspective of our own, or others, moral entitlements. When we think of how we ought to behave in any given situation which demands a moral response, we tend to engage in notions of ‘what ought I do’, or ‘how ought I behave’. We generally do not consult theories of rights as a way of guiding our behaviour.

This leads us to reflect upon how we may engage the vulnerable and what sorts of values or orientations are instructive for maximising the wellbeing of vulnerable people. If human rights as they currently stand and how they are currently practiced have failed the vulnerable, as I maintain, then it seems clear that those in a position to act with regard to the welfare of vulnerable individuals are required to consider
their own actions and the impact such actions can have upon those who are often unable to act for themselves. Such a perspective recognises that what is typical of vulnerable people is that they often require others to act for them. In such circumstances the mere ascription of human rights (or indeed moral or legal rights in general) to vulnerable people misses the point. How are we to engage rights? What values and attitudes may agents embrace in order to activate the rights that vulnerable people are said to have. How can we make human rights (or moral or even legal rights) a lived reality for those who are vulnerable? Where would such inspiration come from to provide a moral context within which agents can act to secure the care and protection of the vulnerable?

My response to these questions is to seek within Christian philosophy and virtue ethics a framework which may guide agents in their dealings with vulnerable people. To this end I consider the role of the vulnerable within the Christian texts and as well I discuss those aspects of Aristotle’s virtue theory that may provide a moral basis for our engagement of the vulnerable. Such a discussion can be seen within the context of the way we approach moral discourse from within what I call ‘the narrative of everyday lives’, that is the characteristic way in which humans typically engage each other from the perspective of everyday moral discourse. It is at this level of discussion that perceptions and attitudes must change if we are to protect the vulnerable. And it is upon this change in perceptions and attitudes that politicians, policy makers, professionals and those who care for the frail aged and the mentally ill can reasonably be expected to base their engagement with the vulnerable.

In the final part of this chapter I make some practical suggestions as to how we might construct a constitution of duties in much the same way as we traditionally construct present constitutions of rights. I do not dwell too much on this aspect. I want to resist the temptation to simply replace lists of rights owned by recipients with lists of
duties owed by agents. This is because such lists and constitutions, although important, are secondary to the psychological and emotional and intellectual connection we make to vulnerable people. Just as the theory of rights reflects or emerges from an intellectual position that one takes about persons and the relationships between persons, so one must begin from the intellectual position that addresses the duties and obligations that one has to the vulnerable. Constitutions of duty will follow, because as humans we have both a need and a compulsion to document, yet first and foremost we must have a moral and psychological understanding of and commitment to the vulnerable in our midst. This philosophical and intellectual grounding upon which such constitutions are anchored must come first.

This thesis is not seeking to replace the ‘human rights paradigm’ with what might be referred to as a ‘human duties paradigm’. What I am seeking is better described in terms of a question of balance and counterbalance. My argument is that the human rights paradigm has failed precisely because the focus has traditionally been upon notions of rights, in particular rights as claims that people can make upon the state and various state institutions and functionaries, but with no compensating ethic of duty. This much is clear, within the Australian context at least when we consider the position of the frail aged and the mentally ill. As far as these groups are concerned human rights reflect sterile assertions of muscular individuality, yet notions of rights cannot be presented apart from or distinct from an equally powerful notion of duty and moral obligation. My emphasis in this thesis is upon ‘human rights’ as distinct from more general moral rights or even legal rights. Yet the same argument could be made in regard to these other presentations of rights. The mentally ill and the frail aged are certainly protected by legal rights, for example the legal right not to be assaulted being an obvious one, yet it is clear that whether or not such rights are
translated into a lived reality for these groups and individuals depends very much upon the sense of duty that those who care for the mentally ill and frail aged hold.

The world inhabited by the mentally ill and those with dementia is often a closed world of institutional routine and regulation far from the glare and spotlight of public discourse. In particular the aged in residential facilities are largely invisible. True, the way they have been treated over recent years in Australia has been the subject of much media (and thus community) debate, but such debate waxes and wanes with its place in the community’s focus. It is dependent in no small way upon the lurid nature of the abuse and neglect that may have occurred in this nursing home or that hostel and subject of course to competition from other equally lurid stories for media attention. To a very large degree their lives are played out behind the closed doors of institutions and the sorts of conditions they live under, either in terms of the services available to them or the standards of care which shape their day to day lives, are dependent upon the attitudes and values that those who care for them have. If an elderly resident in end stage dementia is assaulted, who complains? Certainly not the victim. And often neither does the victim’s family who may fear the consequences to their loved one of complaints about standards.14 (I raise this issue in chapter five) Can any notion of rights, legal or moral or human, protect such vulnerable people if those who are charged with care and protection act out of frustration, or hostility, or enmity and have little or no sense of duty? This is why we need to address agents and the sorts of moral assumptions that agents work from, for it is only via a strong notion of moral obligation or duty that such a debate can be engaged. It is to this debate that this thesis is directed.

14 One (feared) consequence may be that the residential institution may leverage for the complainant to take their family member to another institution. Families also fear being defined as ‘whingers’ or ‘troublemakers’ by institutions. It is often thought politic just to keep quiet and put up with abuse.
There are two final comments I would make, one having to do with the language used in the text and the other purely personal. With regard to the former I am aware of ongoing debates regarding the use of non-sexist language in academic work. In this thesis, rather than using the masculine form of he, his, or him for all cases that assume both masculine and feminine, or continually trying to use non gender specific terms such as ‘one’, which tends to sound contrived or clumsy, I have simply chosen to use ‘he’ or ‘she’, or ‘his’ or ‘her’ throughout. The exceptions are of course when the gender is obviously male or female as when I might refer to a particular author. I hope this does not give offence.

With regard to the personal dimension I would say that this thesis reflects an interest I have had stemming from my own professional work over the last 25 years or so in Australia. In that time I have worked almost exclusively within the area of mental health and aged care, mostly acute psychiatry, but of late within residential aged care facilities. In the course of my professional work, notions of rights and in particular human rights have gained great currency. In Australia such concepts have been directed primarily at the mentally ill and, over the last ten to 15 years, toward the aged in residential facilities. Yet it appears clear that the actual impact upon the lives of such people in terms of personal benefits has been minimal. It is not too much of an exaggeration to say that the same sorts of issues that confronted professionals like myself in the 1970s, prior to the application of rights to these two groups of people, are almost identical to the issues that confront us today.

Briefly, what are the issues that confront clinicians like myself? As far as mental health is concerned there is a lack of professional services for particular groups; the criminally insane, Aborigines, adolescents, those with dual diagnosis (mental illness and drug and alcohol problems) and people who live in rural and regional Australia. As well there are other chronic shortcomings, in particular a lack of 24 hour crisis
services for families in dire need outside normal working hours, poor community
follow up, a chronic lack of mental health beds, and an undue emphasis within
mental health upon medical, as opposed to psychological, intervention. As far as the
aged in residential facilities are concerned the issues of twenty years ago also
remain: poor staff-resident ratios and a lack of trained staff in facilities being the most
obvious. These two problems have been at the heart of some of the more notorious
cases of abuse and neglect of recent years. It seems we are regularly confronted by
media stories of residents being tied to commodes and elderly people left in urine
soaked beds or left to wander in night clothes in the middle of the day because staff
are occupied doing other work. The inappropriate use of restraints (physical and
chemical) is a continuing issue for those with dementia: the lack of enough dementia
specific units and appropriately trained staff is a chronic issue in Australia where
dementia patients often share rooms with those not so impaired. And so it is no
coincidence that residential aged care facilities are thus characterised by very high
levels of depression, most of which goes untreated or even clinically unrecognised.
The examples are seemingly endless and I deal with some (but not all – for obvious
reasons of space) at various points within this thesis.

The current landscape of professional experience looks remarkably similar in many
ways to the one that confronted professionals in the 1970s. One important difference
is that today the well being and integrity of both the mentally ill and the
institutionalised aged are theoretically ‘protected’ and ‘secured’ by the presence of a
whole plethora of rights, - legal, moral and in many cases, human. But the human
rights paradigm, so enthusiastically promoted as a form of moral rescue for the
vulnerable aged and the mentally ill, has had little impact on the day to day lives of
those who find themselves within either the mental health system or the system of
institutional aged care. It is in an attempt to answer why such a state of affairs
should continue to exist that the present thesis has been written.
Chapter One: Vulnerability - Philosophical

i] philosophical foundations

In a most general sense to be vulnerable is taken to be liable or susceptible to hurt, harm or injury. The Macquarie Dictionary for example defines vulnerability as ‘susceptible to being wounded, liable to physical hurt...open to attack or assault [and] weak in respect of defence.’\(^1\)\(^5\) Whilst the idea of vulnerability can be applied widely, so that we may say a poorly constructed building may be vulnerable to earthquake damage or a barren hillside is vulnerable to soil erosion in particularly wet weather, I am not concerned with the application of the term outside the realm of human experience or relationships. Poorly constructed buildings or barren hillsides cannot be said to have interests and so their vulnerability is not of the same order as that which applies to humans.

In a similar vein I would make a distinction between the vulnerability experienced by non-human animals to that experienced by humans. Whilst non-human animals, even the most primitive, could be said to have a valid interest in what happens to them\(^1\)\(^6\) such animals are not members of a moral community. Whilst they may have relationships with each other, although not in the same way that humans have relationships, and perhaps can even be said to fulfil certain roles in respect to one another, nevertheless such roles and relationships are fundamentally different to that engaged in by humans. It seems reasonable to suggest that non-human animals do

\(^1\)\(^5\) Macquarie Dictionary, St. Leonards, NSW, Macquarie Library, 1981.
\(^1\)\(^6\) Peter Singer, Animal Liberation 2nd ed, London, Jonathan Cape, 1990, pp 7-8 writes: ‘The capacity for suffering and enjoyment is a prerequisite for having interests at all...It would be nonsense to say that it was not in the interests of a stone to be kicked along the road by a schoolboy. A stone does not have interests because it cannot suffer. Nothing that we can do to it could possibly make any difference to its welfare.... A mouse...does have an interest in not being kicked along the road, because it will suffer if it is.’
not make moral judgements about the appropriateness or otherwise of actions, nor
do they enter into relationships with others of their species that inspire a whole range
of mutual expectations and obligations in the way that humans do. The assumptions
embraced within the notion of ‘a moral community’ encourage us to view others of
our kind as vulnerable and thus demand that we consider our relationships to them
with respect to their well-being. Within this thesis when I use the term ‘vulnerable’ I
have in mind certain specific and distinct characteristics that apply only within the
context of the relationships that humans share with each other.

i) vulnerability, interests and the rational actor

Vulnerability has traditionally been portrayed in terms of the individual’s response to
‘challenging or threatening environments’, where ‘individual-environment
transactions’ are played out within the context of situations that threaten an
individual’s safety, security or ongoing personal well being. Vulnerability has to do
with the individual’s ‘lessened potential capability’ for successfully dealing with such
environmental challenges.\(^{17}\) Vulnerability describes an individual’s increased
susceptibility to negative consequences when exposed to particular risk factors.\(^ {18}\)
Whereas ‘risk’ identifies features within the environment that may impact upon
individuals resulting in ‘an elevated probability of an undesirable outcome’ so that, for
example, children who experience ‘harsh and inconsistent parenting’ are more at risk
of delinquency than those whose parents experience chronic poor health,
vulnerability identifies an ‘individual susceptibility’ to harm or injury.\(^ {19}\)

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\(^{19}\) ibid, p 11.
according to this definition, has to do with personal attributes whether biological, social or situational. In other words, whether or not vulnerability as a construct is applied to population characteristics measuring relative risk in terms of morbidity/mortality data with an emphasis on predictive outcomes that may guide policy initiatives, nevertheless there is a sense in which vulnerability is (subjectively) an intensely personal phenomenon. In general I agree with Spiers who writes that:

‘People experience the troubles and turmoils of life in ways that cannot be captured simply by biomedical comparison to normative standards of risk. By reducing vulnerability to an epidemiological term, we reduce our vision of the world.’

In this thesis I am interested in vulnerability as an experience of individuals. For whilst it is clear that vulnerability is a socially ascribed characteristic, ascribed by either the person concerned or the society in which she lives, it is important not to underestimate the impact that vulnerability has on the way that individual lives are lived. In making this comment I am acknowledging a Foucauldian approach to vulnerability displayed in some of the literature. For example Hallahan, whilst acknowledging that vulnerability ‘is often linked to being powerless to defend oneself [against environmental threats] or even to perceive and challenge the threat’, writes that vulnerability describes ‘features of the environment [rather than] an attribute of the person.’ She warns that to stray down the path of regarding vulnerability or

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powerlessness as a feature of the individual is to run the risk ‘of only ever seeing [people] as weak, trapped, as forever undermined by their impairments [and to] overlook their capacity for empowerment.’ A similar approach is identified within writings on disability. Oliver suggests that whilst there is a popular understanding of disability ‘as an individual, intensely personal problem’, it is primarily social attitudes reacting to physical (or emotional, or psychological) difference (or impairment) that results in a person being disabled. In this sense ‘disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society.’

Yet it is surely quite reasonable to suggest that there are some individuals and some groups that no matter what their environments or their situations can be defined on the basis of their disability or, and more to the point, on the basis of their vulnerability. As Gaylin points out, what characterises the human new born is its utter helplessness and dependency and he notes that the irony of mankind lies ‘...in the miserable, extended, helpless state in which we are born and remain for so long - untoward in the extreme, and unparalleled in the animal kingdom.’ To be a neonate or an infant is to be vulnerable. To suffer from end stage dementia is to be vulnerable. To lie in a persistent vegetative state is to be vulnerable. It is to be unable to survive without the care and protection of others. It is to be at constant risk of harm, insult, and injury and if, as Handler has suggested, ‘empowerment is the ability to control one’s environment’, then vulnerability represents the absence of

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23 ibid, p 41
24 M. Oliver, Understanding Disability: From Theory to Practice, New York, St. Martin’s, 1996, p 3.
25 ibid, p 22.
27 With regard to the individual in end stage dementia, I recognise that vulnerability may be encapsulated in the forced subjection to needless intervention by medical authorities which prolongs an agonizing vegetative existence.
control over crucial features of one’s existence and the necessity that one rely on others for safety, security and in extreme cases for survival.\textsuperscript{28}

Within discussions on vulnerability certain themes are constant. Vulnerability is dependence; it is powerlessness; it is to lack (either physical or moral) autonomy; it is to rely on others for care, protection and in many cases for one’s very existence. It is often (and particularly with those such as children, the chronically mentally ill and the frail aged) to have one’s goals determined by outside agents. In an early review of the literature on vulnerability and ageing, Fry suggested that at the heart of the concept is a lack of or an erosion of personal control over the environment within which one operates.\textsuperscript{29} For many older people who confront vulnerability it is this theme of ‘loss’ that is most important. This loss may be a reduction in former levels of physical health and thus reduced mobility and independence, the enforced social isolation of the elderly too frail to leave their homes. It may, in more extreme cases, be a loss of control over one’s thoughts, feelings and actions, over one’s mental processes in all their form, structure and content. This is the loss that is associated with chronic Neuro-degenerative disorders such as Parkinson’s Disease or the dementias. Here the loss may be a loss of a previous ability to think, to reason, to identify oneself as a thinking, reasoning, experiencing being who can make judgements, who can reflect on a course of action and who can proceed with the expectation that one will be able to achieve certain desired outcomes.

At this level the idea of loss is well described by Simone Weil who, whilst employing the term ‘affliction’ rather than ‘vulnerability’, yet her description describes powerfully


the degree of loss that accompanies some of the ways in which people can be
described as vulnerable. To acknowledge the reality of affliction or vulnerability,
writes Weil, is to say to oneself that,

‘…I may lose control, through the play of circumstances over which I have no
control, over anything whatsoever I possess, including those things which are
so intimately mine that I consider them as being myself. There is nothing I
might not lose…’\(^{30}\)

To be vulnerable is to inhabit what Zaner describes as the world of ‘the other.’ To be
vulnerable is to be ‘a person set apart’. It is to have ‘one’s usual relations with others
[and] one’s sense of self and the world…compromised.’\(^{31}\) It is an existence beyond
the archetype of the rational, autonomous, independent and assertive moral agent
that so powerfully lies at the heart of the sorts of creatures we take humans to be. To
be vulnerable is to be confronted with a situation that is in some way hostile to one’s
interests. In this way when I use the term ‘vulnerability’ I am identifying a situation
wherein one’s interests are in some way under threat or at risk of harm. Thus my
discussion of vulnerability inevitably leads to a consideration of ‘interests’ and what I
mean by invoking such a term.

The word ‘interest’ embraces the idea ‘of being affected by something in respect of
advantage or detriment.’\(^{32}\) When we use the term ‘interest’ we have in mind
something that is to the advantage of the individual or a particular state of affairs that
is to her benefit or would be of value to her. In talking about one’s interests I am


\(^{31}\) Richard M. Zaner, ‘Encountering the Other’, in. Courtney S. Campbell and B. Andrew Lustig [eds]

\(^{32}\) Macquarie Dictionary, *op cit*. [f/n 15 at p 32]
referring to certain features of an individual’s life rather than that which might be expressed in terms of collective or group based aims or ambitions. Also I do not want to become involved with discussions in any specific sense about what personal goods may be prioritised or ranked as ‘one’s interests’, and who may be responsible for ranking or prioritising them. In saying this I acknowledge an ongoing debate that sees a good deal of overlap between ‘interests’, ‘needs’ and ‘wants’, and in particular distinctions that have traditionally been made (notably by scholars on the left) between ‘true’ and ‘false’ interests.\(^{33}\) In general terms I agree with John Rawls who writes that, ‘society is a cooperative venture for mutual advantage [that] is typically marked by a conflict as well as an identity of interests’. As Rawls points out, there is an ‘identity of interests’ because people realise they need others to achieve ends collectively they cannot achieve individually, whilst at the same time there is a ‘conflict of interests’ because not only does each person wish to pursue their own particular ends in life but also each generally prefers a greater to a smaller share of what are effectively finite goods.\(^{34}\)

Rawls does not specify what these interests actually are although, as his (in particular, feminist) critics have pointed out, implied within his writings is the voice of the rational, autonomous, liberal individual, functioning assertively within the narrow confines of a market economy, an economy that is based upon social competitiveness and economic individualism. It is this voice that has tended, suggest those such as Benhabib and others, to exclude all other voices and all other

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formulations of political and economic life. Debate around the concept of interests recognises a variety of often discordant and conflicting voices, values and experiences. As one group of Frenchwomen observed in 1789: ‘Just as a nobleman cannot represent a plebeian and the latter cannot represent a nobleman, so a man, no matter how honest he may be, cannot represent a woman.’ What then can we say about interests without becoming embroiled in debates about contexts, priorities, authorship and values?

One way of describing my position on the relationship between interests and vulnerability is to say that we can think of interests as operating on [at least] two distinct levels. On one level are those interests, what we might call ‘first order interests’, which can be described as the ability of a person to function as a rational, autonomous and moral being. On another level are what we might refer to as ‘second order interests’; the preferences, choices, appetites or inclinations that people characteristically embrace on a daily basis that make life pleasant, interesting or in some way of special concern and relevance for each particular individual.

The distinction between these two levels of interest is not new. Robertson, for example, differentiates between ‘competent’ and ‘non-competent’ interests. Competent interests are those that are essential to the lives of a competent actor and the choices and decisions such actors make, whilst non-competent interests exist on a much simpler level and do not rely on an established competency for their being and continuation. In similar vein Dworkin suggests that our ‘critical’ interests are

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morally more significant than our ‘experiential’ interests. Critical interests embrace notions of projects, ideas, schemes and strategies that we consciously adopt and which give our life a form and structure in an ongoing continuity or narrative, which is reflective of a deeper sense of value and personal identity. Interests such as these make our lives better and more meaningful from the point of view of an autonomous human self. Experiential interests involve more the day to day minutiae of life; sitting in the sun, listening to music, eating ice cream and so on that is important primarily on a level of experiential enjoyment. Dworkins outlines the difference between critical and experiential interests by saying that,

‘having a close relationship with my children is not important just because I happen to want the experience; on the contrary, I believe a life without wanting it would be a much worse one.’

However in order to have an ongoing and coherent ‘narrative’, or indeed to be ‘competent’, one must first be a rational agent. As Goodin suggests, we need to acknowledge that there are some central or fundamental interests, what I call ‘first order interests’, that are crucial in enabling an individual to act as a rational, autonomous and moral being and exist apart from and prior to an individual’s more particular interests. These first order interests may be regarded as the ‘necessary means to any particular ends a person might choose to pursue’ as an expression of their rational, reflective nature. In this regard first order interests are global and not situation specific. Whilst particular ends may vary according to whim, preference or

39 Ronald Dworkin, ibid, p 202.
40 Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*, Chicago, University of Chicago Press, 1985. Goodin employs the term ‘vital interests’ but I think that his point is much the same. He also talks at some length about the relationships between those who are vulnerable and those who may be seen as having an obligation derivative from that vulnerability.
41 ibid, p 111.
inclination, first order interests remain constant. Such interests are the prerequisite for one to engage in the sort of lives that we characteristically expect humans to both value and engage in. First order interests allow individuals to embark on complex forward thinking scenarios, interactive strategies, ‘if-then’ contemplation, and critical moral evaluation. They enable the establishment of what Miller describes as ‘a life plan’, something that is central to the individual’s way of life in terms of the aims, ambitions, meanings and activities that establish her identity and mark her as unique and distinct from her fellows.

This description of humans and human life is highly idealised and, as I shall later show, is flawed in certain crucial respects. [Importantly it overstates the degree to which we actually, consciously and intentionally choose the values we embrace and the sorts of lives we lead]. Nevertheless at this point I simply state what seems relatively uncontroversial and that is: if one is to embark on the sorts of actions that are typically assumed only humans can embark on and what is understood to be a typically valued human sort of a life, one must be a rational, autonomous and moral agent. If one cannot act as an agent in this way then, on my account, one is vulnerable.

ii vulnerability and relationships

To be vulnerable in the way that I have described the term is to have one’s ability to act as a rational, autonomous and moral agent in some way reduced or impaired. It is because we live in a moral community, wherein the ways we act towards others are subject to an ongoing and critical moral evaluation that the question of how we ought to behave toward the vulnerable presents itself and demands a response.

42 David Miller, Social Justice, op cit, pp 132-133. [f/n 33 at p 38]
What are the terms of the relationship between the vulnerable and others who stand in regard to them and may have a duty to care and protect?

Difficulties emerge in answering this question. One problem is that, in both morality and law, there is often no universally agreed upon approach that defines who is obligated, why they are so obligated and the extent of their obligation. Some have argued for an extreme minimalist position of moral duty towards those in need. Nozick, for example, maintains that whilst it is morally right to rescue those in need it is not morally wrong not to rescue, even when such a rescue can be undertaken with ease.\textsuperscript{43} His position seems to derive from the view that any moral demand that requires we act in a particular way for the benefit of another is an undue imposition that limits the rights of free agents to act as they choose. Such a view posits individual liberty, or the ‘freedom to act’, as a fundamental human value that ought not be compromised or reduced in any way. This perspective is challenged certainly by Mill in \textit{On Liberty} who asserts that one is indeed morally bound to rescue because it maximises the liberty of the person so rescued.\textsuperscript{44} In the following section of this discussion I maintain that Nozick’s view is indefensible in the light of arguments by both Rawls and Kant and also by appeals to the logic that sustains the social and co-operative nature of human life.

With regard to legal obligation in general a cleavage can be noted between common law and civil law countries on the requirements to rescue. Cadoppi puts the issue bluntly:

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'If a man walks through Trafalgar Square and sees an unknown child drowning in the famous fountains, he is not bound under English law to do anything at all. If the same person is sitting by Bernini’s marvellous fountain in Rome’s Piazza Navona, he will be guilty of a criminal offence if he does not rescue a child in a similar plight.45

This suggests that, at the very least, different legal constituencies display a disparity between the different legal obligations that ordinary people may have toward those who are vulnerable. In common law countries (most notably, Australia, Canada, the United Kingdom and the USA) the ‘bad Samaritan’, that is one who chooses not to rescue another who is at risk of harm, is treated, as Feinberg has identified, ‘with grudging tolerance’.46 Halsbury’s Laws of England puts the matter succinctly.

‘Save in exceptional circumstances the criminal law imposes no obligation on persons to act so as to prevent the occurrence of harm or wrongdoing. There is no general duty to prevent the commission of a crime; nor does a person commit a crime or become a party to it solely because he might reasonably have prevented its commission. Omission to act in a particular way will give rise to criminal liability only where a duty so to act arises at common law or is imposed by statute. Such a duty is exceptional and the criminal law does not require a person to be his brother’s keeper.’47

But Cadoppi’s point [above] is somewhat overstated. He later explains that whilst the criminal law within civil law countries does recognise a general duty to rescue those in peril, no such parallel recognition exists within common law countries. The emphasis on general is important for as McCall Smith points out, ‘the common law is not implacably hostile to the notion that liability for a failure to act may sometimes quite properly be imposed’, and he documents numerous instances within common law countries where such an obligation has indeed been found to exist.\footnote{Alexander McCall Smith, ‘The Duty to Rescue and the Common Law’, in. Michael A. Menlowe and Alexander McCall Smith [eds] op cit, p 93. [f/n 45 at p 42]} In Jones v United States of America the court outlines at least four situations where a failure to rescue was held to constitute a breach of legal duty. These were,

‘…where a statute imposes a duty to care for another…where one stands in a certain status relationship to another…where one has assumed a contractual duty to care for another; and…where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.’\footnote{Jones v United States of America 308 F 2d 307, 1962 p 310.}

As McCall Smith makes clear, what is important is the context within which one finds oneself with regard to the vulnerable, where ‘context’ embraces certain ‘proximity creating’ factors that engage one as having a range of legal duties toward those who are at risk of harm or who are in situations of danger. These ‘proximity creating’ factors in part turn on the role that one may (intentionally or otherwise) have played in being instrumental in the situation in which the vulnerable find themselves. For example, whilst it may be true that if I come upon a child drowning at the beach I am under no legal obligation to rescue, or if I see a man about to hang himself I am similarly under no obligation to intervene, a different situation would be presented if,
for example, I suggested to the child in question that she swim in an area I knew to be unsafe or if I gave the man a length of rope and instructed him as to which tree might best take his weight.

But my concern in this section is not to engage in discussion of how different civil law or common law jurisdictions impose different legal requirements upon people and their dealings with those who can be said to be vulnerable. Rather, I want to suggest that no matter what jurisdiction one finds oneself in it is fair to say that there are primarily two sorts of relationships that can be said to exist between those who are vulnerable and others who stand in regard to them and may be seen to have some duty or obligation to care and protect.

The first type of relationship is a ‘general’ relationship. General relationships are those we have simply by virtue of our being rational, autonomous and moral agents; beings who are capable of intention, who have knowledge about actions and consequences, choices to act upon and the ability to accept the responsibility for behaviour freely engaged in. This is the world of the rational, reflective agent. By calling these relationships ‘general’ we recognise that they exist beyond any specific and structured roles that people might occasionally occupy. Such relationships provide a sort of morally codified ‘background noise’ which offers a moral pathway to guide people in the way they relate to others, vulnerable or not. Yet the dynamics of these relationships are often open to a variety of interpretations, analysis and understandings all of which are reflective of varying opinions, values, mores and moral positions that different people might adopt. General relationships often function beyond the legal framework. They invoke obligations which are primarily defined by custom, convention or accepted moral practice and appear, on the surface at least, to be based on the premise that where the interests of others are particularly susceptible to our actions and choices then we have certain, primarily
moral, obligations to act in a way that maximises their well-being, or minimises the extent to which they are harmed.

When we move beyond such ‘general’ relationships to embrace ‘special’ relationships, then duties and obligations, in both legal and moral terms, come into sharper focus. Special relationships are those that emerge from the formal and highly structured roles or positions that individuals often inhabit and that demand a particular conformity to certain professional standards or codes of conduct. For people such as policemen, lifeguards, doctors, nurses, even parents, the notion of a legally enforceable duty obligates such individuals to particular standards of behaviour. Such people, in the course of their professional lives, have an identified legal obligation to act in certain ways and a failure to act in accordance with that obligation may attract both criminal and civil liability. This introduces the notion of ‘duty of care’. Whilst the existence and extent of this ‘duty’ may often be a case for debate, nevertheless it is apparent that some occupations by their very nature embrace such a concept. Certainly whenever a relationship is a protective one that incorporates expectations that one will act in a particular way toward those one has responsibility for in the course of their occupational activities, a failure to protect may render one liable to both civil or criminal action.

The terms and conditions that exist within the confines of a special relationship can be seen as ‘cordoned off’ from the more general relationships that people may be engaged in. This is certainly the case within common law countries such as Australia. For example, outside the special relationship between nurse and patient, a nurse, ‘as far as the common-law principles are concerned [has] no legal duty to stop and render assistance in any type of emergency, and that includes a motor vehicle
accident.50 Similarly, although a parent has a legal obligation to provide a certain 
standard of care and protection toward her child, she is not under any such legal 
obligation as far as any other child is concerned. Once one has freely embarked 
upon a special relationship with the vulnerable then one is bound in certain very 
precise legal ways to certain forms of conduct that have currency only within the 
particular relationship. Outside the relationship the legal rules are different. This 
difference can be seen with respect to the idea of positive and negative duties. As 
Goodin points out, when special relationships are invoked, ‘…positive duties (duties 
to aid others) [are] strictly on a par with negative duties (duties not to harm others); 
neither [are] necessarily any stronger or more compelling than the other.’51 However 
beyond legal relationships this is not the case. If I am driving down a deserted 
country road and I come upon a stranded motorist my responsibility to aid her (a 
positive duty) cannot be as strong as my duty not to harm her (a negative duty).

A similar situation exists with respect to accountability. Within special relationships 
people are held responsible in accordance with some standard that is expected of all 
people who occupy similar positions. As McDonald points out, all doctors are 
expected to behave in a certain way when confronted with sick people, in a way that 
those who are not doctors are not expected to act. Medical practitioners are 
expected ‘to exercise that degree of care and skill which is to be expected of the 
average practitioner of the class to which he belongs.’52 Similarly, ‘a person using or 
answering to the title “Nurse” will be judged according to the standards expected of a 
qualified nurse.’53 Those who fail to live up to the expectations of their role may be 
liable to professional censure, litigation or even criminal action depending upon the

50 Patricia J, Staunton and Bob Whyburn, Nursing and The Law, 4th edition, Marrickville, Australia, 
51 Robert E. Goodin, op cit, p 110. [fn 40 at p 40]
particular circumstances. In this way those who occupy special relationships with regard to the vulnerable are held legally accountable both for what they do and for what they fail to do.

But why is it that we hold those who stand in special regard to the vulnerable legally bound to fairly rigid codes of behaviour? The answer to this question provides an important clue not simply as to what it means to be vulnerable but also to what it means to be human. To be vulnerable is, as I have argued, to be compromised in terms of one's ability to act as a rational, autonomous and moral agent. Thus the vulnerable are unable to ‘act for themselves’ to ensure their own safety, security and well-being and they require others to ‘act for them’. In this way the relationship between the vulnerable and those who stand in special regard to them is powerfully unequal. We recognise this inequality (the vulnerability of one group and the authority, dominance and power of another) by placing strict limits on what can be done by those who have a special relationship to the vulnerable. And the reason why we place such limits on the actions of one group of people is because although we talk in legal terms when we think of those who have special duties toward the vulnerable, fundamentally we recognise that the relationship is a moral one. The relationship between the vulnerable and those who stand in special regard to them is based on the recognition that all humans are moral creatures who must, as Kant asserted, be seen as ends in themselves rather than as means to the ends of others. It is this assertion that I wish to explore in the next section.

iii vulnerability and the moral imperative

At the heart of any relationship that exists between the vulnerable and those who stand in either general or special regard to them is a moral imperative. Indeed it has often been assumed that a sympathy toward others is an inescapable part of being
human. As Epictetus says in his *Discourses*; ‘Have we not natural fidelity, natural affection, a natural disposition to help others, a natural disposition to forbearance?’

The moral requirement to come to the aid of others was certainly suggested by Bentham who asked that ‘in cases where the person is in danger, why should it not be the duty of every man to save another from mischief, when it can be done without prejudicing himself…?’ Yet to say that we are ‘naturally disposed to help’ or ‘why ought we not help’, seems insufficient to addressing the crucial question of why I should actually seek to aid another who is in some form of distress.

I think a satisfactory solution to this can be found in both Rawls and Kant. John Rawls argues that ‘[to] help another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself’, is an example of what he calls a ‘natural duty’. Rawls follows Kant on this. In *The Metaphysics of Morals* Kant makes it clear that ‘…to promote according to one’s means the happiness of others in need, without hoping for something in return, is everyone’s duty.’ For Kant the rationale to rescue, to aid those who are at risk of pain, harm or injury, in other words to come to the aid of the vulnerable amongst us, is located within each person as a rational agent. Thus he writes that,

‘…everyone who finds himself in need wishes to be helped by others. But if he lets his maxim of being unwilling to assist others in turn when they are in need become public…then everyone would likewise deny him assistance when he himself is in need, or at least would be authorised to deny it.’

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54 Epictetus, *Discourses*, Book 2, Ch. 10.
56 John Rawls, *A Theory of Justice*, op cit, p 114. [En 34 at p 38]
Consequently, argues Kant, the obligation to assist those who are in need ‘is a universal duty of human beings just because they are...rational beings with needs, united by nature in one dwelling place so that they can help one another.’\footnote{ibid.}

Kant locates moral action, in this case the duty to rescue, within the image of the rational. The principles that guide moral behaviour are those that are capable of being universalised to all rational agents everywhere regardless of personal interest, inclination, even sentiment or sympathy. This is the world of the ‘noumenal’ self, able to stand beyond time and causality, relationships and interests, and establish moral principles that will genuinely harmonise the interests of all rational agents. To aid others is rational. It is a universal moral duty of all rational beings. In this sense it is in accordance with a categorical imperative.\footnote{The obligation to aid conforms with Kant’s categorical imperative which requires that one acts ‘only on that maxim through which you can at the same time will that it should become a universalised law.’ In this case the duty to aid others is a rational response of all rational agents. H. J. Paton, \textit{The Moral Law: Kant’s Groundwork of the Metaphysics of Morals}, translated and analysed by H. J. Paton, London, Hutchinson University Library, 1972.}

If Kant locates the duty to aid in terms of man’s rationality, Rawls emphasises man’s sociability. The most important reason for aiding those in need ‘is its pervasive effect on the quality of everyday life.’ In other words, ‘the public knowledge that we are living in a society in which we can depend upon others to come to our assistance in difficult circumstances is itself of great value.’\footnote{John Rawls, \textit{op cit}, p 339. [fn 34 at p 38]} Whilst utilitarian conceptions are also important, that is we help others because some day we may need their help in return,\footnote{ibid.} the main value of this natural duty to aid is that it both sustains and indeed reflects man’s essential nature as a social, and sociable, being. It recognises that
man is not isolated or independent rather he is social and interdependent. To refuse to aid would thus be to deny man’s essential cooperative nature and thus undermine the conditions required for cooperative society itself to flourish. Perhaps alluding to the Hobbesian image of man in his natural state, Rawls asks us ‘to imagine what a society would be like if it were publicly known that this duty [to aid others] was rejected.’ It would, he says, ‘express an indifference if not disdain for human beings that would make a sense of our own worth impossible.’

There is also another point worth mentioning about the relationship between law and morals. Whilst legal positivists may argue that the legal and moral are, or ought to be, two separate and distinct entities, with the law being conceptualised as a (value-free) system of rules and conventions backed by sovereign authority for the regulation of human conduct and sustained by sanction, there is clearly a close connection between the areas of law and morality. I think Moore is correct when he says that ‘the content of much of our law is the same as the content of much of our morality’, and that legal precepts are in fact, in general, built upon moral ones.

Within some areas of law this is certainly the case. For example ‘legal rights to property, to liberty, or to equality depend on moral rights to those things; legal liability to punishment or damages depends on moral responsibility.’ Like Moore I suspect that in fact we can find moral justifications for a diverse range of areas such as tort law, contract law and property law. Without going into this argument I think we can fairly say that it often seems that moral laws tend to drive the legal ones. That is we establish ways of acting and codify such actions in law primarily because we think

62 ibid.
64 ibid.
65 Moore suggests that the basis of contract law can be seen within promise keeping, tort law may reflect utilitarian approaches to efficient resource allocation and property law can be seen to be based upon either utilitarian or natural law theories where respective (moral) rights and duties are allocated to relevant parties.
this is the appropriate way to behave, that this is moral and ethical, or it is ‘good’ to act in this way and so we construct legal arrangements to reflect these moral assumptions.

Of course this is not always the case. For example it does not matter if we collectively drive on the left or the right, but this sort of ‘housekeeping’ rule notwithstanding, I think it is reasonable to say that generally the law tends to be based upon and reflect moral and ethical notions of how people ‘ought’ to behave in particular situations and circumstances. Yet there remains a rather more subtle way in which both law and morality are related and that is in the view that both hold of what sort of a being is the subject of their attentions. As Fuller suggests, the law has a particular (moral) view of what constitutes man, and so he writes that ‘to embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules.’66 Such a view also presumes the existence of a shared understanding of rules and the role that such an understanding has as a basis for both moral and legal action. In addition, the notion of a ‘shared understanding’ presumes or suggests one who has highly developed skills of thinking, integrating, decision making, consenting and communicating.

A system of law, then, is dependent upon a particular view of man, one that sees him certainly as a rational, autonomous agent, a being capable of making judgements about possible actions, of embracing intention to act and of accepting consequences for the acts he performs, but it also assumes a being who is a moral agent as well. Indeed people are moral actors before they are legal ones. This means that laws that are viewed in some way as being unfair, unjust, inequitable, or skewed to reflect

certain privileged interests, will be deemed in some way to have failed the crucial test of moral appropriateness. Laws that fail such a test may be regarded as having lost their moral authority, and societies who tolerate a preponderance of such laws are on dangerous ground, both in terms of morality but also in terms of legal, social and political authority. Rawls is making a similar point in the first chapter of *A Theory of Justice* when he says that, ‘justice is the first virtue of social institutions…[and that] laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.’ It is man’s ‘shared conceptions of justice [that] establishes the bonds of civic friendship’ and when these bonds are weakened or diminished, as they are with laws that have no moral standing, then the thread of society is in danger of being unravelled. In Rawls’s words, ‘distrust and resentment corrode the ties of civility, and suspicion and hostility tempt men to act in ways they would otherwise avoid.’

At this point I would make some general comments about my position so far, both by way of summary but also with an eye to future discussion. Vulnerability as I have defined it, is the inability of an individual to function as a rational, autonomous and moral agent. As a result those who are vulnerable are dependent upon the care and consideration of others in order to secure their basic needs and interests which they may be (temporarily) incapable of meeting or even recognising. Thus people are

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67 We nevertheless need to be cautious here for there is often an apparently contradictory relationship between the view of man which sustains the legal system and that which seems is encouraged by the economic system. Whilst the legal system treats man as a rational and moral actor it sometimes appears that the economy is built on a model of man (*homo economicus*) as a rational actor but a moral vandal who flouts social conventions and moral principles in search of self interest. *Homo economicus* rejects community, any sense of tribal loyalty and any obligations other than to himself. *Is homo economicus* a rapacious wolf, and are we expected to behave differently in the marketplace than in civil life? The community’s response to the decade of greed in the 1980s and its more strident response to the excesses of corporate America in recent months would suggest not. Because some corporate high flyers act as rapacious wolves it does not necessarily follow that the market place is beyond the moral framework.

68 John Rawls, *op cit*, pp 3-6. [f/n 34 at p 38]
vulnerable when, at various stages of their lives, they are unable to act ‘in their own
gregard’ and are forced to rely on others to ‘act for them’ to secure their well-being,
care and protection.

The relationship between those who are vulnerable and others who stand in some
regard to them can be thought of in terms of either a ‘special’ or a ‘general’
relationship. Special relationships describe those who have some responsibility to
the vulnerable, such as doctors, nurses, psychiatrists, policemen and the like, with
that responsibility emerging from the particular roles or occupations that relevant
people inhabit. Special relationships often encompass strict legal criteria, and legal
and professional sanctions apply to those whose acts fall below some fairly well
defined standard. General relationships, on the other hand, are primarily moral
demands that people act in a particular way to those they find vulnerable, but such
relationships are open to question from competing moral judgements about how
people ought to act, or even whether they ought to act at all. Crucially though I
suggest that any relationship between the vulnerable and those that stand in regard
to them is moral in both its structure and content. That is, we behave toward the
vulnerable, toward the very young, the sick, the dying, the mentally ill, those with
dementia and so on because of the ‘oughts’ contained within moral discourse.

The ‘oughts’ which guide our actions when considering how we should behave
toward the vulnerable may be inspired by a variety of traditions – some of which
invoke the spectre of rights and some of which do not. The comments earlier by
Epictetus suggest that we often help others not because they have a moral right to
our help but that our helping is due to some natural inclination to reach out to those
who are in need. And whilst both Rawls and Kant suggest that the duties we hold to
others are grounded in the moral rights that others possess, still the implication
remains even here that the act of caring and helping is in some way part of that
constellation of behaviours that rational and sociable beings typically engage in – and do so beyond the justification of rights. We might assume that even within a Kantian or Rawlsian world, if it were agreed that not all rational beings could be said to have rights, then requirements to help would still exist. Or would we argue that we only ever help others if it can be shown that others are rights bearing creatures?

Other traditions approach the vulnerable without any sustaining force of rights. Christian theology and virtue ethics for example, can certainly account for obligations and duties toward the vulnerable that are not grounded in any view of rights, correlative or otherwise. Christian theology would lay emphasis upon notions of brotherhood, acts of compassion, our duties and obligations to the vulnerable being part of a wider act of embracing the Divine. Virtue ethics may identify caring for others as part of a repertoire of responses that the virtuous person may be required to do for no other consideration than that of acting virtuously. And with respect to what I will later discuss as ‘the narrative of everyday lives’, why is it that we act with care towards others? Why does the general medical practitioner stop at a roadside accident to render assistance? Is it because she is compelled to offer aid to a rights bearing creature – or does she assist because of a strong sense of duty and obligation (perhaps driven by Christian charity or the demands of her profession). As we have seen above, once she is engaged in the caring process at the scene of the accident certain rights and expectations that emerge from her professional role may come into play, but this does not explain her act of stopping in the first place – especially when she could have easily and anonymously driven past.

Despite the ‘promise’ that individual rights holds out for vulnerable people – that it can ensure care and protection, this promise has often not been fulfilled. In later chapters I will argue that the failure of rights is premised upon its inability to take account of the sort of people that humans are and the sort of situations that humans
often find themselves in, as well as the direction the thrust of rights takes. This direction has its focus on the recipient of rights, the one who possesses rights, rather than upon the agent who acts, the one who has duties or responsibilities to discharge in order that rights be engaged. But next I want to turn my attention to this idea of vulnerability and to explore exactly what we mean when we say of people that they are vulnerable.

**ii] dimensions of vulnerability**

‘She beckons me with her index finger. We both stare into the mirror together. “There is a girl over there exactly like you”, she says excitedly. I realise it is my reflection and she no longer recognises the mirror…This intelligent woman now has no reasoning powers, no concentration, no patience, no understanding of the simple matters, her ability to put words together has gone. She has lost her independence and relies on others to give her a shower, to keep her clothes clean, to dress and undress, to cook for her and even to tell her when she is tired and hungry…The mother I have today suffers from Alzheimer’s disease.’  

[In disorganised schizophrenia] hallucinations and delusions…are profuse [with the sufferer] subject to bizarre ideas, often involving deterioration of the body. He is constantly changeable breaking into inexplicable fits of laughter and crying…behaviour is marked by a pattern of silliness and absurdity…giggles childishly…speaks incoherently, stringing together similar sounding words and inventing neologisms…His life seems a tangled skein of delusions, mannerisms, and busy, inconsequential rituals…He frequently

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deteriorates to the point that he becomes incontinent, voiding anywhere and at any time...completely neglects his appearance, never bathing, brushing his teeth or combing his hair.\textsuperscript{70}

‘Your newborn baby’s behaviour is a series of reactions to what he perceives as random stimuli. He has instincts and reflexes but no knowledge and no experience. He does not know that he is himself, that the object he sees moving in front of his face is his own hand or that it remains part of him when it has vanished...He does not know that you are people either. He is programmed to pay attention to you, to look at your faces and listen to your voices. He is programmed to suck when you offer him a nipple. He is programmed for survival but he knows nothing.\textsuperscript{71}

The above examples of vulnerability present a powerful image of individuals who are compromised in terms of their ability to function as rational, autonomous and moral agents with regard to their own best interests. Yet vulnerability can confront people on varying levels and to varying degrees. Not all vulnerability is as profound as that presented above. It seems fair to say that people can be ‘more or less’ vulnerable just as people can be ‘more or less’ rational, independent, autonomous, caring, selfish, overweight or industrious. Vulnerability is, like the other variables I have mentioned, a ‘degree-vague’ term, yet this ought cause no conceptual confusion. The fact that we are often unable to be precise about the dimensions of relevant variables does not render the variables themselves either meaningless or invalid. For example, on the colour spectrum there is a point where orange merges into red so that it becomes impossible to distinguish between the two. At some stage a


colour may be ‘more or less’ orange or ‘more or less’ red but this does not invalidate either orange or red that in most cases all but the colour blind would agree upon.

If we accept that people can be ‘more or less’ vulnerable then there are two possible ways we can proceed to elaborate further on this concept of vulnerability. First we can identify vulnerability as encompassing a variety of distinct qualitative dimensions and second we can propose both a stronger and a weaker sense of the term ‘being vulnerable’. With regard to the former I want to suggest that we can see vulnerability as either permanent, transitory, or episodic. Within the category of permanent vulnerability we may place the chronically and profoundly intellectually disabled, (those who suffer from severe autistic disorders for example) those with advanced stages of dementia, those with serious birth trauma, some chronically mentally ill and so on. People in this group may be viewed as incapable of rational, autonomous or moral action in any meaningful sense of the way we employ those terms. Such individuals have a total dependence on the care and protection of others for all aspects of their daily life. By calling vulnerability permanent I have in mind the unremitting and perpetual nature of the impairment with afflicted individuals requiring continuing, ongoing and permanent specialised care by others.

Vulnerability may also be viewed as transitory. This level of vulnerability suggest a resolution. Thus we include within this group the neonate, infant or child, or even the healthy assertive adult who is anaesthetised and undergoing an operation. What is expected is either the emergence to the status of a fully rational, autonomous agent, as in the case of the former, or a return to such status, as with the latter. Nevertheless inhabitants of this group remain totally dependent on the care and protection of others for the duration of their vulnerability. Neonates and very young children depend upon the care and protection of a responsible other, most often their

72 Michael S. Moore, Law and Psychiatry: Rethinking the Relationship op cit, p 206. [f/n 53 at p 51]
parents, to care and protect them, whilst those undergoing operations depend upon the expertise of medical professionals for similar consideration. Whilst neither group can be described as rational, autonomous or moral creatures still, in the first case such ability may be seen as a potential whilst in the second case it can be seen as interrupted.

Finally we may view vulnerability as *episodic*. As the name implies this suggests intermittent episodes of vulnerability in those who otherwise function as rational, autonomous and moral beings. In this group we may include, for example, those who experience recurring acute psychiatric illnesses that regularly demand the intervention of others who are called upon to act in a capacity to care and protect. In episodic vulnerability sufferers may demonstrate a profound impairment of normal functioning, as in the case of someone with severe recurring bouts of catatonic or paranoid schizophrenia or even someone whose manic episodes leave them seriously impaired with respect to their ability to make reasoned and logical decisions about their life. In this category we may also include those who are confronted with profoundly stressful life situations such as being diagnosed with a life threatening illness, a marriage break up, the death of a spouse or a child. It is certain that incidences such as these will engender different responses in different people based upon other factors (emotional responsiveness, personal resilience, support structures and the like). And whilst such episodes may conclude with a return to normal levels of functioning, hence my definition of episodic vulnerability, within the context of experiences as these there will be a great variance in people’s ability to function as ‘normal’ rational reflective agents. Indeed it would seem axiomatic to suggest that crisis situations have the potential to erode one’s ability to function as a fully developed rational, autonomous and moral agent.
Within the above categories of ‘permanent’, ‘transient’ or ‘episodic’ we see the essential features of vulnerability as I have described them. First, is the individual’s inability to function as fully developed rational, autonomous and moral beings that we typically take humans to be. Second, when there is a relationship between those who are vulnerable and those who stand in regard to them and are charged with their care and protection, this relationship is often institutionalised. By ‘institutionalised’ I mean that there are codes of practice, expectations of behaviour, a codification of rules, professional ethics and, in a broader sense, the fact that those who are vulnerable are often cared for within the confines of particular social arrangements. These arrangements may be located within the hospital, the nursing home, the psychiatric clinic or the family. Vulnerability implies one whose first order interests are threatened and another who stands in regard to them and has either a legal or moral duty to care and protect. Finally, the relationship between the vulnerable and those who have certain obligations toward them is driven by moral concerns. Whilst such relationships are often codified within legal frameworks, nevertheless the reason why we care for and protect the vulnerable is because of the moral concerns we have for them. It is the moral ‘oughts’ contained within the relationships we have to the vulnerable that compel us to act in certain ways.

But apart from dividing vulnerability into distinct dimensions, we can also differentiate between vulnerability in a strong sense and vulnerability in a weak sense. This distinction is crucial for in this thesis whilst I acknowledge that some who are vulnerable are still able to engage and employ the idea of rights to advantage, others, particularly those whose vulnerability is profound (those with mental illness and dementia for example), are increasingly unable to make use of rights talk. As stated previously (in the introduction) as vulnerability increases it appears that rights talk becomes less able to secure the care and protection so desired. And in this thesis it is to the severe end of vulnerability that I address my comments. Thus in the
introduction to this section I presented three examples of vulnerability in a strong sense. Certain forms of dementia, severe mental illness and infancy represent vulnerability at its most profound. These states are characterised by an emphatic absence of any ability to function as a rational, autonomous and moral agent. The new born, those in end stage dementia and the profoundly psychotic each share a lack of rational capacity, an absence of independent action, and an inability to care for themselves in even a minimal sense so that, left to their own devices, many will simply die.

But of course not all people are vulnerable to this dramatic extent. For example, whilst young children are vulnerable and liable to (physical, psychological and emotional) harm, injury or death if not cared for, they are not as vulnerable as neonates who have no rational or autonomous capacity. Neonates have a tenuous grip on life. Left alone they will die and they will die very quickly. Vulnerability here is a life and death issue. Children left alone are much less vulnerable and unless encumbered by chronic injury or illness have a much better chance of survival. Yet the differences are perhaps not that great. A substantial proportion of the world’s children live an existence without any parental or adult supervision still they survive. But they survive in a demeaned existence which is less than what we expect as a minimum standard for all humans to enjoy. This tells us that vulnerability is more than physical threats to one’s existence – it exists on the psychological and emotional level as well. At what point in human development can the individual function independently? The question need not be answered here. What is clear is that there are gradations of vulnerability.

With regard to the elderly we can make a similar point. Not all the aged suffer from dementia and, as Carney has pointed out, we ought not automatically pathologise
those who are elderly. Yet both the aged and the frail aged and particularly those
who live in residential aged care facilities face a variety of issues and problems which
render them vulnerable in at least the weaker sense of that term. I am referring here
to the complex of, in particular, biological and social issues that often confront those
who are elderly. Most obvious are the physical realities of being aged, especially the
‘old – old’, whether this involves ‘normal’ age related deterioration such as decline
in memory, judgement, cognitive processes, a loss of mobility, and thus an increased
ability to perform basic acts of self care, an increased susceptibility to illness and
so on, or more specific clinical states such as Parkinson’s Disease and other age
related conditions. Added to this is an often allied loss of autonomy, an increased
marginalisation and dependency and a forced reliance on structures and institutions
over which they often have little or no control or influence. The vulnerability of the
elderly may be contained within the perceptions that the elderly themselves have
about their own fears, limitations, and threats to their personal wellbeing and survival
emanating from their own frailty relative to others in the population. Thus whilst
many aged both inside and outside institutions are not vulnerable in the strong sense
of that term, they are nevertheless vulnerable in a weaker sense in that physical and
social factors intervene to reduce their ability to function as fully developed

73 T. Carney, ‘“Righting” Wrongs for the Aged: A Bill of Rights?’ Australian Journal on Ageing,
74 OECD, Caring For Frail Elderly People: Policies in Evolution, Social Policy Studies No. 19,
75 As Stevenson points out, basic activities such as feeding, changing, walking, standing, getting into
and out of bed, putting on clothes, going to the toilet and so on, all become crucial issues for the aged
and have the capacity to deny them their autonomy and independence and force them to rely totally
upon the good will of others. Olive Stevenson, Age and Vulnerability: A Guide to Better Care,
Multidisciplinary Approach to extended Care, 2nd edition, Melbourne, Churchill Livingstone, 1991,
pp 61-71.
77 D. M. Gibson, ‘The Dormouse Syndrome – Restructuring the Dependency of the Elderly’, ANZJS,
Vol.21, No.1, March 1985, pp 44-63.
78 See ‘perceptions of self-sufficiency and vulnerability in ageing’, chapter nine in: Elizabeth
autonomous and independent beings, and force them to rely increasingly on the actions of others to secure their interests and well being.

And this provides us with the key to the understanding of the idea of vulnerability. To be vulnerable has to do with one’s inability to function as a rational, autonomous and independent being and to be forced to rely on others for some (greater or lesser) degree of support, assistance and protection, and in some cases for one’s very survival. And so we can propose this idea of vulnerability in contrast to the concept of the rational, assertive and independent moral agent who both identifies her own self interests and sets about in a single minded and self assured way to achieve those interests. Indeed it often appears that we have become so focussed on the idea of the individual as a rational, autonomous and moral agent acting in her own best interests that we too often forget of the innumerable periods in one’s life when such a state of affairs does not accurately reflect what it means to be human. We all, for example, begin life in a state of utter vulnerability, depending upon others for our very survival. Many of us will become aged and frail aged and so our choices and options will be heavily circumscribed as a direct consequence.

Yet between these extremes of infancy and old age it would still be folly to assume that the image of the rational, assertive, autonomous and independent rights bearing agent holds sway. Beyond infancy and old age where we may readily accept that the threat of vulnerability is ever present, we seek comfort in the belief that humans are typically rational, autonomous and moral creatures who identify, seek and assert their own best interests. Yet this archetype is not in harmony with the world as we know it, for a multiplicity of influences and incidents can intervene to reduce our ability to function in a way that we take for granted is characteristically human. A variety of
illnesses, whether life threatening or not, the experience of chronic pain,\textsuperscript{79} anxiety, drug addiction, alcoholism, separation and divorce, the death of a loved one, financial ruin, chronic anxiety, the various forms of Post Traumatic Stress Disorder and the like, all these and many other instances besides have the capacity to reduce our ability to function as the rational agents we assume that humans are. Take, for example, the increasingly common incidence of stroke, or cerebrovascular accident. Whyte and Mulsant write that, ‘in the United States, there are approximately 600,000 new cases each year’ and that there are currently some 4.5 million survivors.\textsuperscript{80} Stroke is often accompanied by, and associated with, a whole range of disabilities such as, increased cognitive impairment, loss of health, of occupation, of social role, of independence, an increased incidence of depression, suicidality and mortality.\textsuperscript{81} At such times and in such circumstances we are vulnerable. At such times and in such circumstances we are forced to rely on others for our care and protection.

There are then, many points in our life when we are unable to behave as the rational, autonomous and moral agent that is encapsulated within the liberal notion of human rights. In the next chapter I want to explore this point more fully, but at the present I would content myself with the following position: that there is indeed a prima facie case to be made that suggests the image of the rational, autonomous and moral agent that lies at the heart of the rights paradigm is often insufficient to describe all the many and varied ways in which humans are characteristically human. In order to

\textsuperscript{79} Chronic pain, even in mild forms, can severely undermine the ability of humans to function as rational, reflective agents. Chronic pain challenges ‘…value and belief systems due to a loss of…goals and purpose, loss of self…[of] body image…of identity…of self esteem…of spiritual/religious connection and loss of dignity.’ There are ‘threats to the person’s intactness’ which flow from the experience of ongoing pain which is commonly manifested in subjective feelings of anxiety, fear, grief, anger, shame and humiliation. Heather Collin and Anne Just, ‘Chronic Non-Cancer Pain (CNCP)’, \textit{Pulse: Information Sheet of Royal College of Nursing, Australia}, No.3, 2000.

\textsuperscript{80} Ellen M. Whyte and Benoit H. Mulsant, ‘Post Stroke Depression: Epidemiology, Pathophysiology, and Biological Treatment’, \textit{Biological Psychiatry}, 2002; 52, p 253.

adequately and convincingly account for what it means to be human we must first recognize the reality of human vulnerability. For it is a fact of human existence that before man is rational he is not-rational; before he is independent he is dependent; before he is a creature capable of a moral calculus, he is amoral – that is, before he can hope to aspire to the rational reflective and responsible agent we typically take humans to be, he is vulnerable. And it is also a fact that vulnerability is a constant companion of humans throughout the life span. Not always dominant, to be sure, but always a companion – like a shadow it stalks the rational, autonomous individual constantly threatening his very existence. If this is correct then it becomes of crucial importance as to how we approach those amongst us who are vulnerable; in what way do we depend upon other people and what sustains, in philosophical terms, the relationship between the vulnerable and others who may be called upon to care and protect. In the next section I want to briefly address one particular and current way that we approach these questions.

iii] vulnerability and human rights

When confronted with groups and individuals who are vulnerable, whether we think of this vulnerability as expressed in a strong sense or in a weak sense, we have tended to frame our responses in terms of rights and in particular in terms of human rights. We have made the assumption that the rights response is the most effective way to deal with the vulnerability that some groups and individuals experience. In Australia in recent years we have become familiar with notions of children’s rights,82 the rights of the frail aged in residential aged care facilities83, the rights of the

homeless,\textsuperscript{84} and ‘the human rights of people with mental illness’, to cite a recent federal report of that title.\textsuperscript{85} By engaging the rights response we seek to establish a normative moral framework within which relationships between the vulnerable and those who are charged with their care and protection can be structured. Emerging from this framework we seek strategic benefits for vulnerable people that aim to minimise the effect of their vulnerability from whatever contexts such effects are generated. By invoking human rights we seek two interrelated goals. First, we seek to confirm our commitment to the moral worth and value of such individuals, and second, we hope to protect these individuals against the worst features of their vulnerability. In this way we both re-affirm and re-establish man as a rational, autonomous actor. Through the medium of human rights, vulnerability is challenged and the moral agent is ascendant.

Modern human rights theory, even that which goes beyond civil and political rights and encompasses social, economic, cultural and collectivist dimensions, embraces and enshrines the concept of the rational, autonomous and moral individual. This rights bearing individual, whom Kant identified as a rational being, ‘…a subject of ends…’ and who ‘…must be made the ground for all maxims of action’, lies at the moral and political hub of discussions about human rights.\textsuperscript{86} And although Kant makes a distinction between the phenomenal world (of appearances) and the noumenal world (of things in themselves), nevertheless it is the view of the rational man, the noumenal individual, that lies at the heart of the liberal view of human rights. In Kantian terms, the world of human rights is bounded by the rational actor who, in recognising both his own rationality and the rationality of his fellows, is impelled to act in certain ways that exist beyond narrow self interest. It is this notion

of ‘shared rationality’ that lies at the heart of both Kant’s philosophy and human rights.

To talk of human beings is thus to talk of beings with rights; rights that emerge out of individual rationality. It is to acknowledge the concept of the individual as rational, autonomous and independent, as bound to other rational, autonomous and independent individuals in a system of mutually advantageous rights; a community of equals, each rational, purposeful, assertive and self-willed, and with individuals themselves the best judge of their own unique self interest. To embrace rights is therefore to embrace both a particular idea of what it means to be human as well as to commit oneself to ensure some form of protection for that idea. As Kenneth Minogue once remarked, human rights can be seen as a form of ‘protective moral armour’ designed to shield individuals against a hostile and potentially invasive world. This view establishes people as responsible moral actors, agents capable of making choices about how they act and treat others as well as beings who are inherently valuable and worth protecting. It also establishes people as individuals who can articulate and assert their own interests in the face of the interests of others. Human rights seek to establish man’s ‘humanity’ as well as to offer effective protection for that humanity. To deny people their rights is thus to treat them as less than the rational, autonomous and moral agents that we take all people to be. It is to undermine their interests. It is to diminish their standing as moral creatures. To embrace human rights is to embrace the notion of man as a rational, autonomous and moral agent whilst at the same time it is to seek to protect him against those who would do him harm.

Yet this view of man has only an occasional relationship with reality. As I have suggested throughout this chapter, the idea of vulnerability challenges, compromises and undermines the view of man that has traditionally underpinned the rights paradigm. At its harshest, vulnerability in the strong sense, the picture of man is of one whose capacities for rational, autonomous and moral action are non-existent. This is the experience of the infant, the chronically mentally ill, the sufferer in end stage dementia. But even vulnerability in the weak sense contradicts our view of man as a rational, reflective actor. We are presented then with two possible views of what constitutes the individual. On the one hand we have, as Kitwood has suggested, ‘...the individual...of bourgeois commonsense, the owner of property, the possessor of legal rights…self determining through the rational pursuit of his own ends…’ a perspective, he asserts, that ‘has crept unrecognised into moral theory and become accepted as the criterion of a universal humanity.’

On the other hand we have a picture of one who, although capable of rational thought and action, is nevertheless beset by many periods in her life when such rational, reflective action is impaired, diminished or even non existent. Thus Kitwood notes that in contrast to a view which sees humans ‘as rational, whole, and competent...therapists draw attention to widespread impairment, alienation and fragmentation’ amongst people, which is demonstrated by individuals who ‘...have come to the end of their personal resources [and suffer] “burn out”, anxiety, depression, and a whole variety of stress-related illnesses.’

There is therefore an apparent contradiction between the human rights view of man and the view of the individual that emerges from within the picture of his vulnerability. In emphasising man as a rational, autonomous and moral agent we have tended to

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89 *ibid*, p 3.
ignore the many times in his life when he cannot be so described. But also, in emphasising rights we have tended to minimise duties. Both in our picture of the individual and in the social, political and economic arrangements we have set in place, ostensibly to protect the vulnerable, we have tended to ignore the duties that are required in order for rights to be effectively engaged. This is particularly so in Australia with respect to the aged in residential facilities and in respect to the mentally ill. The terms and scope of duties have been largely ignored. In some cases we have made them optional. Consequently effective human rights protection for vulnerable people, especially the aged and the mentally ill, has been erratic at best and in some cases non-existent. I intend to discuss the plight of these two groups of people at some length later in the thesis. In the final chapter I will present an argument for the care and protection of vulnerable people that pays due attention to the importance of the duties we owe the vulnerable, but for now I want to reflect upon what it means to be vulnerable from the perspective of the individual subjective encounter.
Chapter Two: Vulnerability - Personal

i) introduction

When we describe someone as being a rational, reflective agent we are often led to say that the individual in question is a ‘person’ or that she possesses ‘personhood’. People who talk this way do so in order to make a distinction between different types of human beings or, to be more precise, between human beings with different attributes or abilities. Some human beings, those who are clearly and indisputably rational, autonomous and moral agents for example, are defined as being ‘persons’ or in possession of ‘personhood’. Others, particularly those who cannot be described in terms of a rational reflective ability, are often regarded as either having a diminished personhood or in some cases as having no personhood at all. In a recent textbook on nursing and ethics the authors ask the rhetorical question of why it is that we make the distinction between being a person and being human. Their answer is that in so doing we help to establish who has priority in the allocation of goods and services, or ‘who have priority for being helped to live and those who are valued as being less important.’ As they make clear ‘…one needs some criteria for deciding who lives or dies [and] those with severe mental, social or emotional incompetence may not qualify as persons.’ In other words ‘when there is only so much room at the table, hard choices have to be made.’

Thus there is often a distinction made in the literature between ‘persons’, those who have a certain intrinsic worth and value, who are the bearers of rights and because of this who have entitlements to the allocation of resources - and those, let us call them

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‘non-persons’, who have much less value, minimalist rights and little entitlement to resources. This distinction seems clearly made by the authors of the nursing textbook quoted above. It is also made by those such as Singer, Tooley, Khuse and others.\footnote{In particular Peter Singer and Helga Khuse have written a good deal on and around this general subject. As far as Singer is concerned see: Rethinking Life and Death, New York, St. Martins, 1995; Practical Ethics, Cambridge, Cambridge University Press, 1981. For Helga Khuse see: The Sanctity-of-life Doctrine in Medicine: A Critique, Oxford, Clarendon, 1987; ‘Some Reflections on the Problem of Advance Directives, Personhood and Personal Identity’, Kennedy Institute of Ethics Journal, 9.4(1999), pp 347-364. Also see: Peter Singer and Helga Khuse, Should the Baby Live: The Problem of Handicapped Infants, Oxford, Oxford University Press, 1985.} Most bluntly Tooley has argued that,

‘an organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity.’\footnote{M. Tooley, ‘Abortion and Infanticide’, Philosophy and Public Affairs, 2, 1972, pp 37-65.}

Such a position clearly has profound implications for a whole range of people. Part of the problem is of course that there is a burden of responsibility for those so afflicted to convince others that one is indeed a ‘continuing subject of experiences’ and if one is unable to convince others of this fact then one is on shaky ground indeed. In this way Tooley’s argument, and arguments like his, are based not so much on the ‘possession’ of such abilities as it is upon the ‘demonstration’ that one can be described in this way. The distinction is important and I think one that is too easily ignored. It is by no means always possible to be precise about making distinctions between persons and prospective non-persons, and there are many groups of individuals who must sit uncomfortably on the knife edge between these two discreet conditions; for example those who suffer from autism, Motor Neurone Disease, Parkinson’s Disease, Huntington’s Chorea, and various forms of dementia to name but a few. Further, there is enough research to suggest that simply because...
people cannot assert their personhood in traditional ways it does not mean that personhood is absent. 93

Nevertheless discussions about personhood and its dimensions do connect us to the sorts of problems that confront those who are vulnerable, because those who are vulnerable can be said to have their personhood compromised at least in the traditional sense of what constitutes being a person. Traditionally, when people invoke the concept of personhood they invoke notions of being a rational, autonomous and moral agent and certainly if these qualities are compromised or diminished then (in traditional terms at least) notions of personhood appear under threat. But what do we mean by these terms? In the following I want to first answer that particular question and then reflect upon what it means to have these qualities in some way impaired. In that way we can better appreciate what it means to be vulnerable in the way that I am employing that term.

ii] on personhood

By invoking the concept of personhood we are making a distinction between those beings who are members of a particular species and those beings who are members of that species with certain defining abilities. What are the abilities in question and what is it that is taken as constitutive of being a person? John Locke’s answer to this

93 Morrice for example has demonstrated that following recovery from coma induced by brain injury a number of subjects have reported awareness and thinking whilst in a comatose state. A Morrice, ‘Coma stimulation’, Think, 1992, Sep-Oct; 2(4): 48-50. Wolf-Schein’s research on autistic and deaf-blind children so impaired as to initially be defined as ‘untestable’, yet later able to be helped to advance both educationally and with respect to life skills, similarly cautions us about making hasty judgements with regard to intellectual and cognitive ability. E.G. Wolf-Schein, ‘Considerations in assessment of children with severe disabilities including deaf-blindness and autism’, International Journal of Disability Development and Education, 1998 March, 45(1): 35-55. Within the dementias the ability to effectively communicate is amongst the first faculties to deteriorate thus encouraging us to assume (often incorrectly) that there is no emotional or cognitive ‘connection’ with the outside world. Ruth M. Tappen, ‘Alzheimer’s disease: Communication techniques to facilitate perioperative care’, AORN Journal, December 1991, Vol.54, No.6, 1279-1286.
question is probably still the most well known and the most succinct. In *An Essay Concerning Human Understanding* Locke writes that the term ‘person’ refers to one who is

‘…a thinking intelligent Being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness, which is inseparable from thinking, and as it seems to me essential to it: It being impossible for anyone to perceive, without perceiving, that he does perceive.’

It is from the ability to think, to reason and to reflect that the nature of personhood is most usually defined. It is from the individual’s ‘reflective awareness’ (which is not only to know but to know that one knows) that develops ‘…the ability to engage in imagination, self scrutiny, scientific hypothesising, philosophical speculation, the evolution of a self concept…[as well as] ethical concerns [such as] a sense of right and wrong, good and bad, transcendent values, and scales of values.’ Personhood is thus grounded in or predicated upon, (but not confined to) notions of agency. As Lowe puts it, to be a person is essentially to be ‘…something that acts and perceives and knows that it does so: it is [to be] a perceiving self-conscious agent, or, alternatively, an active, self conscious percipient,’ or at the very least it is to be something that has the capacity to act in this way.

Thus the idea of personhood has traditionally been described in terms of other concepts such as consciousness, self-concept, self awareness, intentional behaviour

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and the ability to construct and to carry out projects, as well as some essential feature of moral awareness. Quinton, for example, suggests five criteria of personhood; consciousness, rationality, agency, morality and what we might call a sensitivity to the aims, aspirations and ambitions of others demonstrated through the ability to form and sustain relationships.\footnote{A. Quinton, \textit{The Nature of Things}, London, Routledge, 1973.} This implies at least two paradigms (inter-related rather than distinct) which can be described respectively as \textit{metaphysical} personhood and \textit{moral} personhood and which can be seen as providing the philosophical context from which notions of personhood emerge or are most usually constructed.\footnote{Tom L. Beauchamp, ‘The Failure of Theories of Personhood’ \textit{Kennedy Institute of Ethics Journal} 9.4 (1999), pp 309-324.}

Metaphysical personhood mirrors that of Locke fairly closely and suggests an entity may be regarded as a person if it displays a certain mix of rather precise cognitive abilities. These are most often defined as individual rationality, the possession of a personalised self concept, an awareness of one's continuing existence over time, an ability to demonstrate a degree of autonomous action, and the capacity to engage in some form of effective communication.\footnote{\textit{ibid}, pp 309-310} This approach is most clearly revealed in the writings of Singer, Feinberg and Tooley. Singer has suggested that persons are ‘self-conscious or rational beings.’\footnote{Peter Singer, ‘Value of Life’ in. \textit{Encyclopaedia of Bioethics}. Vol. 2, p 823.} What makes a being a person in a ‘morally relevant sense’ and thus places such beings in line for special consideration not due other animals, are powers of ‘self awareness…rationality… moral sense …autonomy or some combination of these.’\footnote{Peter Singer, ‘Embryo Experimentation and the Moral Status of the Embryo’ in. Eric Matthews and Michael Menlowe [eds] \textit{Philosophy and Health Care}, Aldershot, Avebury, 1992.} Similarly Feinberg suggests that personhood consists of consciousness, a self concept, self awareness, the capacity to experience emotions, to reason, to have understanding, to plan, to act subsequent to plans and
to experience pleasure and pain. Tooley, as we have seen, has argued that such cognitive abilities form the basis not only of the ownership of rights but also, and by extension, a moral entitlement to exist.

Others have sought to be even more precise about the criteria of personhood. Fletcher’s definition includes neo-cortical activity, an IQ at least in the region of 20 to 40 points, the existence of a sense of past and future with self-awareness, consciousness of others, the ability to communicate and the ability to form and sustain what is defined as ‘significant’ relationships. In distinguishing between being human from being a person Bandman and Bandman suggest that whilst the former is biological, the latter is (crucially) biographical.

‘One who has hopes, plans, projects, a past, the sense of the present, joys, frustrations, the capacity to regret, and a sense of a future with expectations and prospects, all of which presuppose consciousness – such a being is said to have a life as a person. If one can plan a vacation, drive a car, play a musical instrument, or have some similar project, then one is living a biographical life and said to be a person.’

Contrasted with metaphysical personhood is moral personhood. Moral personhood lays emphasis upon man as a moral actor. It assumes that one is a person if one ‘...is capable of making moral judgements about the rightness and wrongness of actions and...has motives that can be judged morally.’ To be a person is to be a

103 J. Fletcher, Four Indicators of Humanhood: The Inquiry Matures, Hastings Centre Report, 1974; 4(6), p 51.
104 Elsie L. Bandman & Bertram Bandman, Nursing Ethics Through the Lifespan, op cit, p 234. [En 90 at p 70]
moral agent. It is to be one who understands ‘moral reciprocity and the communal expectation that they will treat others as moral persons.’

The idea of persons being ‘moral actors’ involves both distinctions between what constitutes ‘good’ as opposed to ‘bad’ behaviours as well as an ability to make evaluative judgements between alternate ways of being. Two contexts are implied here. One has to do with moral communities who establish rules that evaluate moral conduct and the other has to do with the moral actors that inhabit such communities. With regard to the notion of moral communities the emphasis is upon social structures composed of rational, self conscious entities who have agreed upon some (albeit minimalist) shared notion of appropriate ways of acting, of moral standards, of rules of conduct and who are able to accept, as well as ascribe to others, responsibility for actions. To refer to moral communities is to assume the existence of beings who can make morally relevant evaluations about standards and codes of conduct. To assume that such beings exist is also to assume that they are beings who are capable of making choices, of rationally deciding between different courses of action and being able to give reasons in terms of rationality and morality for why they acted so.

The other context has to do with the sort of lives led by those who live in moral communities. This recognises that only persons have the potential to make qualitative and evaluative judgements about standards of acting that for them represent the pursuit of the good. I am referring here to discussions by both Frankfurt and Taylor on the distinction between first and second order desires.

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105 Tom L. Beauchamp, op cit. p 316. [fn 98 at p 74]
Whilst both humans and animals may have first order desires, defined as wants, motives or choices, humans alone possess ‘...the capacity for reflective self evaluation that is manifested in the formation of second-order desires.’\textsuperscript{108} Second order desires are the ability to evaluate desires and make judgements that some are desirable and some are undesirable. This is a ‘qualitative evaluation of desires’ that recognises that not all wants are of the same order or on the same level. But it also recognises that to persons how they are and the type of individual they are is important. The way they live lives, whether to be honourable, or virtuous, or courageous, or noble, their ability to reflect on qualitative standards of being that drive areas such as the arts, music, literature, language, psychology and moral discourse, is fundamental to being a person.

On this reading then, there is a distinction to be made between persons and agents. The two are not synonymous. To be an agent is to act with regard to one’s own interests. Such a definition may often include higher order animals. Indeed we could suggest that all animals may to a degree possess agency in some sense especially if we define agency as self interest followed by a crude goal directed intentionality. Yet non-human animals are generally not regarded as having personhood and the reason for this is that they are not viewed as moral actors. To be a person is certainly founded upon or predicated upon a conscious, reflective, rationality (agency) yet personhood goes further and embraces a moral dimension. That is, to be a person involves both the ability to make moral judgements, to see oneself as a being who is capable of ‘praise and blame’, whilst it is also to understand oneself on a evaluative and qualitative level that encourages us to constantly define and redefine both our world and who we are in the world in a way that allows us to be moral beings that are in unique ways distinct from all other beings.

\textsuperscript{108} H. Frankfurt, \textit{op cit}, p 6. [\textsuperscript{\textit{fn}} 106 at p 76]
Put another way, when confronted with beings, whether human or non-human, that display rational, autonomous or moral capacity we are led to identify personhood, whereas for those who display no such attributes or abilities we often (it is said) find it difficult to attribute any sense of personhood to them.\(^\text{109}\) As Lowe points out, 'when we want to consider what sort of evidence we look for if we want to detect the presence of a person...we do not in fact necessarily look for bodily characteristics of any sort: [rather] we look for intelligent activity, and where we find it we attribute its source to a person.'\(^\text{110}\) Perhaps, and more importantly, when no intelligent activity is found, when one is confronted with an individual who displays no rational, reflective activity, then, on the above premise, many find it difficult to attribute personhood. The emphasis is thus upon persons defined in terms of rational, autonomous and moral agents. In traditional terms at least this is what personhood identifies. This raises difficult moral issues, not the least being what happens to those humans who cannot be defined as persons, and of course why ought moral consideration attach to certain cognitive and intellectual qualities? Whilst these are important questions to address, in the following I want to focus primarily on the traditional approach to personhood. Certainly it seems that we would all agree that no matter what we saw as essentially constitutive of being a person, in some way the 'being' of a person is necessarily diminished if that individual cannot be regarded as a rational, autonomous or a moral agent.

\(^{109}\) This view has in recent years been challenged, in particular within the dementia related literature that sees 'personhood' as more than some expression of the rational, reflective actor. For example see: David Jenkins and Bob Price, 'Dementia and personhood: a focus for care?', *Journal of Advanced Nursing*, 1996, 24 pp 84-90; Julian C. Hughes, ‘Views of the person with dementia’, *Journal of Medical Ethics*, 2001, 27 pp 86-91; Tom Kitwood, *Dementia reconsidered: the person comes first*, Buckingham, Open University Press, 1997; John Bond, ‘Quality of life for people with dementia: approaches to the challenge of measurement’, *Ageing and Society*, 19, 1999, pp 561-579.

\(^{110}\) E. J. Lowe, *op cit*, p 110. [fn 96 at p 73]
iii] personhood and rationality

It is rationality which provides the ‘intelligent activity’ upon which the concept of personhood has traditionally been founded. There are at least two ways in which we can understand the notion of rationality. These I identify as ‘agency-based rationality’ and ‘virtue-based rationality’. Agency-based rationality, or what we may call ‘the common sense approach’, has to do with the ability of individuals to act out of reason and in pursuit of certain goals or ends that they view as desirable. Virtue-based rationality, on the other hand, derives in large part from Kant and, as Lindley points out, has not to do with ‘the authorship of beliefs, desires, emotions and actions...[but with] their acceptability.’

To act rationally according to Kant is to divorce oneself from personal inclinations, desires, feelings and wants, to go beyond whim, ambition and narrow self interest and to act in accordance with certain universal moral principles. To describe some moral principles as ‘universal’ is to say that they can be applied equally to all rational beings everywhere and be recognised as a way such rational beings ought always be treated. Thus such principles transcend any notion of narrow self interests or the demands of one’s own particular situation. Kant’s view of rationality is intrinsic to and underpins both his notions of moral action and autonomy and by extension his view of the person. To be a person, according to Kant, is to be a rational and autonomous individual, what he calls ‘the subject of a morally practical reason’.

In The Groundwork to the Metaphysics of Morals, Kant writes that rational actions are those based upon laws themselves derived from what he calls ‘the categorical imperative’. In practical terms this demands that one ought to adhere to the maxim

to ‘act in such a way that you…treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.’\textsuperscript{112} This requires the individual to transcend his own particular interest and act as if the interests of all people were as equally as important and valid. Writing in \textit{The Metaphysics of Morals} he says that ‘moral personality is…nothing other than the freedom of a rational being under moral laws,’ and in a footnote says that, ‘the less a human being can be constrained by natural means (by force or authority) and the more he can be constrained morally (through the mere representation of duty), so much the more free he is.’\textsuperscript{113}

Rationality for Kant is thus to act out of concerns for rationality (i.e. ‘pure’ rationality) alone, that is, to be moved only by what is rational in a universal sense and not by one’s own perspective. In this way Kantian rationality transcends self interest. Yet Kant’s view of rationality is fundamentally at odds with what we see as descriptive of ordinary people. The most telling criticism of ‘pure rationality’ is that the moral actor is in some way portrayed as disembodied from the conditions of his own social existence, yet at the same time is called upon to make moral judgments that assess how one should act in the real world of human roles and relationships. In trying to ‘factor out’ notions of self interest, which Kant sees as a deceptive and misleading basis for moral action, Kant has, according to Sandel, denied too much of the human situation and located too much in the transcendental.\textsuperscript{114}

The relationship between individuals and their interests is precisely the point at which Kant’s virtue based rationality differs from agency based rationality, or what we may

regard as the common sense approach to rationality. When we talk about rationality in common sense terms we are firmly locating people within the context of their own social being and we are making judgements about the appropriateness or otherwise of their behaviours and actions within this context. Whereas Kantian rationality eschewed self interest and the pursuit of the individual will, the common-sense approach to rationality seeks precisely these ends. In this way agency based rationality is strategic rather than virtuous.

Agency based rationality demands that one has the ability to reflect upon one’s actions, choices, options and possibilities and to construct responses that are valid according to one’s personal life, a life that is located within a social and cultural context. As Epictetus tells us in his *Discourses*, it is man’s rational faculty alone that enables him to make judgements, ‘to approve or disapprove’, concerning how he ought to act for it is this faculty alone ‘...which contemplates both itself and all other things.’ ‘The rational faculty,’ he writes ‘...is the only faculty that we have received which examines itself...and examines all other faculties.’¹¹¹⁵

This logical reflective approach is echoed later in the writings of both Hobbes and Locke. Writing in *Leviathan*, Hobbes says that, ‘when a man Reasoneth, hee does nothing else but conceive a summe totall, from Addition of parcels; or conceive a Remainder, from Subtraction of one summe from another...’¹¹⁶ But reasoning for Hobbes is not simply a mechanistic faculty or ability. Crucially it is a reflective process, ‘a good and orderly Method’¹¹⁷ he calls it, engaged in by rational, reflective beings to regulate the framework of their lives whether this embraces philosophy, law, politics, geometry, logic and so on. And reasoning is not embraced in the

¹¹⁵ Epictetus, *Discourses*, Book I, Chapter 1.
¹¹⁷ *ibid.*
abstract as Kant might have us believe. Reason begins by describing (naming) the world that people inhabit (information obtained from the sense) and moves on from that point to understanding and action. Writes Hobbes;

‘The use and End of Reason, is not the finding of the summe, and truth of one, or a few consequences, remote from the first definitions, and settled signification of names; but to begin at these; and proceed from one consequence to another. For there can be no certainty of the last Conclusion, without a certainty of all those Affirmations and Negations, on which it was grounded and inferred.’\(^\text{118}\)

Reason is for Hobbes man’s *sine qua non*. ‘Right reason’ as Hobbes puts it, is after all ‘the undoubted word of God’ to be ‘employed in the purchase of Justice, Peace, and true Religion.’\(^\text{119}\) Although some have argued that Hobbes’ man is best described in terms of his appetites or passions\(^\text{120}\) I agree with both Goyard-Fabre\(^\text{121}\) and Gert\(^\text{122}\) that it is in fact man’s ability to reason that defines him. Reason subdues the passions and encourages man to seek his best interests.

Of course we assume that it is reason that drives action. An essential part of being a rational agent is the ability to control our emotions and not to be overwhelmed by them. Strong passions (love, hate, envy, lust, greed, ambition) if followed without reflection or assessment or consideration of potential risks may simply hasten our

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\(^{118}\) *ibid.*

\(^{119}\) *Leviathan* Part III, Ch XXXII. Although in this instance Hobbes uses the term ‘our naturall Reason’.

\(^{120}\) Oakeshott for example writes that; ‘[The] capacity for general hypothetical reasoning distinguishes [man] from the animal, but he remains fundamentally a creature of passion, and it is by passion not less than by reasoning that he achieves his salvation.’ Michael Oakeshott, ‘Introduction’ in, *Leviathan* (1651), Oxford, Basil Blackwell, 1971, p xxvii.


own destruction. An important part of being a rational agent is to stand apart from our emotions and to assess the costs that any potential action may have for us. Those who cannot do this, who are led in a very reactive sense by their emotions with no regard for the impact their actions will have on others or themselves, we regard as unpredictable, dangerous or irrational. When confronted with such people, with those who cannot be rational in a strategic sense, then we are encouraged to impose external measures of control to supplant absent internal measures.

In like vein Locke too made it clear that it was man’s ability to engage in rational contemplation as ‘a thinking intelligent Being, that has reason and reflection’, that defined him as a person. Reason is, says Locke, ‘the discovery of the Certainty or Probability of such Propositions or Truths, which the Mind arrives at by Deductions made from such ideas, which it has got by the use of its natural Faculties, viz. by Sensation or Reflection’.\(^{123}\) It was the ability to reason that separated ‘man from brutes’.\(^{124}\) Similarly it was defects in rationality that define both ‘madmen’ and ‘idiots’. Madmen may have retained the ability to reason but, says Locke, ‘having joined together some ideas very wrongly, they mistake them for Truths; and they err as men do, that argue right from wrong Principles….’ But idiots, he says, ‘make very few or no Propositions, and reason scarce at all.’\(^{125}\) Further, a lack of rational ability can also be found in children but as Locke makes clear this is amenable to upbringing by which children, through industry and education, become rational agents that attain full adult (or person) status.


\(^{124}\) Locke writes of ‘brutes’ (non-human animals) that; ‘...the power of abstracting is not at all in them…and that the having of general ideas is that which puts a perfect distinction betwixt man and brutes, and is an excellency which the faculties of brutes do by no means attain to.’ Bk II, Ch X1: *Of Discerning*.

\(^{125}\) *ibid.*
Agency based rationality describes actions that are based upon desires that are valid or understandable within the context of an individual’s personal existence and are directed towards ends that are themselves equally valid and understandable ‘...as something a person would want.’126 Thus when the idea of ‘personhood’ is embraced, it is to identify more than simply a rational agent yet it is difficult to imagine this idea of personhood in the absence of an agency based rationality. In talking of rationality we are acknowledging not simply that man is an animal characterised by his ability to think (to plan, to calculate, to act), but more importantly it is to think in a way that enables him to both reflect on what he thinks and to engage in a sensible and continuous dialogue with others of his kind. As Crowley writes (and it is a point which could easily be seen as a rebuff to anti-psychiatrists), rationality ‘is a faculty which permits a human being in full possession of his senses to act in a way which others in his society find intelligible.’127

As an agent who thinks, rationality serves the prioritising of certain specific goals amongst a whole range of possible goals. Rationality on this level recognises, as Hume puts it, ‘that...in adapting means to ends [we] are guided by reason and design, and that ‘tis not ignorantly nor casually we perform those actions, which tend to self preservation, to the obtaining pleasure, and avoiding pain.’128 As an agent who reflects (Frankfurt’s 'second order desires'), rationality serves a critical evaluative function that offers an account of what was done and why one course of action was preferred to another when one is confronted by a whole variety of possible actions. Finally rationality involves recognition that the choices adopted by

126 Michael S. Moore Law and Psychiatry: rethinking the relationship, op cit, p 101.[f/n 53 at p 51]
an individual must be seen within the context of possible choices by numerous
individuals. Thus the individual

‘...realises that she must choose among many possible ways of life, and that
the breadth and richness of her choices depend on the existence of other
persons choosing in other ways. She therefore sees her life in a social
context, as made possible through interaction with others – interaction which
of course also makes possible their lives.’

Human rationality is thus strategically social.

iv] personhood and autonomy

The concept of autonomy is closely bound up with the notion of personal or individual
freedom. We are autonomous when we are free to make our own decisions about
how we ought to live and we are free only to the extent that autonomous
(independent, self-initiated, rational) decision making is possible. It is this
association between freedom, rationality and autonomy that Locke is appealing to
when he described man as a rational, autonomous actor who had joined with other
equally rational, autonomous actors to give their consent to be governed, with the
expressed aim of preserving their natural freedom and individuality. Locke spoke of
the ‘...equal Right that every Man hath, to his Natural Freedom, without being
subjected to the Will or Authority of any other Man’, and that liberty itself consisted
in the ability of the individual ‘...to dispose, and order, as he lists, his Person,
Actions, Possessions, and his whole Property, within the Allowance of those Laws

129 David Gauthier, ‘The Liberal Individual’ in. Shlomo Avineri and Avner De-Shalit [eds]
130 John Locke, Two Treatises of Government, edited and introduction by Peter Laslett, New York,
under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own.\textsuperscript{131}

In talking about autonomy and freedom in this way, Locke was endorsing a fundamental historical shift that was occurring in the way that the individual was conceived. To be sure notions of individual freedom and liberty did not begin or end with Locke, but Locke does represent a dramatic shift in the way that freedom and autonomy (particularly its social, political and economic variant) was conceptualised. The individual in Locke’s political theory was vastly different from pre-modern man. In pre-modern society, for example, the idea of the individual existing in some way apart from the social institutions and structures within which men found themselves (church, state, city, occupation, family) was unknown. Man regarded himself, and was regarded by others, in terms of his association with other men and his place in the overall social order. As Fromm points out

\begin{quote}
‘a person was identical with his role in society; he was a peasant, an artisan, a knight, and not \textit{an individual} who \textit{happened} to have this or that occupation…He did not conceive of himself as an individual except through the medium of his social (which was then also his natural) role…[and neither did he] conceive of any other persons as “individuals” either.’\textsuperscript{132}
\end{quote}

In the Middle Ages, as Burckhardt argues in his well known thesis, ‘man was conscious of himself only as a member of a race, people, party, family, or corporation – only through some general category.’\textsuperscript{133} Such a view is diametrically opposed to our modern day conception of what it means to be an autonomous individual. Indeed

\textsuperscript{131} \textit{Second Treatise}, Ch. VI, 57. 28-32.
\textsuperscript{133} Jacob Burckhardt, \textit{The Civilisation of the Renaissance in Italy}, London, Allen & Unwin, 1921, p 129.
our modern day view owes much to Locke, where the emphasis is upon one who, whilst enmeshed within social networks of varying kinds, can nevertheless still remain beyond such networks and retain a social, political and economic identity that is in some way distinct from all others with whom one interacts.

Whilst the idea of freedom as autonomy has its roots in John Locke, it is to be found also within both Kant and in particular in John Stuart Mill’s *On Liberty*. Kant’s view of the rational individual was discussed above where it was noted that rationality consisted in the ability of the individual to stand apart from the social roles she occupied and to judge values, beliefs and ideas according to the dictates of a reason that transcended self interest. According to Kant it is only this individual who can be said to be autonomous; that is, to be fully autonomous one has to be fully rational. The truly autonomous person is one possessed of a pure rationality, one who seeks only those actions that are in harmony with certain moral principles; principles which are capable of being universalised beyond narrow self interest; principles that any rational individual in any situation would want to apply as a guide to ways of behaving.

For Mill, to be autonomous, or to be an ‘individual’ for Mill did not use the term ‘autonomy’ directly, is to be firmly grounded within the social and political order and to be able to subject that order to intellectual scrutiny in a never ending quest for ultimate truth. Autonomy for Mill is not an end in itself. The purpose of autonomy is to be able to question traditional and accepted norms no matter how inconvenient, irritating or uncomfortable such questioning might be, in order to arrive at what is, for oneself, the correct way to live. The truly autonomous person, according to Mill, questions all social values and beliefs, including her own, in order to arrive at truth. Thus Mill sought to minimise interference in the lives of others. His well known ‘liberty principle’ is a call to respect the autonomy of others, for in the absence of
certainty over how one ought to live, each person must discover for herself the
correct life to choose. Whilst Mill acknowledged that a community could exercise
power over another to prevent him doing others harm he was adamant that ‘over
himself, over his own body and mind, the individual is sovereign.’

Despite problems inherent in the works of Locke, Kant and Mill our present day
approach to autonomy in general reflects the writings of these individuals. Locke for
example puts the rational, autonomous, rights bearing individual who freely gives his
consent to be governed as the very reason for the existence of the liberal state. Yet
Locke clearly excluded atheists, women and slaves from his conception of social
participation and political liberty. From Kant came the idea that rational beings
ought to be seen as ends in themselves, as beings of unconditional worth and value,
rather than as means to the ends of others. But in his emphasis on the subjection of
the individual will to norms that can be universalised and applied to all rational beings
Kant emphasises that freedom is thus acquired by a life of duty whilst posing a
view of autonomy and rationality that seems far removed from the sorts of problems,
dilemmas and issues that confront individuals in a social reality. And whilst Mill
argues that the individual is sovereign over all acts and actions that affect only
himself – the distinction between ‘self-regarding’ and ‘other-regarding’ behaviours –
his position falters on the recognition that in fact no such distinction can (in the

134 John Stuart Mill, *On Liberty: with The Subjugation of Women and Chapters on Socialism*,
This is the epitome of the modern, western, liberal democratic, capitalist view of freedom that is in
harmony with the isolated, egoistic, atomistic view of man – *homo politicus, homo economous.* We are
free when there is no outside or arbitrary interference in our actions and as long as we do not interfere
with the like actions of others we are left to structure our personal (political, social, economic) life as
we see fit. This view is much different to the Greek (for example see Aristotle’s) view which proposed
freedom as self realisation or the capacity to develop our potential to the full only in the human
community.
135 See, for example, Howard Zinn’s discussion of Locke’s philosophy as applied (by Locke) with
regard to the American states, particularly as advisor to the Carolinas where, ‘he had suggested a
government of slave owners run by forty wealthy land barons’ and his (Locke’s) belief in a feudal type
aristocracy which excluded much of the population from the business of government. Howard Zinn, *A
majority of cases) be easily made. Also, Mill the utilitarian is no doubt forced to admit that if it satisfies utility that no-one be autonomous then indeed heteronomy ought prevail.

Nevertheless, such comments aside, our modern approach to autonomy reflects elements of the above authors. In particular it reflects that of Mill. As opposed to Kantian universality, Mill doubts that ethical norms can be universalised and that individuals can ever be ultimately certain about the nature of reality and the nature of truth. People, that is rational, autonomous and moral agents, have to seek in a purposefully reflective way the truth that is meaningful to themselves. To have ‘truth’ imposed by others is as demeaning as it is illogical. It is demeaning for it reduces humans to less than the rational creatures that we know they are, and it is illogical for no-one can be certain that their particular view of reality is in fact the correct one. Individuals ought to shape their own lives in a way that reflects their own rational ends for it is in this shaping, this affirmation of one’s own will and personality thoughtfully considered and unhindered in its expression that the mature, independent and autonomous individual emerges. As Mill makes clear;

‘The human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom makes no choice. He gains no practice either in discerning or desiring what is best. The mental and moral, like the muscular powers, are improved by being used….He who lets the world, or his own portion of it, choose his plan of life for him, has no need of any other faculty than the ape-like one of imitation.’

Thus our modern view of autonomy has come to mean, as Miller puts it, ‘…the right to make one’s own choices, [with]…respect for autonomy [being] the obligation not to interfere with the choice of another and to treat another as a being capable of choosing.’ To be autonomous is to be a self with particular ideas and reasons for acting and it implies freedom from external influence, control, manipulation or coercion. It is to have a will of one’s own and to act in pursuit of freely, self chosen goals. And whilst it is clear that no-one can exhibit a total independence from external forces, autonomy has come to mean the intellectual capacity which enables us to submit such forces to critical evaluation. Thus a person is autonomous, as Lukes points out, ‘…to the degree to which he subjects the pressures and norms with which he is confronted to conscious and critical evaluation, and forms intentions and reaches practical decisions as a result of independent and rational reflection.’

But whilst autonomy is certainly grounded in the intellectual and moral capacity to make and establish choices and preferences, it is also directed toward the practical expression of needs and interests. That is, simply making judgements about how one would like to act is not enough to satisfy autonomy. It is also important to be able to act. Thus autonomy can be compromised in a variety of ways. Whilst we would all agree that the infant, the baby, the profoundly mentally ill and those with dementia all lack a self governing ability consistent with autonomy, it is clear that the degree of independence required for us to assume autonomy is present can be absent in a variety of different situations and to varying degrees. The aged, for example, and particularly the frail aged, may experience impaired autonomy in their inability to do for themselves the everyday sorts of tasks that we normally take for granted and do (largely) without thinking; cooking, cleaning, dressing, bathing,

139 Richard Lindley, *Autonomy*, op cit, p 12. [f/n 111 at p 79]
walking to the shops and so on. All of these tasks may now depend upon the assistance of others to a greater or lesser extent. People with disabilities may require goods and services provided either by society or by particular individuals that enable them to lead lives approaching what the rest of us take for granted. And some individuals may have impaired autonomy by the very fact of the groups they belong to; Aborigines, the homeless, the unemployed, the poor, those in areas of regional and rural Australia with minimal public services – schools, hospitals, medical practitioners and the like.

Autonomy then is not simply about a moral or an intellectual ability, it is also about physical capacity and indeed what we might refer to as a social capacity. It is important not to separate the phenomenal and the noumenal. People are more than simply isolated units of rational and autonomous energy. They are also social creatures living within a physical-biological framework, and autonomy must be judged against the totality of the sorts of ways that human lives are led. Not only have we tended to judge autonomy simply on a moral – intellectual dimension, but also we have tended to see autonomy as dominating all other moral concerns. Thus Smith has raised justifiable concerns that has seen ‘respect for autonomy’ emerge as a prime consideration in moral action over riding all other issues and considerations such as, for example, resource allocation, the role of duties, notions of virtuous behaviour amongst professionals and so on. As she points out, it is increasingly assumed that once individual autonomy is assured then no other moral concerns need to be addressed. On a similar note, Callahan suggests that there are assumptions embedded within the idea of autonomy that tend to undercut the social and communal ties that bind individuals and encourage us (wrongly) to assume that

individuals are nothing more than isolated ‘morally self enclosed [and] self encompassed animals’, and that all obligations owed others (and that others owe us) can be reduced simply to respect for individual autonomy.\footnote{Daniel Callahan, ‘Autonomy: A Moral Good, Not a Moral Obsession’, \textit{The Hastings Centre Report}, October 1984, pp 40-42.}

This is not to say that humans are not capable of either rational or autonomous action and behaviour – certainly they are, although as I will argue in a later chapter our commitment to such concepts often appear to be out of all proportion to a large amount of evidence to the contrary. What I am suggesting is that this view of autonomy, as with the view we have of rationality, does not account for all human behaviour or experience by any means. Humans undergo marked periods of their lives when such rational and autonomous action is beyond them for varying reasons. In these periods they are vulnerable and in these vulnerable periods we often apply notions of rights, in particular human rights, to secure their care and protection, with the intention of minimising the degree to which they are vulnerable – the degree to which they are impaired in their ability to be the rational and autonomous creatures we typically take humans to be. And if our emphasis upon the individual rights that vulnerable people are entitled to ultimately fails to secure for such people effective care and protection, then we are forced to consider other approaches that may offer a better chance of success.

\textbf{v] personhood and the moral agent}

It is appropriate to reflect on moral agency \textit{after} rationality and autonomy, for it is the capacity to engage others morally that makes humans distinctively human, or, for those that talk in terms of ‘personhood’, that forms the essential ingredient of what constitutes being a person. It is, I suspect, generally agreed upon that certain higher
order non-human animals are capable of varying degrees of rational behaviour. I think also that we could reasonably extrapolate from this fact to assert that some degree of (at least) crude autonomy is a likely part of such animals’ existence even if only in a mechanistic sense. But as Scarlett makes clear, the ability to engage in a moral discourse is a facet of human interaction that is singularly unique. It is only humans, for example, who are capable of forming a moral community and it is this that encourages us to treat them differently. Humans can reason, have intention, have ideas of right and wrong, employ concepts such as virtue and vice to attach to specific actions and by which they evaluate the sorts of actions they engage in. Animals, however ‘…are not guilty, whatever the offence may be. They sometimes do undesirable things, and sometimes we apply punishment to train them not to repeat the damage. And sometimes we kill them to make sure, as in the case of man-eaters and savage dogs. But we do not hold that they are to blame.’

When we are referring to humans as moral agents we are of course suggesting that the ability to make moral judgements is different to the ability to make good or bad moral judgements. In popular parlance people may refer to others as being ‘amoral’ or of having ‘no morality’, but this usually denotes a hostility to specific actions or behaviours rather than a considered view that the individuals concerned have no capacity for moral judgement at all. To be a fully developed human is to have such a capacity and those who have no such capacity, or those in whom this capacity is to some degree impaired, we regard as being both unpredictable and dangerous, and thus corrosive of the moral community, as well as being in some way less than fully developed humans.

One is reminded here of Adam Smith's comment concerning ‘moral sense’. In *The Theory of Moral Sentiments* he writes that;

‘According to some the principle of approbation is founded upon a sentiment of a peculiar nature, upon a particular power of perception exerted by the mind at a view of certain actions or affections; some of which affecting this faculty in an agreeable and others in a disagreeable manner, the former are stamped with the characters of right, laudable, and virtuous; the latter with those of wrong blameable, and vicious.’

Smith tells us that the sentiment deriving from a ‘particular power of perception’ is referred to by some as ‘a moral sense’. When we talk about human beings acting as moral agents it would seem to be this ‘moral sense’ that we are alluding to.

To have a moral sense refers to a capacity to distinguish between acts on the basis of their appropriateness from a moral point of view. It is to see ourselves and others as beings capable of moral choice. It is therefore to be able to make distinctions between ‘want’ and ‘ought’. To be a moral agent is to be held culpable or responsible for the acts that one does, or that one fails to do. This is why it is appropriate to talk of moral agency *after* one talks of rationality and autonomy, for one must first be both rational and autonomous before one is held morally accountable. Required for moral agency is what Moore refers to as ‘the tie of practical reason’; it is to be ‘obligated by moral norms’ and only those who are so obligated, that is those who are rational and autonomous beings, can be held responsible when their actions breach moral norms.

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In similar vein when we talk of moral communities, the sort of communities inhabited by persons, we are making an assumption that there are beings capable of making choices, of rationally deciding between different courses of action and able to give reasons, in terms of rationality and morality, for why they acted so. As Englehardt has pointed out, ‘the very notion of a moral community presumes a community of entities that are self conscious, rational, free to choose [that is, autonomous] and in possession of a sense of moral concern.’ The relationship between moral communities and persons is thus crucial. Without persons there can be no moral communities, for such a community is based upon the ability to be rational, reflective and autonomous, to be responsible and accountable. Thus he writes that;

‘One speaks of persons in order to identify entities one can with warrant blame and praise, which can themselves blame and praise, and which can as a result play a role in the core of moral life. In order to engage in moral discourse, such entities will need to reflect on themselves, they must therefore be self conscious. They will need in addition to be able to conceive of rules of action for themselves and others in order to envisage the possibility of a moral community. They will need to be rational beings. That rationality must include an understanding of worthiness of blame and praise: a minimal moral sense.’

Yet whilst a ‘moral sense’ depends upon both rationality and autonomy it also includes something else, for there is some doubt that rational thought and action alone is sufficient to guarantee a moral agent. Certainly there are some groups of people who are beyond the reach of moral laws because of their inability to make reasoned judgements about how they should act in particular circumstances with

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respect to moral behaviour. To quote Moore again, ‘they are not...sufficiently rational
that they can reason about moral or legal norms and adjust their behaviour to them.
In a phrase, they are not good practical reasoners.’\textsuperscript{147} This clearly applies to infants
and very young children, indeed Locke for example saw no difference between ‘all
children and idiots’, neither having ‘come to the use of reason’;\textsuperscript{148} but it also applies
to others such as those with dementia, the intellectually impaired and in some cases
it will apply to those who are profoundly psychotically disturbed. The general
proposition is that people cannot be held accountable for what they do or for what
they fail to do if they are incapable of discriminating between what is approved from
what is not approved according to social rules. To this extent to be a moral agent is
thus to be an individual ‘who acts for intelligible ends in light of rational beliefs.’\textsuperscript{149}

But is a rational and autonomous capacity enough to guarantee a moral sense? I
suspect not. The human community is not established \textit{simply} by the presence of
rational and autonomous beings. A degree of sociability is required and sociability
implies rule making and rule following. It also implies engaging others on a
dimension of empathy and altruism. As Aristotle makes clear in his \textit{Nicomachen
Ethics}, socialisation and enculturation within the human enterprise is antecedent to
being a fully rational and moral being. Socialisation embraces language, an
internalisation of the norms and values of the social group, a concept of personal
existence (ego) and an ability to distinguish between ‘I’ and ‘thou’ yet also to see that
‘I’ and ‘thou’ are part of an interdependent, communal, cooperative enterprise. It also
suggests the ability to care for others, to respond to their needs, to engage them
within the context of everyday lives. In Hyde’s words, it is to ‘place ourselves in
communion with what we find outside ourselves’,\textsuperscript{150} and arguably this has as much to

\textsuperscript{147} Michael S. Moore, \textit{Law and Psychiatry: Rethinking the Relationship}, op cit, p 62. [f/n 53 at p 51]
\textsuperscript{148} John Locke, \textit{An Essay Concerning Human Understanding}, op cit, Book I Ch II. [f/n 123 at p 83]
\textsuperscript{149} Michael S. Moore, \textit{Law and Psychiatry: Rethinking the Relationship}, op cit, p 66. [f/n 53 at p 51]
\textsuperscript{150} Lawrence Hyde, \textit{An Introduction to Organic Philosophy}, Reigate, Omega Press, 1955.
do with early childhood issues of nurturing, caring, dependence and attachment as it
does the ability to be a rational and autonomous actor.

vi] vulnerability and the personal encounter

There are many instances within the life of any given individual when she may be
vulnerable, that is, when she finds it difficult or even impossible to function as the
rational, reflective agent which we assume is so characteristic of the human
condition. As I have already noted we all begin life in an intensely vulnerable state.
The neonate, the infant and the very young child are all profoundly vulnerable and
without the constant care and protection of others many, if not most will die. It often
appears that we assume that the life journey is one which, although beginning in
intense vulnerability, eventually emerges into an adolescence and adulthood that is
characterised by a more or less permanent state of rational, reflective moral agency.
Nothing could be further from the truth. Not simply are many of us unable to ever
reach that ideal, but all of us at various stages of life are confronted with periods
when we fall far short of the image of the rational, autonomous individual. I have
previously described vulnerability as ‘permanent’, ‘transitory’, or ‘episodic’. In this
way it can embrace conditions as diverse as autism, Down’s syndrome, cerebral
palsy, foetal alcohol syndrome, mental illness and the dementias, to a variety of
social experiences such as separation, divorce, the death of a spouse or child,
bankruptcy and so on, all of which, depending on the personal resilience of the
individual concerned, have the potential to reduce or diminish our ability to function
as the rational, reflective agents we typically take humans to be.

Not all vulnerabilities are profoundly debilitating. Some, for example, may simply
impair our ability to make decisions, in the short term, good enough to maximise our
best interests. Other vulnerabilities go to the heart of what it means to be a rational,
reflective agent and impair our ability to even approximate acting as the sort of person we assume humans can be. It is when we think of vulnerability in this latter way that we most usually engage notions of rights, with the aim being the care and protection of compromised individuals. In the remainder of this chapter I want to consider just one example of vulnerability. My focus is on what it means to be vulnerable from the point of view of both the individual concerned and the sorts of relationships that the vulnerable person may share with others who are engaged to care and protect. My intention is to embrace the notion of vulnerability from the point of view of those who experience it first hand. This is ‘…vulnerability…as a lived experience’,\textsuperscript{151} and there is certainly a degree to which vulnerability can only be fully appreciated by encountering it from the perspective of the individual who is vulnerable and considering that individual within the context of the relationships she shares with others.

\textit{dementia as vulnerability}

Arguably no other condition poses such a profound threat to the integrity of the human personality as does dementia. Indeed dementia may be conceptualised (and often is by those that talk in this way) as the very destruction of the person, as the obliteration of personhood. According to Smith, whilst

‘…cancer kills you…it doesn’t remove your very humanity…It doesn’t turn you into a vegetable…But a person with a serious dementia is no longer human.

\textsuperscript{151} Judith Spiers, ‘New perspectives on vulnerability using emic and etic approaches’, \textit{op cit}, p 719. [f/n 21 at p 34]
He’s a vegetable. That’s devastating. Fearsome. Terrifying, to anyone
who’s ever seen it – the thought that it could happen to you.¹⁵²

Within dementia we see vulnerability at its most powerful. Notions of harm, of
danger, of powerlessness, of loss and of dependence are confronting. What is
increasingly eroded in dementia is the ability to act as a rational, autonomous and
moral agent – the kind of individual who has been the focus of my discussion over
the preceding pages. What is engaged is the demand that one rely on others, initially
for aid, help, comfort and support and eventually for one’s physical survival.

Dementia has become a public health issue of some magnitude particularly in
Western society where the population’s life expectancy is increasing. In the United
States, for example, dementia affects between 5%-8% of those over 65 years of age,
15%-20% of those over 75 years and between 25%-50% of people over age 85.¹⁵³
Australian figures tend to mirror those from the US. In 1995 over 250,000
Australians were identified as suffering from dementia.¹⁵⁴ According to Hampson

‘currently [2000] 2-3 per cent of Australians aged 65-74 have some sort of
dementia, with 5-6 percent of these experiencing moderate to severe
symptoms. Of people aged 70-74, about 11 per cent have dementia. Above
this bracket the figure rises steadily until, beyond 80 years, almost 20 per cent

¹⁵² David H. Smith, ‘Seeing and Knowing Dementia’, in. Robert H. Binstock, Stephen G. Post and
Peter J. Whitehouse [eds] Dementia and Aging: Ethics, Values and Policy Choices, Baltimore, John
Hopkins, 1992, p 51.
¹⁵³ Michael G. Wise, Kevin F. Gray, Benjamin Seltzer, ‘Delirium, Dementia, and Amnestic Disorders’
in. Robert E. Hales and Stuart C. Yudofsky [eds] Essentials of Clinical Psychiatry: based on the
American Psychiatric Press textbook of psychiatry, Third edition, Washington DC, American
are afflicted. By the time we reach the age of 85, the odds of our suffering from dementia are more than one in four.\textsuperscript{155}

As the population inevitably ages so the numbers of people who suffer from the various forms of dementia will similarly increase. And whilst the term ‘dementia’ has become something of an umbrella term under which a variety of age related neurodegenerative disorders are clustered,\textsuperscript{156} it is clear that ‘the general picture is similar in all – a progressive disintegration of intellect, memory and personality …[with]…a uniformly hopeless prognosis.’\textsuperscript{157} To have dementia is to slowly lose one’s ‘functional and cognitive capabilities that previously made it possible…to interact with the world in a meaningful way.’\textsuperscript{158} Rationality is diminished and is finally non-existent. Autonomy is destroyed and the moral actor vanishes, and this long before the individual herself suffers biological death. Having said this what does dementia mean both for those who suffer from this illness and for those, family, friends and professional carers, who are called upon to care and protect?

Although current tools for establishing a diagnostic criterion for describing dementia provide little comprehension for the impact the condition has on both individuals and carers, such an approach is nevertheless a useful starting point for an understanding of the illness. DSM-IV describes ‘the essential feature of a dementia [as being] the development of multiple cognitive deficits that include memory impairment and at least one of the following cognitive disturbances: aphasia, apraxia, agnosia, or a

\textsuperscript{155} Amanda Hampson, \textit{Take Me Home: families living with Alzheimer’s} Dora Creek, Rezolv, 2000, p 15.
\textsuperscript{156} For example, dementia of Alzheimer’s type (the most common form of dementia), Multi-infarct (Vascular) Dementia, Pick’s Disease, Frontal Lobe Dementia, Huntington’s Disease and Jakob-Creutzfeldt Disease to name but a few.
disturbance in executive functioning.'

Memory impairment, both as the loss of previously learned material or the inability to retain new information, is crucial. Those who suffer from dementia often present with minor, and then an increasing, impairment in memory. ‘They may loose valuables like wallets and keys, forget food cooking on the stove, and become lost in unfamiliar neighbourhoods. In advanced stages of dementia memory impairment is so severe that the person forgets his or her occupation, schooling, birthday, family members, and sometimes even (their) name.’

Lishman describes a three stage approach to Alzheimer’s disease, the most common form of dementia, which can be reasonably extrapolated to cover dementia in general. He notes an initial phase, lasting some two to three years, characterised by ‘failing memory, muddled inefficiency over the tasks of everyday life and spatial disorientation’ with occasional mood disturbances of agitation and restlessness or apathy and lack of spontaneity. A second stage reveals greater intellectual and personality disintegration. Symptoms such as dysphasia, apraxia and agnosia emerge. Parkinsonian characteristics such as disturbances in posture, gait and an increased rigidity in muscle tone are evident. Occasionally marked psychotic-like symptoms such as delusional ideas or auditory or visual hallucinations may appear. Finally in the third stage there is increased vegetative signs. The patient becomes bedridden, is doubly incontinent, develops severe rigidity and tremor with ‘forced grasping and groping’ and sucking reflexes and finally shows a marked bodily wasting.

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160 ibid.
161 William Alwyn Lishman, Organic Psychiatry: The Psychological Consequences of Cerebral Disorder, op cit, pp 420-430. [En 162 at p 101]
Such clinical descriptors give only a hint of the personal deterioration involved in the
dementing process from the point of view of the impact on individuals and carers.
Having read the above we still feel somewhat removed or ‘abstracted’ from the
degree of vulnerability experienced by dementia sufferers. Blondin provides an
antidote to such rather sterile accounts by breaking Alzheimer’s down into six distinct
stages, and outlining the both the impact for the individual and the types of
responses engendered from families, thus placing the dementia sufferer within a
social and personal/interpersonal framework. In stage one Blondin identifies ‘early
confusion’, where the sufferer has difficulty in concentrating and difficulty with
learning new tasks. Such memory problems (typically the first sign of a dementing
process) often establish a point of conflict with immediate family, demonstrated as a
loss of empathy and increased irritation with forgetfulness. In stage two, ‘late
confusion’, it may become clear that some form of pathology is at work. The person
in this stage often gets lost in familiar places, forgets appointments, forgets to pay
bills and shows a loss of interest in and a withdrawal from formerly enjoyable
activities. Apathy, social isolation, an increasing tendency to be irritable, agitated
and quarrelsome with family and friends may also emerge as a feature. Denial that a
problem exists (from both the person and immediate family) is interfaced with
mounting family conflict, arguments and frustrations.

Stage three reveals ‘early dementia’. Here the person may forget the names of
‘significant others’, most notably more distant family (grand children, cousins, aunts
and uncles) and friends. Wandering and getting lost is an increasing problem and
more obvious cognitive deficits are revealed, such as finding the correct word to
describes feelings, events and people. Often at this stage the person becomes an

162 M. Blondin, *Alzheimer Disease Stages*, Alzheimer’s Information Support Services, Madison,
Wisconsin, 1988 reproduced in. David Jenkins and Bob Price, ‘Dementia and personhood: a focus for
care?’, *op cit*, 1996. [Fn 109 at p 78]
identified problem. In stage four, described as 'middle dementia', the sufferer needs ongoing supervision in even the simplest of tasks. Washing, bathing, dressing and undressing, toileting, cleaning and cooking, all become fraught with difficulties and dangers. In middle dementia personality changes are clear. The individual characteristically displays outbursts of fear, anger and hostility both in a verbal and physical form that reflects their own sense of intellectual and personality deterioration, fragmentation and loss. They may also be sexually disinhibited. The alienation felt by the sufferer is mirrored in many respects by an alienation and loss experienced by those closest to him. The concept of the sufferer as one who is losing or has lost their own personal identity, what is commonly called their 'personhood', is often invoked at this stage.

From this point on, stages five and six, what Blondin calls 'middle – middle dementia' and 'late stage dementia', demonstrate inexorable deterioration in all aspects of physical functioning. The individual is now a patient, one who requires assistance in all aspects of daily life, from dressing, to bathing to going to the toilet, to feeding themselves. In these stages there is, for the most part, no level of functioning that can be identified as indicative of the person's former intellectual, psychological or emotional existence. In this stage many sufferers do not recognise their own spouse, their children, their siblings, friends they have known all their life, their own name or even their reflection in a mirror. They may not speak at all or if they can their speech may be so garbled and unintelligible as to be largely incoherent to other people.

The impact upon family can be profound and devastating. Hampson presents a bleak picture.

‘As the patient slips through the stages from memory loss to complete dependence, it is the fate of many carers to find their world revolves
increasingly around the patient’s needs to the exclusion of all else. But still carers keep going. Many are driven beyond their limit by the spectre of the nursing home. Some see it as a betrayal, evidence that they have ‘given up’ on a partner.\footnote{Amanda Hampson, \textit{Take me Home: families living with Alzheimer’s}, op cit, p 35. [En 160 at p 101]}

Dementia is a vulnerability that embraces families and family relationships as ‘more than two-thirds of people with dementia live at home and the majority are cared for by family members.’\footnote{Peter V. Rabins, Constantine G. Lyketsos, Cynthia D. Steele, \textit{Practical Dementia Care}, New York, Oxford University Press, 1999, p 111.} Typically the carer is female, either spouse or eldest daughter.\footnote{Thus we are confronted with an area of research that inevitably embraces sexual politics; the role of women in society, in the family, as unpaid labour whose role of ‘carer’ is an expected function of their gender. Whilst there is an emphasis that those with dementia are best cared for in the community, this inevitably places a great burden upon female family members. Carter makes the point that “…women still shoulder the major burden of family care [and that] men are more likely to give financial assistance than be involved in the physical and emotional tasks.” As she makes clear: ‘The “family carer” therefore becomes synonymous with the “female carer”’ – that is, the wife, the mother or the daughter.’ Christine E. Carter, ‘The family caring experiences of married women in dementia care’, in. Trevor Adams and Charlotte L. Clarke [eds], \textit{Dementia Care: Developing Partnerships in Practice}, London, Bailliere Tindall, 1999, p 188. For the dichotomy in caring between male and female and its relationship to feminist politics see, Carol Gilligan, \textit{In A Different Voice}, Cambridge, Mass.: Harvard University Press, 1981.} The former is usually herself elderly and perhaps frail, and the latter probably in her 50s who, after raising a family and caring for her own children, now finds herself returned to the mothering role – responsible now for the care of an aging parent and often at great cost to herself and her own family relations.\footnote{Alan J. Lieberman, ‘Family Dynamics and the Flow of Caregiving’, in. Sue E. Levkoff, Yeon Kyung Chee and Shohei Noguchi [eds], \textit{Aging in Good Health}, New York, Springer, 2001, pp 89-107.} Caregivers, whether male or female, have their own unique set of emotional problems that are a direct consequence of caring for a loved one whose personality is inevitably deteriorating before their eyes and whose behaviour can be increasingly unpredictable, erratic and challenging. These ‘emotional problems’ are described in terms of grief, anger, demoralisation, guilt and fatigue, as carers are faced with the
inexorable destruction of the individual, a formerly rational, autonomous and moral
agent who was once a recognisable human person.167

The concept of loss is powerfully associated with the process of dementia. This loss
embraces the periods prior to and subsequent to the death of the dementia sufferer
and embraces themes such as; a loss of both person and relationship; the loss of
hope; the experience of pre-death grief; the expectancy of death; a post death relief;
and care giving reflections.168 The title of the work by Cohen and Eisdorfer, *The Loss
of Self*, appropriately sums up this sentiment.169 Commenting on this phrase Ronch
writes that it ‘eloquently and comprehensively describes what happens when
progressive neural devastation makes a person vanish while still physically in our
midst.’ And she continues that this ‘…loss of self happens before the very eyes of
the person whose self is vanishing.’

‘The basis of unique personal identity established over the life span
eventually deteriorate. Characteristic style and patterns of doing things
become ephemeral as memory, thought, language and all other aspects of
cognition deteriorate.’170

As one carer so eloquently put it:

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167 Peter V. Rabins et al, *Practical Dementia Care*, op cit, pp 111-117. [fn 169 at p 105]
168 C. Collins et al, ‘Loss and grief among family caregivers of relatives with dementia’, *Qualitative
170 Judah L. Ronch, ‘Mourning and Grief in Late Life Alzheimer’s Dementia: Revisiting the Vanishing
'Alzheimer’s disease seems to rob the human body of everything except the soul.'\textsuperscript{171}

Thus the question that confronts carers is often ‘what is left of the person’ whom they once recognised as a rational, autonomous, and moral agent; a perceiving, reasoning, reflective being whom they engaged in ongoing communication and with whom they may have shared intense emotional feelings and relationships? This person, now diagnosed with dementia, may be institutionalised, as most of those with moderate to severe dementia are, and may display a range of behaviours which include biting, screaming, pacing and other repetitious actions as well as angry outbursts, delusional and paranoid thoughts, and as a consequence may be subject to restraint, medication or segregation. They are almost certain to be incontinent of urine and faeces and will have lost the capacity to feed, cloth or wash themselves or even to remember or recognise the very people with whom they have lived for most of their lives.\textsuperscript{172}

\textit{vii]} dementia, vulnerability and human rights

It is clear that dementia represents a powerful example of vulnerability in the way that I have portrayed that term. To have dementia is inevitably to be consigned to an existence wherein one is increasingly unable to function as a rational, autonomous and moral agent. The impairment is physical, psychological and moral. It is chronic

\textsuperscript{171} Noel Tuohy, ‘My Veronica’, in. \textit{Dementia: A Positive View}, op cit, p 97. [f/n 59 at p 56] The comment that only the soul remains is not meant to introduce any existential argument but it does reinforce the view (amongst many relatives of dementia sufferers – and indeed amongst a growing body of professionals too) that there is more to a ‘person’ than a rational, reflective capacity. Amongst professionals there is an increasing tendency to described the person in terms of ‘feelings, emotions and the ability to live relationships’. John Bond, ‘Quality of life for people with dementia: approaches to the challenge of measurement’, \textit{op cit}, p 564. [f/n 109 at p 78]

and irreversible. Beginning slowly, and by degrees, it becomes inexorable and total. As it progresses it inspires an increasing degree of commitment on behalf of those who are care-givers, whether these are family members or professionals. Without this commitment to care and protect, the dementia sufferer’s existence would be very miserable indeed. The scope and extent of this commitment is often, and increasingly, framed in terms of rights; sometimes legal but increasingly, in Australia at least, moral rights – moral rights described as ‘human rights’ the individual entitlements of individual people, ascribed to people to ensure their care and protection.

By invoking the spectre of individual rights, framed within the confines of human rights, and by applying these individual rights to the care and protection of vulnerable peoples – in this case the frail aged with dementia – we seek to both affirm our commitment to the moral worth of such individuals and as well we hope to protect those with dementia from the worst excesses of their vulnerability. Human rights, as I identified earlier, can in this respect be seen as a form of protective moral armour. Yet the care and protection of those with dementia depends not so much upon any particular resources that afflicted individuals can muster, as it does upon the acts, actions and behaviours of others. The characteristics of dementia, the memory loss, the increasing confusion, the apathy, the social isolation, changes in mood and behaviour, the occasional (and increasing) outbursts of anger, as well as the erosion of the ability to do even the simplest of tasks (washing, bathing, dressing and undressing, toileting, cleaning, cooking and so on), all of these signal the decay of personal resources and the demand that the individual increasingly rely on others for survival.

Such a description of the person with dementia seems strangely at odds with the concept of the rights bearing individual. This is not to say that the person with
dementia ceases to be a rights bearing creature, but it is to say that the survival of
this person depends not so much upon the rights she possesses as it does upon the
attitudes that those who care for her have. The day to day survival of the demented
elderly depends wholly upon the commitment to care and protect that significant
others, either family or professional carers, may identify with. In a sense the idea of
human rights with its intellectual and philosophical foundations rooted firmly within
the context of the rational, assertive, articulate, autonomous and moral individual,
one who identifies and articulates and claims her just moral entitlements, is strangely
abstracted from the personal experience of dementia. What will ensure the well
being of those with dementia is not their ability to articulate their rights, for they
cannot. Nor is it their ability to claim their rights, for again they cannot. Rather, what
is instructive as to how the dementia sufferer will fare is the commitment to care and
protection that caregivers have, as well as the degree to which relevant institutions
and structures are sensitive to the needs and interests of those who are so disabled.

The above comments apply to many types of vulnerable groups and individuals – in
particular they apply to those whose vulnerability is at the moderate to severe end of
impairment. But in our rush to award a whole diverse range of vulnerable peoples a
variety of human rights, we seldom stop to think of the multiplicity of impediments
(personal, social, political, economic) that impact upon their situation and effectively
neutralise their ability to engage the human rights that we so enthusiastically attribute
to them. It is no doubt true that, as Hart has written,

‘rights are typically conceived of as possessed or owned by or belonging to
individuals, and these expressions reflect the conception of moral rules as not
only prescribing conduct but as forming a kind of moral property of individuals to which the individuals are entitled',\textsuperscript{173}

yet it is also clear that the simple ownership or possession or ‘entitlement’ of human rights (or indeed any form of rights at all) is never enough to protect the vulnerable. It is also true, to quote Hart again, that ‘...to have a right entails having a moral justification for limiting the freedom of another person and for determining how he should act',\textsuperscript{174} yet this again seems something of a hollow comment if one person is vulnerable and the other person is asked to care and protect yet feels no compunction to do so.

Hegel’s point that ‘it is uncultured people who insist most on their rights, whilst noble minds look on other aspects of the thing',\textsuperscript{175} may be closer the mark when we consider the relationships between those who are vulnerable and those who stand in a certain regard to them and are charged with their care and protection. If human rights provide little or no guarantee of protection for vulnerable peoples, as they certainly appear to, then what can stand in their place or, more to the point, what principles of action can we employ to engage the rights that vulnerable people already have? If people cannot assert, claim or demand their rights, or if such assertions, claims or demands fail to engage their rights, how can we (as professionals, as relatives, as friends, as carers) proceed? This will be the theme of our final chapter. At this point I want to return to the notion of vulnerability and consider the relationship between vulnerability, human rights and the liberal state and, in some detail, to outline the view of man that is encapsulated within the liberal democratic concept of human rights. This will set the scene to discuss my assertion

\textsuperscript{174} \textit{ibid}.
that the human rights view of man crucially misinterprets what it means to be vulnerable and in so doing renders human rights largely irrelevant for the care and protection of vulnerable peoples.
Chapter Three: Vulnerability - Political

i] vulnerability, human rights and the contract theorists

So far I have argued that one is vulnerable when one is unable to act as the rational, autonomous and moral agent that we typically take humans to be. Whilst vulnerability itself can be thought of as existing on a variety of dimensions [infancy, childhood, chronic mental illness, dementia for example] and to varying degrees [I have identified ‘transitory’, ‘permanent’ and ‘episodic’], it nevertheless suggests one who is impaired with respect to his own interests and another who stands in regard to him and is called upon to care and protect; that is to secure those interests for him. The relationship between one who is vulnerable and one who stands in regard to him can be thought of as a moral relationship. How we act toward others of our kind reflects important underlying moral assumptions that define much of what we as humans do and who we as humans are.

When we are confronted with vulnerable groups and individuals we commonly invoke the concept of human rights. As I have suggested, by engaging the rights response we seek to reaffirm the moral worth and value of those who are vulnerable and as well we seek to protect those so described from the worst excesses of their vulnerability. This has certainly been the case within the liberal democracies. Within such polities we have tended to see human rights as an effective means by which the vulnerable are afforded a degree of care and protection that reflects both their special needs as vulnerable people, as well as what is due them on the basis of what is owed to all people everywhere. Whilst it is clear that there is an important connection between vulnerability and human rights, there is also a connection, though less obvious, between vulnerability, human rights and the liberal state. To a large degree
liberal democracies are described by the rights they accord their citizens. Those societies that do not embrace notions of individual rights cannot in any real sense be described as either ‘liberal’ or ‘democratic’. Thus whilst human rights can be seen as a response to vulnerability they can also be seen as the basis for the liberal democratic state. In this way the liberal democratic state itself can be seen to be grounded both in the idea of human vulnerability and at the same time to be a response to that vulnerability.

In this chapter I want to consider two interconnected ideas. First I want to examine the relationship between vulnerability, human rights and the liberal state. Second I want to outline the view of man that has traditionally been encapsulated within the liberal democratic concept of human rights. With regard to the first issue we can present the idea of vulnerability as an important yet oft ignored strand of liberal democratic thought. Vulnerability, as I describe it, can be portrayed as lying at the heart of the contract view of civil society, particularly as that view is expressed within the works of Hobbes, Locke and Rawls. Within each of these theorists the idea of certain fundamental rights, presented as ‘natural rights’, ‘the rights of man’ or simply ‘human rights’, establishes a compelling reason for man entering civil society. Human rights, according to this view, can be seen both as a response to the inherent vulnerability of man in his ‘natural’ state, whether this was the ‘state of nature’ as proposed by Hobbes and Locke or the ‘original position’, as proposed by Rawls, as well as encapsulating the idea that man is a rational, autonomous and moral individual. In this way we can understand human rights as establishing the basic conditions necessary for a person to act as an agent with respect to her own particular interests.

In the second part of this chapter I want to consider the view of man that is contained within the liberal democratic concept of human rights. This individual is traditionally
described as a rational, autonomous and moral actor who is independent and assertive when it comes to identifying and securing her own interests and well being. This is also the image of the individual which is presented within the writings of Hobbes, Locke and Rawls. In other words, the notion of what constitutes an individual is common to the contract theorists, to the type of person fit for liberal society and also is the archetype for one who possesses human rights. Such a discussion is important for as we saw in the previous chapter in our discussion of dementia (and as I shall argue again later), this image of man is at odds with what it means to be vulnerable. Indeed it is because the human rights view of man fails to accurately describe what it means for individuals to be vulnerable, and as well fails to take account of the sorts of social contexts that vulnerable individuals often find themselves in, that the concept fails to protect the vulnerable in general and particularly fails to protect those most vulnerable.

ii] vulnerability and the contract theorists

In Hobbes and Locke’s account of ‘a state of nature’, man’s vulnerability is confronting. Before he enters civil society mankind ekes out an uncertain and dangerous existence. To Locke the state of nature is ‘a State of perfect Freedom’ by which men order their affairs ‘their Possessions and Persons as they think fit…’\(^{176}\) It is ‘a State also of Equality’ in which ‘all the Power and Jurisdiction is reciprocal, no one having more than another.’\(^{177}\) In the state of nature, says Locke, man is ‘lord of his own Person and Possessions, equal to the greatest, and subject to no Body…’\(^{178}\) Hobbes of course agrees with this essential character of man’s natural state. Before civil society is constituted amongst men, all live together without ‘a Common Power


\(^{177}\) The Second Treatise, Ch. II. 4.

\(^{178}\) The Second Treatise, Ch. IX. 123.
to keep them in awe, and to direct their actions to the Common Benefit.\textsuperscript{179} It is a
time when there is ‘no government at all’ and ‘no common power to feare’,\textsuperscript{180} a time
before any civil authority to regulate men’s actions, to manage conflicts, resolve
disputes, settle arguments, to dispense justice and enforce laws. The state of nature
is a time when men are forced to seek their own well being, self interest and survival,
according to their own talents and devices.

And herein lies man’s vulnerability dramatically exposed. Hobbes in particular is
emphatic. Without a common power to regulate social life all men naturally have a
right (Hobbes calls it a ‘natural right’) and entitlement to all things. ‘Nature hathe
given to everyone a right to all. That is, it was lawfull for everyman in the bare state
of nature…to doe what hee would, and against whom he thought fit, and to
possesse, use, and enjoy all what he would, or could get.’ ‘In the state of nature’,
wrote Hobbes, ‘to have all, and to do all is lawfull for all.’\textsuperscript{181} For Hobbes this situation
ensured that the state of nature was in fact a state of war. In \textit{De Cive} he makes it
clear that ‘\textit{the state of man without civill society}\ldots \textit{is nothing else but a mere warre of
all against all}’\textsuperscript{182} It is not, says Hobbes, that men are naturally wicked or evil;
indeed they are not.\textsuperscript{183} Rather it is this ‘radical individualism’\textsuperscript{184} that sees men living
together without any superior on earth to regulate social life, with each man
competing with each other for often limited resources, and each judging his own
needs, welfare and interests greater than his fellows (which men in general always

\textsuperscript{179} Thomas Hobbes, \textit{Leviathan}, op cit, Ch. XVII. [\textsuperscript{f/n 116 at p 81}]
\textsuperscript{180} \textit{Leviathan}, Ch. XIII.
Ch. 1. X.
\textsuperscript{182} \textit{De Cive}, ‘The Authors Preface to the reader’.
\textsuperscript{183} As Johnson points out, the portrayal of men in their natural state as ‘wolf like creatures who preyed
without step or relent against one another’ is to fail to understand Hobbesian psychology. Men in their
natural state are neither good nor bad, yet creatures driven by their own passion to ensure their survival
as best they can. And neither does Hobbes advise people to be mean spirited to achieve their ends, in
fact Hobbes’s account leaves much room for communal and sympathetic behaviours. Paul J. Johnson,
‘Hobbes and the Wolf Man’ in. J. G. van der Bend, \textit{Thomas Hobbes: His View of Man}, Amsterdam,
Rodopi, 1982, 31-44.
\textsuperscript{184} The term belongs to Johnson, \textit{ibid}, p 41.
tend to do - both within the state of nature and beyond it), that puts men into a state of inevitable conflict with each other.

It is this ‘natural equality’, this lack of any authority to impose law and order that encourages a state of war. As Hobbes makes clear, in the state of nature ‘...if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies and ...endeavour to destroy, or subdue one another.’ Life is uncertain and dangerous. Each man is a threat to each other and all are vulnerable, for even the strongest can be subdued or killed by the weakest. And even if war is not a permanent state of fighting yet there is what Hobbes called a ‘disposition’ to fight; the constant threat of violence when no man can be sure if he is safe or in danger; it is a time when ‘...every man is enemy to every man...wherein men live without other security, than what their own strength...shall furnish them...’ and, concludes Hobbes, there is ‘...no society; and which is worst of all, continual fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short.’

The dramatic picture of human vulnerability that Hobbes presents us with is not shared by Locke. The distinction that Locke makes is between ‘a state of nature’ and ‘a state of war’, the two being separate realities. In the former, men live together ‘according to reason, without a common Superior on Earth, with Authority to judge between them...’ whilst in the latter ‘...force, or a declared design of force upon the Person of another, where there is no common Superior on Earth to appeal to for relief...’ describes the relationships between men. As Locke makes clear:

185 *Leviathan*, Ch. XIII.
186 According to Hobbes even ‘the weakest has strength enough to kill the strongest, either by secret machinations, or by confederacy with others.’ *Leviathan* Ch. XIII. We are all equally vulnerable when we are asleep.
187 *Leviathan*, Ch. XIII.
188 *The Second Treatise*, Ch. III. 19.
'Want of a common Judge with Authority, puts all Men in a State of Nature:

Force without Right, upon a Man’s Person, makes a State of War, both where
there is, and is not, a common judge.'

In the state of war says Locke, a person ‘…attempts to get another Man into his
Absolute Power…[it being]…a Declaration of a Design upon his life…[to] use me as
he pleased…and destroy me too when he had a fancy to it…i.e. make me a slave.

This is quite different to a state of nature, which Locke suggests is a state of perfect
freedom and equality with men living together according to the dictates of reason.
Yet Locke must surely admit that the sense of danger, of uncertainty, of doubt, of
ambiguity, indeed the overwhelming sense of vulnerability must be ever present in a
situation wherein there is no established law or authority to regulate actions between
men. Again it is not that men are evil, in fact most men may indeed live by that
unwritten law of nature which both writers agree is the voice of reason applied to
human affairs, rather the problem for men, and it is a problem which ensures his
continuing vulnerability, is that not only are evil men not deterred by laws and
authority, for there are none, but most crucially one does not know who is evil and
who is not. As Hobbes tells us, and this must apply equally to Hobbes’ state of
nature as to Locke’s:

‘for though the wicked were fewer than the righteous, yet because we cannot
distinguish them, there is a necessity of suspecting, heeding, anticipating,
subjugating, selfe-defending, ever incident to the most honest…’

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189 The Second Treatise, Ch. III. 19.
190 The Second Treatise, Ch. III. 17.
191 De Cive, ‘The Authors Preface to the Reader’. 
Locke’s state of nature, rather than being an idyllic paradise, is in fact constantly at risk of descending into chaos and war. Disagreements will always occur between men and such disagreements are liable to descend into conflict wherein the only appeal for the individual is to heaven.\textsuperscript{192} Man may indeed have perfect freedom and equality in the state of nature, ‘yet the Enjoyment of it is very uncertain, and constantly exposed to the Invasion of others.’\textsuperscript{193} The state of nature is structurally flawed. First because there is no clear and settled standard by which men can establish right and wrong, and second because there is no impartial or disinterested judge. With regard to the first point, the law of nature, reason, may offer guidance to men but men are often ‘…biased by their Interest, as well as ignorant for want of study of it [and] are not apt to allow it as a Law binding to them…’\textsuperscript{194} With regard to the second point, without any common and impartial judge men are themselves ‘both judge and executioner’ in all matters and are of course ‘partial to themselves’, and so are liable to ‘Passion and Revenge [which can] carry them too far, and with too much heat, in their own cases: as well as negligence, and unconcernedness…in other Mens.’\textsuperscript{195} Mankind’s vulnerability then is as marked here as it is within Hobbes’s writings and we are left thinking that Locke’s state of nature is not too different from that of his predecessors.

In considering Hobbes and Locke it is clear that the image of the vulnerable individual powerfully underpins their work. Yet this would seem to be at odds with the actions of man who, in the state of nature, already appears to be a rational reflective being. After all, when confronted with the uncertainty and danger of his pre-social state, man uses reasoning to see that his best interest lies in establishing a compact with his fellows and consenting to the law and order of civil society and

\textsuperscript{192} The Second Treatise, Ch. III. 20, 21.
\textsuperscript{193} The Second Treatise, Ch. IX. 123.
\textsuperscript{194} The Second Treatise, Ch. IX. 124.
\textsuperscript{195} The Second Treatise, Ch. III. 125.
does this not suggest one who is already rational and reflective? The short answer is that there is no contradiction here. We must make a distinction between one who reasons and one who is rational. In the state of nature we may say that man’s rationality is crude. It extends simply to the ability to reason. That is, if I do this then I will achieve certain immediate outcomes. A rational agent can certainly reason (reasoning ability is surely at the heart of rationality), yet to be rational embraces much more than simply making a judgement that to escape constant danger is a better course of action than to endure it. True rationality, the considering of one’s best immediate interests and the considered reflection of preferred paths that one’s life ought to take, seem out of place in the Hobbesian state of nature. To be truly rational and reflective one must seek the peace and security of civil society.

But there is another point worth mentioning about Hobbesian vulnerability. In the state of nature man as a moral actor does not exist. Mankind’s vulnerability is not simply compromised by his crude rationality but also by his lack of moral capacity. Those incapable of moral acts we do not regard as fully developed human beings. Moral action, the ability to ‘praise and blame’, to hold and be held accountable in a moral sense, to judge standards against a notion of right or wrong, is not applicable within the state of nature as there is simply no standard of right or wrong, certainly no standard beyond self interest that all would agree upon. As Hobbes makes clear, in the state of nature ‘…notions of Right and Wrong, Justice and Injustice have no place [for] Where there is no common power, there is no Law: where no Law, no Injustice…’ And whilst it is clear that one may offend against God or break the

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196 Surely this leads us to the rationale of deterrence theory. I do not have to have a particularly sophisticated understanding of events and strategies to realise that if I do not comply with certain acts or if I do act in a particular manner then overwhelming force will apply to me. Even those with minimal rationality can appreciate where their best chance of survival lies, thus the state of nature does not demand from us the complex sort of rationality that latter defines human existence. It only requires us to want to survive.

197 *Leviathan*, Ch. XIII.
laws of nature, nevertheless ‘Injustice against men presupposeth Humane Lawes, such, as in the State of Nature there are none.’ 198 Moral action as we understand it must wait for civil society, for man made laws and a constituted authority that provides a framework within which men are empowered to make moral decisions and be judged on the decisions they do make. In the state of nature we have an image of man who is driven by reason, by a crude sense of being rational, yet who is without any moral sense at all. 199

But autonomy also is illusive in Hobbes’ state of nature. In his pre-social state man is an individual, but only in the sense of being an isolated, egoistic individual devoid of any social union with his fellows. To say that pre-social man is autonomous is to confuse autonomy with isolationism. True autonomy is of value only when expressed within the social context of men interacting with other men yet at the same time establishing their own unique identity that is free from coercion, compulsion and duress. In the state of nature all is competition and conflict, or at least the threat of it. Autonomy, based upon Kant’s view as the ability to seek out those actions that are in harmony with certain moral principles and which transcend narrow self interest, is denied, partly because there will be no moral principles beyond self interest and partly because moral action in an environment where such consideration is not reciprocated will hasten one’s destruction rather than secure one’s well being. Similarly, if we see autonomy in Millean terms as a faculty that allows us to scrutinise social beliefs and values in search for some ultimate truth, then such a position has no place before the social contract. Mill’s ‘liberty principle’ is clearly not applicable here.

198 De Cive, Ch. 1. X.
199 In the state of nature man displays a reason that is somehow abstracted from moral consideration and thus invites the image of the psychopath rather than the image of one who we would recognise as a fully developed person.
With regard to Locke we are entitled to make similar comments. It seems not too radical to suggest that even in Locke’s state of nature the full development of individual potential must be limited, even if the state of nature does not degenerate into a state of ‘enmity and destruction’, that is a state of war. In his natural state man cannot function as a rational, autonomous and moral creature. As we have pointed out before, even if only some are not guided by the demands of rational reflection and moral consideration the impact upon all is surely profound. The entire social fabric is threatened. And if we do not know who these individuals are then the whole of social intercourse is fraught with dangers and uncertainty. The notion of the rational, autonomous and moral agent cannot find expression in one who is continually looking over her shoulder in a perpetual condition of uncertainty about her future, or suspicion about her associates, or a fear that events may take a sudden turn into chaos or violence where the safety and security of all is threatened. This is not to say that the rational reflective agent, as we understand that term, is impossible within Locke’s state of nature; it is only uncertain. And it is this uncertainty that, like Hobbes, Locke claims will compel man to make an agreement with his fellows to quit the state of nature and enter into civil society. Thus, civil society can be viewed as the necessary condition for development of rational, autonomous and moral agents, just as the state of nature can be seen as the epitome of human vulnerability.

Like Hobbes and Locke, John Rawls hypothesises individuals existing in a pre-social state wherein they contract with each other to artificially construct social and political life. In his original thesis Rawls hypothesises rational beings, who are rational in a considered and reflective sense, existing in what he calls the ‘original position’; where individuals exist behind a ‘veil of ignorance’ which prevents them from knowing anything about themselves as they will be when finally they emerge into society. Yet

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200 John Rawls, *A Theory of Justice*, op cit. [f'n 34 at p 38]
in this situation they are called upon to construct certain principles of justice that all
would agree upon and which will form the basis of the social life (institutions and
social arrangements) they are yet to confront. This is what Rawls calls ‘justice as
fairness’. According to Rawls, in the original position

‘…no one knows his place in society, his class position or social status, nor
does anyone know his fortune in the distribution of natural assets and
abilities, his intelligence, strength and the like…[his] conception of the good or
[his] special psychological propensities…’

Since all are completely ignorant of life beyond this original position no one is able to
design a principle to favour their condition within civil society and neither are any able
to bargain with others concerning their future position; because as men do not know
what interests they will have they cannot bargain to secure them. All men know for
certain is that they will have interests and they will all have a desire to further them.
It seems that they are all aware that there will be a degree of conflict regarding those
interests, because as each individual pursues his own ends each naturally seeks a
larger rather than a smaller share of the benefits of social life. And because these
benefits will be finite there will be competition for them. On this basis men must
design a civil society.

The idea of vulnerability pervades Rawls yet in different form to that which we saw in
Hobbes and Locke. In the original position individuals are less than the rational,
autonomous and moral agents that we take humans to be. Rather they are, as
Rawls’ critics initially pointed out, better seen as ‘disembodied spirits’, devoid of and

\[201\] ibid, p. 12.
abstracted from social existence and social being.\textsuperscript{202} For Rawls this arrangement is necessary to enable such individuals to make decisions unfettered by self interest, the sort of self interest that inevitably arises from one’s location in a social reality. The end result seems to be that those who inhabit the original position cannot be viewed as moral or autonomous beings in any way that we might understand these terms. They are rational, says Rawls, but they are isolated units of pure rationality, devoid of any morality or autonomy both of which are essentially dependent upon the relationships with which one engages others.\textsuperscript{203}

Yet from this position of ‘pure vulnerability’ there is an apparent awareness that a more tangible form of vulnerability is possible. That is, in the original position, there is the awareness that some will do very badly out of social life. Each knows that she will emerge into civil society yet no-one knows what her situation will be when she arrives. No one knows what her social or economic existence will be and neither does she know what will constitute her personal and psychological profile. And neither do people know what ideas and beliefs they will have, although all know that they will hold religious, philosophical and political points of view. Individuals will emerge as bankers, lawyers and doctors, whilst others will emerge as unemployed, as homeless or abandoned or suffering from mental illness or even dementia. Thus it is against this spectre of continued vulnerability within society that the parties agree upon a particular form of social and political arrangement, one that hopefully protects individuals from the worst excesses of prospective vulnerability.


\textsuperscript{203} We may suggest though, that as each has a sense of fairness then this surely implies that they are limited moral agents – moral agents in some nascent state - rather than the fully developed moral actors that we take humans to typically be.
The choices these rational entities make reflect what they regard as the best means of satisfying whatever interests may emerge as their own once they enter society, without of course knowing in advance what those interests are. These interests Rawls defines as ‘primary goods’ which are ‘things…a rational man wants whatever else he wants.’\footnote{John Rawls, \textit{A Theory of Justice}, p 92. [\S 34 at p 38]} Men choose that type of society which maximises their ability to escape from being vulnerable, to escape from having their ability to act as rational, autonomous and moral actors diminished. And although Rawls says that men would reject a utilitarian form of social structure, still there is something utilitarian about the choices they make: they choose that form of social life that maximises their ability to function as rational, autonomous beings and they reject any form of social arrangement that might compromise such a possibility. For it is only when men are rational, autonomous and moral creatures, when they are free from vulnerability that they are able to maximise their full potential.

Rawls’s theory has of course aroused criticism. Sandel and Taylor for example have argued that it is not possible to conceptualise the individual as in some way free from or ‘abstracted’ from the connections of society, custom and morality and exist as detached from her desires and self interest.\footnote{In addition to Michael Sandel [\S 207 at p 122] see; Charles Taylor, \textit{Hegel}, New York, Cambridge, 1977.} A related criticism might be to ask how such individuals in the original position can possibly negotiate with each other when the act of negotiation itself implies communication and communication implies language. Language in turn may be viewed as one aspect of the framing and describing of man’s social existence. Language emerges from within the social world and both describes that world and communicates its signs, symbols, significance and images to others. Hence there can be no language that exists beyond man’s social existence. Thus the question emerges as to how people in the original position can
conceptualise and communicate to each other those symbols and images they can reasonably have no knowledge of, for they are symbols and images of a reality they have not yet encountered. 206

In response to such criticism, Rawls has countered that his conception of man in the pre-social state is political rather than metaphysical. 207 That is, he is not proposing a view of the nature of man, (‘claims about the essential nature and identity of persons’). 208 Rather, he is proposing an idea of the person in the original position as a device for reflecting and clarifying those basic principles of justice upon which institutions and social engagements may be structured. As he points out, ‘the description of the parties [in the original position] may seem to presuppose some metaphysical conception of the person, for example, that the essential nature of persons is independent of and prior to their contingent attributes, including their final ends and attachments, and indeed, their character as a whole’. Nevertheless, he suggests, ‘…this is an illusion caused by not seeing the original position as a device of representation’. 209

But does a metaphysical conception of the individual still creep into Rawls’ argument? Rawls himself acknowledges the problem whereby a metaphysical conception of the person may yet be assumed or implied by the use of the concept of persons (‘the basic units of deliberation and responsibility’) as moral and political

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206 It is clear that those in the original position must have some form of understanding of what life will be like in civil society in terms of what they may encounter; that is, what is it like to be homeless, to be mentally ill, to be suffering from dementia and so on. Also they must have some understanding of the dynamics of social and political life with respect to areas such as health care politics, resource allocation, the possible structures of different social, political and economic systems and the like, for choices are really only choices if they are informed, and informed choices require a degree of sophistication (and social engagement) that can only be achieved within the context of a social framework.


208 ibid, p 223.

209 ibid, p 238.
agents. But, he asserts, not only does no metaphysical doctrine about the nature of persons appear within his argument or is required by his argument, but also if such presuppositions are involved then, they are generalist and certainly not identifiable with any particular metaphysical perspective. Still such arguments are not directly relevant to my point. My present intention is to highlight how we can see within Rawls’ project a view of individual vulnerability and how we can see his project, in part, as a response to that vulnerability, and it certainly seems consistent to assume that the idea of vulnerability is a motivating factor behind the choices made in the original position.

Still I would make one point about the actions of agents in the original position. In this state I may reason that if I emerge into civil society as a rational, intelligent, assertive and healthy male adult in a well to do family then my wellbeing will not so much depend upon engaging individual rights, particularly human rights, for my personal, psychological, emotional and economic resources, not to mention my family connections, will see me through. But if I emerge into society as a quadriplegic, or someone who is poor, female, who suffers from chronic mental illness or who has middle or end stage dementia, then in such cases notions of rights may be of little use to me. Indeed, my well being may depend not so much upon any notion of rights that are attributed to me but on notions of duty and obligation that those who are charged with my care and protection may have. If this is the case then I may argue, in the original position, that the principles that govern the organisation of social institutions ought reflect a strong conception of duty than any minimalist rights.

My reasoning is that for the intelligent, assertive and healthy amongst us, good outcomes are (relatively) easily assured, but for those who are impaired in some way

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210 *ibid*, footnote p 240.
(and especially for those who are profoundly impaired) and who depend on others for their survival and existence, the issue is not so much what rights they are entitled to as it is what conception of duties others have. Given I realise that although humans are defined in terms of their rational, reflective capacity, it is the periods of intense vulnerability within their lives that pose the greatest threat to their self interest I may, in my caution, opt to maximise notions of duty. In addition I may subscribe to the view, expressed by both Hobbes and Locke, that when it comes to their own interests humans tend to promote themselves and tend also to minimise the interests of others. What may counterbalance this position? An emphasis upon rights, even minimalist, may not seem as good a choice to me as a strong commitment to duties and obligations of some sort. This option is not intended in any way to undercut Rawls’ project, rather it may provide a plausible alternative; wherein notions of duty and obligation, along with a minimalist conception of rights, may sustain social institutions and provide ‘.willing political agreement between citizens viewed as free and equal persons.’

iii] human rights and civil society: the contractarian response to vulnerability

The solution that the contract theorists propose for the innate vulnerability that mankind experiences within the state of nature is civil society. In the above I have focussed on Hobbes, Locke and Rawls – the former two going so far as to construct a view of human social interaction in a ‘pre-social’ state. But Hobbes and Locke were not alone in juxtaposing man’s ‘natural’ state (and its inherent failings) to the security and protection of ‘civil’ society. Equally well known is Rousseau who, writing in *The Social Contract*, presents a view of the state of nature that is not dissimilar to

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211 *ibid*, p 230.
either Hobbes or Locke. In Rousseau’s state of nature all men have a ‘common liberty’ wherein each man ‘is the sole judge of the proper means of preserving himself’ – the first law of nature requiring man to ‘provide for his own preservation’. Prior to the social contract man has ‘…an unlimited right to everything he tries to get and succeeds in getting.’ and man’s ‘natural liberty…is bounded only by the strength of the individual…’ It is this that creates the dangers that Hobbes, in particular, describes so powerfully. Whilst in the state of nature there is indeed ‘a universal justice’, inspired by reason and occasioned by God, yet it is clear that such natural laws are insufficient to regulate conduct between men. As Rousseau comments: ‘They merely make for the good of the wicked and the undoing of the just, when the just man observes them toward everybody and nobody observes them towards him.’ What is needed are ‘conventions and laws’ that ‘join rights to duties’ and replace man’s ‘…natural liberty’ with a civil liberty that establishes not just civil rights and protections but importantly ‘a moral liberty, which alone makes [man] truly master of himself.’

Pufendorf also presents a view of man in his natural state which is, as Tully so rightly points out, ‘rich and unsurpassed’ in both its imagery and intensity. Pufendorf also closely approximates the writings of Hobbes in his portrayal of man’s overwhelming vulnerability. The state of nature is, writes Pufendorf, ‘…attended with a multitude of disadvantages…’ and he asks us to

‘…picture…a person (even an adult) left alone in this world without any of the aids and conveniences by which human ingenuity has revealed and enriched

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our lives, you will see a naked dumb animal, without resources, seeking to satisfy his hunger with roots and grasses and his thirst with whatever water he can find, to shelter himself from the inclemencies of the weather in caves, at the mercy of wild beasts, fearful of every chance encounter.\textsuperscript{214}

Typically, in the state of nature man ‘…is protected only by his own strength…’ and again there is no authority to judge disputes and settle conflicts and to dispense justice and ensure law and order. In an echo of Hobbes he writes: ‘There is the reign of the passions…war, fear, poverty, nastiness, solitude, barbarity, ignorance, [and] savagery…’ But within civil society there is ‘…the reign of reason…peace, security, wealth, splendour, society, taste, knowledge, benevolence.’ And so he reminds us that ‘…the true and principal cause why [men] abandoned their natural liberty and had recourse to the constitution of states was to build protection around themselves against the evils that threaten man from man.’\textsuperscript{215}

But despite both Rousseau and Pufendorf juxtaposing man’s ‘natural’ to his ‘civil’ state, and despite also the image of vulnerability that serves (to a greater or lesser degree) as a backdrop to their work, I do not intend to proceed with either of these writers. As regards Rousseau, civil society comes into being to provide security and protection for man, certainly, but the notion of rights, as those fundamental or inalienable qualities that we associate initially with Hobbes and particularly so with Locke, are missing. In fact Rousseau’s concept of ‘the general will’ which he presents as a kind of collective of individual wills seems to suggest quite illiberal and despotic tendencies that take us away from the perspective on rights that I want to focus on. Rousseau’s picture of the general will functioning as ‘a moral and

\textsuperscript{214} On the Duty of Man and Citizen, Book Two, ch.1:9.
\textsuperscript{215} On the Duty of Man and Citizen, Book Two, ch.5:7. Pufendorf puts it bluntly: ‘Without courts of law, men would devour each other.’
collective body’, a ‘public person’,\textsuperscript{216} is all-powerful and incorporates into its persona all the ‘multitude (of citizens – of individual wills) so united in one body.’\textsuperscript{217} In speaking of the sovereign authority Rousseau writes that,

‘As nature gives each man absolute power over all his members, the social compact gives the body politic absolute power over all its members also…(with) the Sovereign…the sole judge of what is important.’\textsuperscript{218}

And further that

‘…whoever refuses to obey the general will shall be compelled to do so by the whole body.’\textsuperscript{219}

Thus Rousseau’s view of civil society tends to take us away from the perspective of universal rights as establishing individual moral entitlements.\textsuperscript{220}

And although Pufendorf assuredly has a ‘rich and unsurpassed’ notion of the state of nature from which, in emphasising man’s vulnerability he deduces a sociability that impels men toward the security of civil life, he has no established concept of natural rights as articulations of specific individual interests and as justifications for the establishment of civil life in the way that Hobbes and [in particular] Locke do.

Certainly Pufendorf was a natural law theorist who identified moral authority as stemming from God and, further, he argued that the natural law right of self

\textsuperscript{216} The Social Contract, Book 1, 6.
\textsuperscript{217} On the Duty of Man and Citizen, Book 1, 7.
\textsuperscript{218} On the Duty of Man and Citizen, Book 2, 4.
\textsuperscript{219} On the Duty of Man and Citizen, Book 1, 7.
\textsuperscript{220} Are there illiberal and despotic tendencies within Rousseau or is this an unfair reading of him? This is a major debate that I do not wish to embark upon. In any case it would require more time and space than the current work allows and the prosecution of it would seem to obscure my immediate goals.
preservation was both the origin of all rights and the origin too of political arrangements.\textsuperscript{221} It is true also that he advances the notion that rights need to correspond with duties and in fact it is clear that in this regard Locke drew a good deal of inspiration from Pufendorf.\textsuperscript{222} But Pufendorf is not part of the human rights tradition and so I do not want to stray into arguments and discussions that take us away from my central concern, the focus of which can best be dealt with by a discussion of Hobbes, Locke and Rawls. In saying this I recognise there is debate over when this tradition began and which thinkers it contains, and whilst some seem to identify a human rights thread that begins [implausibly I would suggest] with Antigone or even Christ, in this thesis I subscribe to the view that its \textit{genesis} is more likely to be found in Hobbes and later in Locke.\textsuperscript{223} From these two writers in particular came the essential feature of rights as the medium through which interests are both articulated and secured.

Within Hobbes and Locke man’s innate vulnerability within the state of nature is resolved by the making of a compact, an agreement by which each individual gives up his ‘natural right’ to all things and submits to the will of a constituted authority. For

\textsuperscript{221} \textit{On the Duty of Man and Citizen}, Book One, ch.5:5-6; Book Two, ch.5:7 where he writes that ‘…the true and principal cause why heads of households abandoned their natural liberty and had recourse to the constitution of states was to build protection around themselves against the evils that threaten man from man.’

\textsuperscript{222} And not just in this regard either for as Haakonssen points out; the essential notion of a human nature which reveals a concern for self preservation, a recognition of one’s inability to survive unaided, a degree of sociability, an awareness that such faculties exist within others, and the idea that although moral authority came from God the moral context was defined by humans – in all this ‘…Pufendorf’s theory is clearly a precursor of Locke’s in the \textit{Essay Concerning Human Understanding}.’ Knud Haakonssen, \textit{Natural Law and Moral Philosophy. From Grotius to the Scottish Enlightenment}, N.Y., Cambridge University Press, 1996, pp 35-46.

Hobbes, man’s problem lies with this concept of a ‘natural right’. In *Leviathan* he makes it clear that ‘...as long as this natural right of every man to every thing endureth, there can be no security to any man, [no matter] how strong or wise...he be...’\textsuperscript{224} The solution is obvious and it is ‘that a man be willing, when others are so too...as for Peace, and defence of himselfe he shall...lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himselfe.’\textsuperscript{225} What is needed is to supplant this ‘natural right’ with a ‘civil right’, that is, to substitute a ‘right to all things’ by a limited and well defined notion of right which is enforced and sustained by a civil law that all have agreed to at least by virtue of agreeing to join together to enter civil society. In other words, to ensure their security men must agree with each other to subject themselves to the will of the sovereign and to place themselves under his will. In order to escape from the inherent vulnerability of the state of nature Hobbes writes that ‘there was requir’d to the security of men, not onely their Consent, but also the Subjection of their wills in such things as were necessary to Peace and Defence..'\textsuperscript{226}

As Hobbes sees civil society as a solution to man’s inherent vulnerability so too does Locke. Locke asserts that men join with other men and freely give their consent to be governed ‘...for their comfortable, safe, and peaceful living one amongst another, in a secure Enjoyment of their properties...’ It is man’s vulnerability that drives him to civil society and like Hobbes civil society is based upon the freely given consent of those about to be governed. As Locke says, it is only consent ‘...which did, or could give beginning to any lawful Government in the World.’\textsuperscript{227}

\textsuperscript{224} *Leviathan*, Ch. XIV.  
\textsuperscript{225} *Leviathan*, Ch. XIV.  
\textsuperscript{226} *De Cive*, Ch. VI, III.  
\textsuperscript{227} *The Second Treatise*, Ch. VIII. 99.
The beginning of Politick Society depends upon the consent of the individuals, to joyn into and make one Society; who, when they are thus incorporated, might set up what form of government they [think] fit.\textsuperscript{228}

But not only is the concept of civil society a response to mankind’s vulnerability, so is the notion of fundamental rights. In Hobbes the idea of a human right exists only in an embryonic state. Indeed much debate has been directed to the question of, ‘is Thomas Hobbes a human rights theorist or not?’\textsuperscript{229} Certainly Hobbes does embrace at the very least two of the fundamental principles of human rights doctrine. The first is that all legitimate government is based solely on the freely given consent of individuals, and the second is that the ‘end game’ of politics has to be about the security and well being of the people - even though within Leviathan this idea of the ‘well being of the people’ must be viewed within the context of the sovereign’s [almost] absolute power.\textsuperscript{230} Despite the obvious absolutism within Hobbes the point of the compact is clear and that is the security, protection and interests of the people.

It is within Locke that we find the first major statement of rights that endure into civil society; rights that reflect the ongoing benefit of individuals and that are actively held against other individuals and indeed against the state. (The idea of ‘actively’ is important for if one cannot ‘act’ – as with the demented elderly or the mentally ill – then one is left wondering exactly what benefit comes from this sort of right?)

Reflecting on Hobbes, Locke asks why men would escape from the state of nature

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\textsuperscript{228} The Second Treatise, Ch. VIII. 106.


\textsuperscript{230} The power of the sovereign over his subjects is not absolute on a number of counts. The sovereign cannot command a man to harm or injure himself in any way and neither can he require that a man not defend himself against even those who would lawfully injure him. Further, the sovereign cannot demand a man ‘abstain from the use of food, ayre, medicine, or any other thing without which he cannot live.’ Neither can a man be commanded to confess to any crime. But most importantly Hobbes makes it clear that subjects only have an obligation to the sovereign so long as he is able to provide them with peace and security. Leviathan, Ch. XXI.
only to give themselves up to a despot not bound by any laws? Rather, says Locke, political authority lies with the community. In political society ‘the Community comes to be Umpire, by settled standing Rules, indifferent, and the same to all Parties; and by men having Authority from the Community, for the execution of those Rules.’ As he points out ‘those who are united into one Body, and have a common establish’d Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, are in Civil Society one with another.’ Men enter civil society for specific reasons, says Locke, and these are to protect those basic and fundamental rights that men held, but could not enjoy, within the state of nature.

‘The great and Chief end...of Men’s uniting into Commonwealths, and putting themselves under Government, is the Preservation of ...their Lives, Liberties and Estates, which I call by the general Name, Property.’

Locke’s concept of ‘property’ has caused much controversy and indeed, as Laslett observes, is the weakest part of his theory, combining notions of a man’s person and his liberties to that with which a man has mixed his labour. Nevertheless ‘it is through the theory of property that men proceed from the abstract world of liberty and equality’ which is the state of nature with all its dangers and uncertainties, ‘to the concrete world of political liberty guaranteed by political arrangements.’ Property, however we conceive it, is at risk in the state of nature and out of mankind’s vulnerability comes the desire to enter civil society and to protect his basic liberty and

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231 The Second Treatise, Ch. VII. 95; where Locke states that men would not be so foolish after having avoided ‘what Mischiefs may be done them by Pole-Cats, or Foxes...’ would be content to give themselves up ‘...to be devoured by Lions.’
232 The Second Treatise, Ch. VII. 87:15-20.
233 The Second Treatise, Ch. VII. 87: 25.
234 The Second Treatise, Ch. IX. 123.
235 Peter Laslett, ‘Introduction’ to Two Treatises of Government, p 103. [f/n 130 at p 85]
liberties. Thus the connection is made by Locke between mankind’s vulnerability, civil society and (a particular kind of) human rights.\textsuperscript{236} Once in civil society man constructs artificial arrangements to protect his natural rights, such as a representative assembly of taxpayers to authorise taxation (‘that men might have and secure their properties’) and an independent judiciary so that none may be unjustly penalised.

Whilst few have doubts that Locke is indeed a human rights theorist, he is not one in the way we currently think of human rights. For example Locke’s community of consent giving, rational, self governing individuals did not include, at the very least, women, atheists, slaves and men who owned no property. That would be enough for any modern day thinker to be regarded as quite hostile to our notion of human rights. But Locke is an example of the way that men’s thought is often taken to be more than what they intended. In the present day we find within Locke, human rights principles that we can easily identify with: government by consent, the locus of political authority lying within the community, individual rights, personal liberty, representative democracy, limits placed upon the authority of government, the rule of law and ideas of tolerance. And certainly at the heart of Locke’s approach we can find the all pervasive image of vulnerability.

Within natural law theorists such as Hobbes and Locke, and even Rousseau and Pufendorf, we find the concept of vulnerability inextricably linked to man’s passage from the state of nature to civil society. But it is within the writings of Hobbes and in particular Locke that we find the connection made between vulnerability, rights and civil society – where the possession of certain fundamental rights, which are themselves the expression of the individual interests of the rational actor, form the

\textsuperscript{236} I am referring here to ‘claim rights’; those human rights that are mostly defined in terms of civil and political rights.
basis for the civil and political arrangements that characterise life in the modern liberal democratic state.

John Rawls continues this theme but with important differences. The discussion in *A Theory of Justice* focuses on what sort of social organisation will satisfy the rational interests of rational men and according to what principles relevant institutions can be identified and structured to give voice and expression to these interests. In this discussion, and later in his *Political Liberalism*, Rawls identifies the idea ‘…of certain basic rights, liberties and opportunities (of a kind familiar from constitutional democratic regimes)…’ together with the assigning of a special priority to these rights, liberties and opportunities and as well various measures provided to ensure citizens can make effective use of these goods. 237 These principles are an essential part of what Rawls calls ‘…a liberal political conception of justice.’ 238 Thus the principle of a civil and political equality in terms of the ownership of rights and entitlements attaching to individual persons form the basis of Rawls conception of the liberal state. And as well the principle of a procedural equality inevitably attaches to parties in the ‘original position’.

‘It seems reasonable to suppose that the parties in the original position are equal. That is, all have the same rights in the procedure for choosing principles; each can make proposals, submit reasons for their acceptance and so on.’ 239

In the original position the notion of equality is surely extended to include more than just the process of choice, for respective parties must also be regarded as equal in

238 *ibid*.
239 *A Theory of Justice* p. 19. [f/n 34 at p 38]
terms of their ignorance of their lot when they finally emerge into civil society. In this way they are all equally vulnerable. Further there is equality in terms of their disinterest as regards one another and one another’s interests. Further they acknowledge that no one’s interest are any more important than anyone else’s, a crucial part of what constitutes equality. Rawls also assumes that these individuals possess a certain equality of understanding of the dynamics of human social life, which certainly suggests an equally sophisticated level of intelligence. Thus he writes that ‘it is taken for granted…that they know the general facts about human society…political affairs…the principles of economic theory…the basis of social organization…[and] the laws of human psychology.’

In the original position the parties are what Rawls refers to as ‘representatives of free and equal citizens’. He is at pains to point out (in rebuff to the communitarians) that this original position is hypothetical and nonhistorical. It is ‘a device of representation’ and not a metaphysical statement about the nature of persons. It provides a basis for equality where choices can be freely made beyond the intrusion of other variables such as social position, religious ideas, or political or philosophical bias. In this ‘original position’ and behind the ‘veil of ignorance’ rational constructed individuals choose two basic principles of justice, the first having lexical priority over the second, upon which society and its institutions will be based and upon which relations between people will be structured. These two principles are,

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240 Rawls talks of the parties in the original position as being ‘rational and mutually disinterested [which] does not mean that the parties are egoists, that is, individuals with only certain kinds of interests, say in wealth, prestige, and domination…but only that] they are conceived as not taking an interest in one another’s interests.’ *A Theory of Justice* p. 13. [fn 34 at p 38]

241 *A Theory of Justice* p. 14. [fn 34 at p 38]

242 *A Theory of Justice*, p 137.

243 *Political Liberalism*, pp 24-25, fn 27. [fn 237 at p 134]
‘First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.’

These principles are the basis upon which society is founded and ‘are to govern the assignment of rights and duties and to regulate the distribution of social and economic advantages.’ These principles also distinguish between those aspects of the social system that define ‘the equal liberties of citizenship’ and those that ‘establish social and economic inequalities.’ Equal liberties are ordered first and are given priority. That is, it is not possible for people to trade off a lesser share of liberty to enable a greater share of social and economic goods. That is to say ‘any distribution of wealth and income, and the hierarchies of authority, must be consistent with both the liberties of equal citizenship and equality of opportunity.’ The idea of equal liberties is fundamental. To argue for less liberty would be irrational and would compromise the desire that people have to maximise their self interest. According to Rawls the ‘basic liberties’, we might say ‘rights’, of citizens are; ‘political liberty (the right to vote and to be eligible for public office) together with freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person along with the right to hold (personal) property; and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law.’ Moreover, says Rawls, ‘these liberties are all required to be equal by the first principle, since citizens of a just society are to have the same basic rights.’

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244 *A Theory of Justice*, p 60
245 *A Theory of Justice*, p 61
246 *A Theory of Justice*, p 61
Rawls holds to the notion of fundamental liberties which he grounds in rational choice theory. The rights that rational people would agree to are the only ones possible given the logic that all people wish to rationally pursue and indeed maximise their self interest whilst at the same time recognising that others have a just and valid demand to act in similar vein. Further, Rawls suggests that only a society founded upon these principles of justice, what he calls ‘justice as fairness’ is rational, and that all other social configurations such as utilitarianism, intuitionist conceptions, classical teleological conceptions and so on are deficient in certain key areas and are thus irrational. So it is that Rawls, like Locke in particular and Hobbes to a lesser extent, views both civil society, albeit a particular form of it, and the concept of basic equality and fundamental liberties, what we would feel comfortable calling human rights, as a response to mankind’s inherent vulnerability. In Rawls, as with both Locke and Hobbes, the idea of vulnerability extends into civil life and his theory sets about to minimise the impact of such vulnerability in the ongoing life of those who have emerged from the original position.

iv] the human rights image of man

So far in this chapter I have argued that we can see the concept of vulnerability (the inability to act as a fully rational, autonomous and moral agent) as a sustaining force behind the contract theorists. In Hobbes and Locke it is the uncertainties of life prior to civil society which convinces man that he ought quit his natural state. In Rawls the concept of vulnerability is equally as powerful even though, as we have seen, Rawls seeks no metaphysical conception of pre-social man. For him the idea of man prior to civil society is an artificial device for outlining certain principles upon which the just society can rationally be structured, yet elements of vulnerability are clear here also.

The decisions taken in this pre social state can be seen within the context of a potential or implied vulnerability to the interests of each agent when they finally do emerge into civil life. Next I have argued that the response to man’s vulnerability is civil society: an arrangement artificially constructed to serve and safeguard the interests of consenting members. In Hobbes and Locke man consents to civil life in order to achieve peace, security and certainty and, especially in Locke, to protect his natural rights (now civil rights) of life, liberty and property; rights which themselves seek to ensure an ongoing safeguard against vulnerability in civil society. Vulnerability is thus vanquished and the rational, autonomous and moral agent is asserted. In Rawls the interests of rational agents are protected by a certain arrangement of social life (justice as fairness) which maximises man’s ability to develop his potential and so become a fully developed human being. Again vulnerability is checked by a society grounded upon equal basic rights and liberties and an equality of (social and economic) opportunity for all.

In the remainder of this chapter I want to ask, in what way does the image of man presented by the contract theorists reflect the image of man contained within the liberal democratic concept of human rights. To begin with I will consider Hobbes and Locke – later I will address Rawls. For a start, the emphasis in both contexts is upon individuals [individuals qua individuals] and even when the human rights dialogue embraces social, economic and cultural dimensions nevertheless the emphasis remains the betterment of individual life – even if this individual life is contained, as it typically is, within a communal setting. It is true of course that the concept of the individual as an ontological entity certainly antedates the contract theorists. For example it can be found within early Christian teachings, particularly the New

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249 By this I mean ‘egoistic’ individuals, individuals beyond a social construction of their individuality. That is, no particular way of expressing their individuality is assumed by the idea of human rights. In fact human rights leaves it to individuals to construct their lives as they see fit.
Testament, where the idea of the individual as a moral essence is one who is held accountable for adherence to certain codes of conduct that are in line with Divine command. As Smith points out, ‘…in the Parables and in the Sermon on the Mount, the form of address is to the individual person.’ 250 And Jesus emphasised equally the idea that individuals were bound to each other as they were bound to the Divine so that the address of the New Testament is directed both to God’s people in a collective sense as it is to the individual members of that collective.

But the individual of the contract theorists, as the individual within the human rights dialogue, is overwhelmingly a political individual. He is more than Aristotle’s *zoon politikon*, for both the contract theorists and the human rights paradigm placed man as the very reason for the existence of the state. It may be that man achieves the highest expression of his individuality, certainly in social, economic, moral and political terms, (even technological terms) *within* civil society, of which the state is the most obvious manifestation, but the crucial point is that the rationale for the existence of this institution is for the benefit of man. Writes Polin:

‘One must not forget that, within the necessary dialectic of the individual and the state, the very source of this political dialectic is found in the existence of the political individual, individual and social being at the same time, who is finally a moral existence.’ 251

The contract theorists are clear that the reason for the existence of the modern state is the security and protection of the individual. From Hobbes and Locke in particular came the image of individual men who were ‘…independent and rational beings…the

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sole generators of their own wants and preferences, and the best judges of their own
interests...'; with these wants, preferences and interests being secured only within
the institutional arrangements of civil society. And in similar vein modern [liberal
democratic] human rights theory maintains that although the individual is an
individual within a state structure, and although the enjoyment of human rights
depends upon state institutions and legislative frameworks, still, such institutions and
frameworks are legitimate only to the extent that they acknowledge the moral
primacy of those who live within their borders. Thus modern human rights theory is
predicated upon the rights and freedoms [civil, political, economic, cultural] of
individual humans, and the modern state is lawful (certainly from a moral sense) only
to the degree to which it respects such freedoms. Both the contract theorists and
human rights advocates substantially agree on this point.

But the overriding feature of this individual, what distinguishes him or sets him apart
from other creatures, is his rationality. For Hobbes it is man’s ability to reason that
both rescues him from the state of nature and establishes his socio-biological
uniqueness. According to Hobbes it is by the benefit of reason that ‘wee are led as
‘twere by the hand into the clearest light’. And in comparing man’s natural state to
civil society Hobbes writes, ‘for the naturall state hath the same proportion to the
Civill, I mean liberty to subjection, which Passion hath to Reason, or a Beast to a
Man.’ It is the power of reason, that ‘law of Nature [which] is given by God to every
man for the rule of his actions’ that reveals to man he must quit the state of nature

253 As Crumper points out, even ‘oppressive and authoritarian [regimes] routinely claim to respect the
rights of their citizens,’ no doubt for convenience, certainly, but it does reflect the reality that a good
deal of moral weight accompanies the human rights paradigm – even if this weight does not translate
Cavendish, 1999, p 1.
254 De Cive, Dedicatory: p 8.
255 De Cive, Ch VII. XVIII.
256 De Cive, Ch IV. I.
and enter civil society to ensure his own survival and security. It is as Hobbes makes clear, a ‘generall rule of Reason’ namely ‘That every man, ought to endeavour Peace, as far as he has hope of obtaining it…’so that ‘the first, and Fundamentall Law of Nature…is, to seek Peace, and follow it.’ It is reason that enables man to rise above his animality and to secure his survival beyond the state of nature. It is ‘…[reason] alone [that] is able to secure man against the risks and miseries of his natural condition.’

In like vein Locke also ascribes to the view that it is mankind’s ability to reason which both establishes his humanity and at the same time delivers him from his vulnerability in the state of nature. As he says in the introduction to his Essay, ‘..it is the understanding that sets man above the rest of sensible beings, and gives them all the advantage and dominion which he has over them.’ And later in comparing man to ‘beasts’ it is clear that the ability to think as rational, reflective beings is the critical difference for he says of beasts ‘…that the power of abstracting is not at all in them; and that the having of general ideas is that which puts a perfect distinction betwixt man and brutes…’ According to Locke ‘we are born Free, as we are born Rational’ and the liberty of an individual to act according to his own will and dictates ‘is grounded on his having Reason.’

Human beings possess reason because it has been given by God; it is ‘the voice of God’ in man and is in fact the basis for all human action and intercourse and indeed for human social life itself. Locke makes this clear in the Second Treatise when he writes that it is that ‘which God hath given to be the Rule betwixt Man and Man, and the common bond whereby

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258 John Locke, An Essay Concerning Human Understanding, Ch 1. 1. [fn 94 at p 73]
259 An Essay Concerning Human Understanding, Ch XI: 10.
260 The Second Treatise, Ch VI. 61.
261 The Second Treatise, Ch VI. 63.
262 The First Treatise, Ch 9. 86.
humane kind is united into one fellowship and societie…’ Beyond reason is madness, where there is war and force and the ‘wild beast’ and ‘noxious brute with whom Mankind can have neither Society nor Security.’ Like Hobbes it is this voice of reason that advises man to quit his natural state and enter civil society for his own well being and survival.

The final aspect of the image of this rights bearing individual is the idea of a moral agent. Whilst the concerns of this individual are often expressed politically, yet they are essentially moral concerns. In seeking to both explain and justify the existence and authority of legitimate government the contract theorists recognised that the reason why government was so important was that it maximised what Reiman has referred to as ‘the ideal of individual sovereignty’. Certainly this is clear within the writings of both Locke and Rawls, whose prescriptions for civil society encompassed strict limitations upon the power of the civil authority [however constituted] to interfere within the lives of the people. But Hobbes too is also keen to maximise individual sovereignty, although of course in a different way. He is aware that in the state of nature there is a permanent threat of war between men which renders the business of society; industry, commerce, agriculture, arts, science and so on impossible. What Hobbes wants is a settled and agreed upon method for resolving disputes among men, for establishing law and order and for the protections that men require so they can carry on their normal everyday lives in peace and security. In other words the contract theorists, and those that ascribe to the notion of human rights, hold a similar moral position, namely; ‘…that all human beings are entitled to the maximum ability to live their lives according to their own judgements, subject to the conditions necessary to realise this for everyone.’ And though there are variations upon how

263 The Second Treatise, Ch XV, 172.
265 ibid, p 1.
this principle of individual sovereignty is expressed it is, as Reiman points out, a moral position ‘because it claims to identify a universal good and a universal moral right.’

John Rawls presents us with some differences from the other contract theorists. Whilst in his original work, *A Theory of Justice*, Rawls emphasised rationality, in his later work, *Political Liberalism*, he has introduced the notion of reasonableness to account for allied concepts of fairness, mutual obligation and cooperation as qualities sustaining the just society. The distinction is important. Rationality has to do with the identifying and securing of preferred ends and the means employed to secure those ends. Rational agents ‘…adopt the most effective means to ends, or …select the more probable alternative, other things being equal.’ But rational agents ‘approach being psychopathic when their interests are solely in benefits to themselves’ thus reasonableness inspires cooperation which encourages the just society. The two concepts are separate and distinct but they compliment each other [ie. they ’stand together’], for they ‘…specify the idea of fair terms of cooperation, taking into account the kind of social cooperation in question, the nature of the parties and their standing with respect to one another.’

According to Rawls

> ’merely reasonable agents would have no ends of their own they wanted to advance by fair cooperation; merely rational agents lack a sense of justice and fail to recognise the independent validity of the claims of others.’

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266 *ibid.*
267 *Political Liberalism*, p 50.[fn 237 at 134]
268 *ibid.*, p 51.
269 *ibid.*, p 52.
270 *ibid.*
Rawls introduces an important and powerful dimension to the construction of civil society and fleshes out the idea of a just society being not simply a society of equals but crucially a society in which cooperation and a certain sympathy and affection for others is embedded within, and is necessary for, its institutional framework.

What then are the key elements of the contract theorists view of man that sit so comfortably with the liberal view of human rights? First there is the focus on the individual and the betterment individual life. Second there is the view of the individual as political actor, the centre of political life whose well being is the very reason for the existence of the state. Third is the associated concept that grounds state legitimacy within the freely given consent of individuals. Next is the idea of rationality. This is a metaphysical construct for Hobbes and Locke, whilst for Rawls it is a device (moderated by reasonableness) required to sustain his argument that liberal democracies, as typically conceived (rights based and cooperative) would be embraced by any logical and rational agent seeking to realise his best interests. Finally there is the view of the individual as moral agent, a view based upon man's ability to rationally choose certain forms of life over any other form and thus to be held accountable for the choices he makes. Thus the view of the individual that has been such a powerful focus for liberal approaches to human rights is of a rational, rights bearing, moral agent; autonomous, self willing and consent giving, one whose self identified interests and claims lie at the heart of social and political life. In the modern world human rights have emerged as the necessary conditions required for a human to exist as the rational, autonomous and moral agent that we typically take humans to be.

The view that human individuals are creatures with certain basic and fundamental rights that stand against all others (states and individuals) has emerged as a political force only since the Enlightenment. It has built upon assumptions by Plato and, in
the modern world, Kant, who both saw human rationality as that which separated us from non-humans. Following Rabossi, Richard Rorty calls this view, foundationalism – metaphysical presuppositions about the nature of human beings.271 It is an approach to thinking about humans that recently has come under attack, certainly by Rabossi and Rorty (but I think also from Rawls) as being not so much epistemologically false as it is simply irrelevant in getting humans to recognise that they have certain basic qualities in common with other humans and so ought to treat them better. One reason this approach has had so little apparent success is that to the extent it focuses upon the rational, autonomous and moral agent – the maker of claims and the claimer of rights (the archetype of the liberal individual) - it has nothing to say to those who do not comfortably fit this rather exclusive picture.

Rights theory has traditionally been so overshadowed by the rational agent that it has too often neglected the reality of those who are not rational.

John Rawls has, as we have seen in this chapter, consciously moved away from the metaphysical maze. Yet within his work there is little comfort for the sort of individual I have in mind. For example his (political not metaphysical) view of the person ‘…is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.’272 Social cooperation itself has three elements. It is ‘guided by publicly recognised rules and procedures that those cooperating accept and regard as properly regulating their conduct’; it involves, secondly, a conception of fairness in that there are ‘terms that each participant may reasonably accept, provided that everyone else likewise accepts them’; and third it ‘…requires an idea of each participants rational advantage or good.’273 My point is, and it is one already

272 Political Liberalism, p 18. [fn 237 at 134]
273 Political Liberalism, p 16.
made (in part) by Rawls feminist detractors,\textsuperscript{274} that debates between metaphysics and politics are all very well but his language inevitably hides a reality that effectively excludes all those who cannot engage, cooperate, recognise, participate, and be regarded as reasonable ‘free and equal persons’. That is, it fails to address the issues and existence of particularly vulnerable groups of individuals such as the frail aged with dementia and the chronically mentally ill. It is not so much that Rawls excludes such people it is that he does not speak to them. They are effectively outside the debate. This distinction is important and I will return to it in my final chapter when I consider the image of ‘the other’ and how we might engage the other.

But hostility toward the image of the rational as metaphysics is not limited to Rawls. Of late there has been an emphasis upon human rights being informed by an individual’s \textit{capabilities} and \textit{functioning} – a view increasingly put by those such as Nussbaum and Sen,\textsuperscript{275} yet even here we have as backdrop the image of the individual who lives in a world of choosing and choice making, which implies a predominance of rationality. Reflecting this new approach Nussbaum writes that, ‘enabling people to develop their potential captures the essence of the capabilities approach’ to human rights.\textsuperscript{276} And in explaining ‘the central human capabilities and their correlation to human rights’ she states:

‘The list [of central human capabilities] is supposed to be a focus for political planning, and it is supposed to select those human capabilities that can be


convincingly argued to be of central importance in any human life, \textit{whatever else the person pursues or chooses}. The central capabilities are not just instrumental to further pursuits; they are held to have value in themselves, in making a life fully human. But they are held to have a particularly central importance \textit{in everything else we plan and choose}. In that sense, central capabilities play a role similar to that played by primary goods in Rawls’s more recent accounts: \textit{they support our powers of practical reason and choice, and have a special importance making any choice of a way of life possible}.”\textsuperscript{277} [emphasis added AB]

The spectre of rational man still haunts the human rights exercise even here.

In the first section of this thesis I have reflected primarily upon the concept of vulnerability which I have discussed from the perspective of the philosophical, the personal and the political. My references to rights have been of necessity brief and by way of examples to illustrate relevant points. In the next section I want to focus primarily on the concept of human rights but within the context of their application to the frail aged and the mentally ill within Australia. My task in the next two chapters will be therefore first, to outline what human rights promises these vulnerable people and second, to argue that the concept is largely irrelevant to their care and protection. In the final chapter I will offer an alternative to caring for vulnerable people that does not rely for its justification upon the individual rights that such people are said to be entitled to.

\textsuperscript{277} \textit{ibid}, p 43.
When confronted with vulnerable people we have tended to embrace the notion of rights and in particular human rights. The reason we adopt this approach is because we recognise that the vulnerable are, in certain crucial ways, less able than those of us who are not vulnerable to control the circumstances of their existence and without some form of support or care or protection would fare very badly indeed. Thus a central theme within human rights is to seek a guarantee for the protection of vulnerable groups and individuals. This reminds us of Dworkin’s comment about human rights being ‘trumps’ over all other aspects of politics and policy, or Minogue’s suggestion that human rights are to function as a form of ‘protective moral armour’. There is inherent within human rights a sense of an individual’s moral entitlement. To have a human right is to be entitled to something – particularly, as concerns the vulnerable, it is often an entitlement to some form of treatment.

By embracing the idea of human rights we do two things. First we seek to establish a fundamental sense of the equality of all peoples and second we see within human rights a powerful means to protect those who are vulnerable and so secure for such individuals a standard of existence (social, political, economic, cultural and the like) that is commensurate with what it means to be a rational, autonomous and moral agent. By invoking human rights, and applying them to vulnerable groups and individuals, we are asserting that although there are some who are clearly disadvantaged in crucial ways when compared to the rest of us they are, nevertheless, our moral equals. Despite obvious differences between people in terms of their abilities or capacities or talents, we regard all people as being equal on
at least the dimension of moral worth; people *qua* people. Thus we both hope and assume that human rights will not only protect people from the worse excesses of the vulnerability that some experience but will also go some way toward restoring those individuals to full participation within the social and political body politic.

The attraction of rights talk and in particular human rights talk is that within this form of discourse there is a moral tone that demands both acknowledgment and resolution. Groups and individuals embark upon human rights talk because the moral imperative contained within such talk asserts the (moral) validity of the claims made in their name. And this is the case at no matter what level we embrace the idea of human rights. Whether we are debating human rights as underpinnings of international law in the form of some basic standard that all countries ought to identify with and endorse, as the ground rules for the establishment of a just and fair society, or as the rationale for the treatment of specific vulnerable groups and individuals, it is to this moral imperative that we are appealing.

If we concede the above then it seems reasonable to suggest that we adopt human rights talk and embrace the moral dimension inherent within such talk because we seek certain specific outcomes. The outcomes sought depend of course upon the context within which those who articulate rights concerns are located. Different outcomes are expected at the level of international jurisprudence than are expected at the level of domestic politics, but essentially the rationale is the same. We engage in human rights rhetoric both because it justifies and supports (in a moral sense) our position and because it provides a framework within which we enclose and frame our expectations and demands. In other words human rights hold out the ‘promise’ of a certain state of affairs that those who embark on human rights talk seek to realise, either for themselves or for those they claim to represent. It is the dimensions of this ‘promise’ that I wish to explore in this chapter. In the following chapter I will argue
that human rights have failed this promise and that they are inevitably flawed, particularly as a paradigm of moral rescue for the vulnerable, but first it is imperative to understand precisely what it is that human rights promises and how its promises are framed and to whom its promises are directed.

ii) human rights and street level philosophy

When talking about human rights there are at least two ways that we can approach such a discussion. One is to consider the ways in which the general term ‘rights’ is employed within a given body of knowledge. Recognising that the concept of ‘a right’ is anchored within a legal lexicon we could proceed by a discussion that considers what is meant when we say that someone ‘has a right’ and what sort of relationships are, by definition, embedded within this premise. From this point we would then embark on a discussion of ‘human rights’ being one variant of the more general species ‘rights’. Such an explanation we could call a stipulative definition. This defines the phrase ‘to have a right’ ‘…by making a proposal as to what it ought to mean to people…[wherein]…one stipulates (as opposed to discovers) the criteria that are henceforth to govern the use of a term.’278 The American jurist W. N. Hohfeld presents an example of a stipulative definition of rights.279 Displaying a Bentham-like hostility toward ‘…inadequacy and ambiguity of terms…[which]…reflect, all too often, corresponding paucity and confusion as regards legal conceptions’,280 Hohfeld sought to bring an order and consistency to the notion of a legal right.

278 Michael S. Moore, Law and Psychiatry: Rethinking the Relationship, op cit, p 182. [\fn 53 at p 51]. My general approach in categorising ways of talking about rights as either ‘stipulative’ or ‘strategic’ is inspired by Moore.
280 ibid, pp 35-36.
Hohfeld proposed four sorts of relationships that were embraced by the general term ‘right’. These were ‘rights’, ‘privileges’, ‘powers’ and ‘immunities’. A ‘right’, often referred to as a ‘claim right’, is where another has a duty or obligation to let one do or have something. In this sense rights and duties are coterminous so that one’s right is equal to another’s duty. A ‘privilege’ or liberty is where one is under no obligation not to do something. It is ‘…one’s freedom from the right or claim of another.’281 In this way my right to act in a particular way, for example to speak in public, is a privilege or liberty since it corresponds to a lack of any duty which prevents me from acting in this way. A ‘power’ is a legal ability to alter rights or duties or legal relations in some particular way. Powers impose no correlative duties on another, for example where one holds a power of attorney or a power of appointment.282 Finally an ‘immunity’ is a protection against the imposition of certain duties. The most obvious example of an immunity is the constitutional protection within the United States Bill of Rights which prohibits any legislature from enacting certain laws which constrain particular freedoms such as the freedom of speech or assembly.

However stipulative definitions pose certain problems. One is that the term may cover more than one discipline and in so doing subtle alterations in meaning and emphasis may emerge. For example Hohfeld’s concern was solely with rights as legal entities. He did not mention the area of moral rights or duties and it is when we enter this domain that relationships become increasingly complex and uncertain. Thus Hohfeld’s conception of a duty as ‘…the invariable correlative’283 of a right so that ‘when a right is invaded a duty is violated’284 is, within the arena of moral

281 ibid, p 60.
282 A power of appointment is defined as ‘a power which enables the donor of the power the right to allocate property which he does not own as he directs. The power may be general (in which case the donor can allocate the property to himself) or special. By the Law of Property Act 1925 s.1(7) a power of appointment operates only in equity.’ Leslie Rutherford & Sheila Bone [eds] Osborn’s Concise Law Dictionary, 8th edition, London, Sweet and Maxwell, 1993.
283 W. N. Hohfeld, op cit, p 38. [f’n 279 at p 152].
discourse in particular, not always applicable. Within the area of moral and ethical discussion, and indeed within social and political discourse in general, one may identify many instances where rights and duties are said (by some parties at least) to exist without any clear or precise correlativity being readily acknowledged – and this is especially so within the area of welfare rights.285

It may be that, following Mill, we can divide duties into those of perfect obligation, which imply correlative rights, and those of imperfect obligation, which do not. But where does the distinction lie? According to both Mayo286 and Meldon287 it lies with given undertakings that involve contracts, promises and agreements between two or more consenting parties. But still we seem no closer at establishing general agreement as to what constitutes that particular brand of moral rights identified as human rights, for human rights often involve claims and claims often involve the assertion of one’s entitlement based not upon any prior agreement at all but simply upon the (perceived) moral entitlement itself. The debates seem never ending. At the heart of the issue is that discussions within moral and ethical fields generally constitute normative statements where rights in general, and human rights in particular, describe what ought to be rather than what actually exists, with there often being little agreement on the underlying precepts upon which moral rights are founded. Within positive law there is no such disagreement. We may argue that some laws are good and some are bad, or that some are just and others unjust, and

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285 For instance, one may claim a right to free child care, to a safe environment, to a satisfying job, to pollution free air or to the ownership of land based upon race and prior occupancy but it is often not clear who holds the correlative duty for these rights or even if such a duty (or indeed such rights) exist at all. As far as duties without rights are concerned I may be said to have a duty to care for my children but can they claim rights from me based upon this? And as an ageing parent my children may be said to have a duty to care for me but can I claim it from them as a right? Also it seems reasonable to suggest that I have a duty to help a motorist broken down on a deserted country road but it is doubtful that she can be said to have a right to my aid.


we may even debate to whom the law applies, but we would never argue that the law
did not exist.

If stipulative definitions about moral rights seemed doomed to failure, then another
way to embark on a discussion of rights would be to consider what people have in
mind when they make rights claims. That is, we would disregard discussion about
how a phrase such as ‘human rights’ ought to be used, and rather focus on what sort
of arrangements people actually have in mind when they invoke the term. Such a
discussion may begin by thinking not about human rights themselves but about what
people mean when they invoke the concept of human rights. What arrangements
between people are assumed by those who make human rights claims? In this way
we are not interested in the validity of human rights, that is, are human rights as
opposed to other forms of rights an appropriate subject for discussion and debate
and what course ought this discussion and debate take, (or indeed, and reflecting
upon comments in the previous chapter, is there any metaphysical point upon which
we can anchor human rights), rather we are interested in the application of the idea
of human rights to human problems by those who employ the term to resolve those
problems. Such an explanation we could call a strategic definition.

Strategic definitions of rights focus on the way that talk about rights are employed at
the street level. By using the term ‘street level’ I am referring to an ongoing
discourse that involves those groups, individuals and agencies who employ notions
of rights as a means to achieve certain outcomes. Our interest is directed to the way
that human rights are applied by the various groups and individuals who employ such
talk to achieve certain strategic ends within the social and political marketplace.
Such an approach recognises that those who apply rights [or who claim rights] at the
level of the street, are quite content to leave the philosophical debate about what
constitutes human rights, about issues of the correlativity of rights and duties and the
strength and direction of such correlativity, about whether human rights can reasonably be collapsed into Hohfeldian ‘claim rights’ or are better described in terms of welfare rights, and about the relationships between rights, duties and social justice, to political scientists, philosophers and lawyers. At the level of the street, people are interested primarily in outcomes.

Within strategic definitions the idea of human rights can often be seen as derivative. That is, what people choose to define as human rights tends to reflect not so much some internal philosophical antecedent as it does their own particular considered perspective. The inclination to clothe social and political aspirations within the rhetoric of rights is a common ploy by social reformers and interest groups across the ideological spectrum. Also, strategic definitions of rights seem based upon empiricist logic. Human rights are invoked because there is an expectation that they will provide certain outcomes. With the increasing democratisation of public policy there is anticipation that policy options will reveal tangible benefits for the ways that ordinary lives are led. Whatever public policy option people embrace is embraced because there is an expectation that certain favourable outcomes will be delivered. In this way human rights are employed because they are convenient social levers to ensure certain desired outcomes for certain groups.

Having said the above we may now formulate the basic position that people at the level of the street hold with respect to the idea of human rights. For those who embark upon rights talk with the purpose of making social, moral or political claims, the relationship between the holders of rights and those who are viewed as responsible for the discharge of respective duties may be expressed as follows:

To have a right is to suggest that there is at least one person [A] who ‘owns’ the right as well as there being at least one other person [B] against whom
this right is ‘held’. In this case [B] may be said to have a duty to [A] to the extent that [B] may either have to do some action for [A] to realise the enjoyment of the right, or else [B] may simply have to refrain from impeding the ability of [A] to act in a manner of [A]’s choosing.

In this way the street level application of rights can be seen to embrace two concepts. The first is the strict correlativity of rights and duties and the second is empowerment, and it is these two concepts that both groups and individuals have in mind when they embark on rights talk and in particular on human rights talk.

To say that correlativity is strict is to say that for every right holder there is a corresponding holder of duties, with the obligation being either to provide certain goods or services or simply to forbear. Thus within street level democracy we can identify two types of rights. The first we may call enabling rights. Here a right holder [A] is established as well as another [B] (most often the state) who is duty bound to provide certain goods or services fundamental to the enjoyment of [A]’s right(s). To fail to provide these goods or services is to fail the moral obligation attached to the right and to deny the right holder the ability to act in the manner of his choosing. The second we may call forbearance rights. In this case [B] simply has to stand aside, as it were, and allow [A] to enjoy his right(s) in whatever manner he sees fit. To intrude, in this case, and to place constraints upon [A]’s enjoyment of his rights is again to fail the test of moral obligation. But whatever type of rights are involved, the relationship between right holder [A] and the correlative duty holder [B] is assumed to be strict, with [B]’s obligation being either to enable or to forebear; to provide certain goods and services or to stand aside.

Associated with correlativity is the idea of empowerment. For [A] to have a right against [B] suggests that whilst [A] is free, [B] is bound by his duty or obligation to [A].
It is [A] who holds the right, can alter the conditions of it\textsuperscript{288} can enforce it assert it or even waive it. Whilst this may not always be the case yet it is true that it is the claiming, or demanding, or asserting of one’s rights that gives them ‘their special moral significance’ and, as Feinberg has observed, ‘….enables us to “stand up like men”, to look others in the eye, and to feel in some fundamental way the equal of anyone.’\textsuperscript{289} In this way individual rights can be seen as the reflection of the interest of the right holder(s) with, ‘…their special function or significance in moral and political thought (being) that they represent the individual’s perspective…against the general or public good or against claims, demands, needs or requirements of others generally.’\textsuperscript{290} It is in this way that rights are regarded as empowering and it is this empowering function that people seek when they make rights claims. Moral rights, and in particular human rights, mark the boundary of individual autonomy and action, establish the moral worth and dignity of the person, and enable individual’s to make what they regard as valid and binding moral claims upon others based upon what they view as their own entitlements \textit{as individuals}.\textsuperscript{291}

When people embark upon human rights talk at the level of the street they have in mind these dual concepts of correlativity and empowerment. Precisely, human rights are empowering because there is an \textit{assumed} strict correlativity between rights and duties, between the rights that people enjoy and the duties that others hold to enable the enjoyment of such rights. If there was no correlativity then there would be no possibility of empowerment and one would be no better off with rights than without

\textsuperscript{288} This is surely true in some cases, and particularly so in cases of moral rights. If I am owed $100.00 which is due to be paid at the end of the month it seems fair to say that I have a right whilst the person who owes me money has a duty. Thus I can suggest that he pays me half at the end of the month and the rest the following month. I can alter the conditions of the right but he cannot.


\textsuperscript{291} See a comment by Flathmann who says that rights enable people to be free as in ‘free to do something’ which is why groups value rights. It is their ability to deliver certain ends that make them useful or valued. Richard E. Flathmann \textit{The Practice of Rights} Cambridge, C.U.P. 1976, p 144.
them. If such a case existed, if it were true that rights could never be regarded in any way as correlative and one’s ownership of rights implied no correlative function at all, then at the level of the street rights would be abandoned as having no relevance.

With regard to strategic definitions of rights it is outcomes that are crucial.

My above comments are a reflection of the assumptions that stand behind human rights by those who employ such talk at the level of the street, regardless as to whether one defines rights in terms of ‘needs’ or in terms of ‘equality’, in terms of claim rights or in terms of welfare rights. Nolan and Oakes suggest that human rights can be thought of as both ‘protections from domination as well as protections from interference.’ The former represents what they describe as a ‘republican’ or ‘needs driven’ approach. This suggests that some groups require special treatment because they are poorly strategically placed to articulate their interests, or else they are structurally disadvantaged in some way. The latter reflects a ‘liberal’ or ‘equality driven’ ethos. This view stresses ‘equality-driven, civil and political rights defined by freedom from interference.’\(^{292}\) Whilst those such as Lake have suggested that, with regard to human rights, ‘equality as sameness does not provide protection’,\(^{293}\) especially for the structurally disadvantaged (the mentally ill, young children, the aged and infirm, the intellectually disabled) who are excluded from discussions and decisions about allocation of (political, social and economic) resources, Nolan and Oakes suggest that ‘a needs based definition of human rights is not widely used in social or legal discussions of human rights.’\(^{294}\) Needs-based definitions of rights, that human rights ought be sensitive to the differences in situations and circumstances


\(^{294}\) Mark A. Nolan and Penelope J. Oakes, op cit, p 6. [f/n 292 at p 159]
that confront various social groups, might be reflected in the comment by
Charlesworth who suggested that, ‘the essence of the idea of human rights is to
protect vulnerable groups from the will of the majority’, yet it is, according to Nolan
and Oakes, ‘a radical view of the purpose of human rights, and one that differs from
traditional approaches that describe human rights using equality rhetoric.’

In general terms I do not think the distinctions matter that much. Early in their paper
Nolan and Oakes raise what I think is a crucial point when they ‘flirt…with the idea
that when an aggrieved person turns to law they are merely searching for yet another
powerful rhetorical tool with which to convince others that the treatment they have
suffered is an injustice.’ Of course, as they correctly point out, legal concepts, as
well as philosophical (moral, ethical and political) ones are always open to
interpretation, so that when one has to make a choice between ‘…a description of the
purpose of human rights as treating everyone equally and a description of the
purpose of human rights as protecting vulnerable groups…’ many factors influence
the subsequent choice. Not the least of these factors is ‘…the audience to whom a
particular interpretation of human rights is being put.’ This tells us, and crucially,
that at the level of the street, not only do people seek outcomes with respect to
human rights, and outcomes that reflect their own particular aims and interests or the
aims and interests of the groups they claim to represent, but also what they define as
‘human rights’ in terms of social and political benefits are fluid. And whilst it is true
that ‘equality’ has traditionally been the focus of the thrust of human rights it is no
less true that ‘needs’ are an equally powerful justification. To put it bluntly, it seems
rather obvious that any human rights theory that failed to protect vulnerable groups

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295 H. Charlesworth, ‘No excuse is good enough for a bad law: The victory of states rights over human
rights has impoverished our social and political culture’, The Australian, March 21 2000.
296 Mark A. Nolan and Penelope J. Oakes, op cit, p 3. [fn 292 at p 159]
297 ibid, p 4.
298 ibid.
and individuals (and account for their impoverished need) would be seen, certainly by mainstream opinion, as lacking not only morally and politically but also intellectually.

ii] the promise of human rights

In the introduction to this chapter I asserted that when applied to the vulnerable, human rights seek to establish a fundamental sense of the moral equality of all persons and they seek to protect those who are vulnerable, that is those who are impaired in their ability to act as rational, autonomous and moral agents with respect to their own interests. I suspect that the judgement made by Nolan and Marks, that human rights can be seen in terms of either republican ‘needs driven’ or liberal ‘equality driven’ urges obscures the reality that in general those who embrace human rights talk at the level of the street seek to combine these two approaches. In other words, for those who employ human rights rhetoric for the protection of vulnerable people, the approach adopted reflects a hybrid of both republican and liberal traditions.

This is certainly the case within the Australian context. Here no great distinction can be made about the use of human rights concepts which are, in reality, inextricably bound to issues of need, equality and social justice. In the following I wish to reflect on this fact, and also to reflect on exactly what it is that human rights promise vulnerable people by reference to some of those documents that seek to protect the human rights of two specifically vulnerable groups; namely, the frail aged in Australia’s nursing homes and the mentally ill in general.299

299 In the following I have kept to a minimum any analysis of the relationship between human rights and public policy within either aged care or mental health. With regards to mental health there is not one policy in Australia, rather (if one considers the states, territories and the federal government) there are nine. Also, to adequately discuss the dynamics of such policy and its integration within the mental health field in general would require too much deviation from the task at hand – the issue of human rights. A similar comment could be made with respect to aged care politics.
It would seem almost axiomatic to say that those who live in this country’s nursing homes are amongst the most vulnerable of citizens, yet the concept of moral entitlements loosely gathered under the rubric of ‘human rights’ and directed toward nursing home residents is of relatively recent development. The concept of what we now refer to as ‘the rights of residents in nursing homes’ emerged within the early years of the 1980s and against the backdrop of a number of reports that, by degrees, revealed serious concerns about the quality of life for this growing population. The McLeay Report of 1982 was one of the first to raise such issues at an official level.\textsuperscript{300} Here we can clearly see that the rights debate has always reflected both a needs and an equality philosophy. In fact the Minister for Social Security of the day noted the necessity ‘… for directing welfare to those in greatest need…’ as well as the demand ‘…to meet adequately the needs of the poorest group in our community.’\textsuperscript{301} The Australian Council on the Ageing embedded these concerns within a rights paradigm by suggesting that;

‘A national policy on care of the ageing should be developed, within which there should be provision of care of the elderly in “any kind” of setting, the right to high quality care and the right of the elderly to decision-making in regard to their own care.’\textsuperscript{302}

Whilst the McLeay Report did not embrace directly the idea of ‘residents’ rights’ as we now know them, it did bring to the attention of the public the existence of a group

\textsuperscript{300} The Parliament of the Commonwealth of Australia, \textit{In a Home or at Home: accommodation and home care for the aged}, Report from the House of Representatives Standing Committee on Expenditure, Canberra, AGPS, October 1982.
\textsuperscript{301} \textit{ibid}, p vii.
\textsuperscript{302} \textit{ibid}, p 25.
of people who were united in their collective disadvantage. And it did hint at some of
the structural inequalities that faced these people, in particular the lack of effective
controls over nursing home proprietors and the lack of any mechanism for complaint
and redress for residents. In fact the Report recognised that residents in nursing
homes lacked any effective form of representation at all, so that ‘…many grievances
are never articulated and…the management of institutions have very effective ways
of containing complaining residents by isolation, by restraint and by just ignoring
them.’ The reality was, as the Report noted, that ‘people who are unprotected in
nursing homes are often afraid to raise their voices in anger or protest.’ As far as
the relatives of such individuals were concerned, they also

‘…are in a bind if they have been driven to the point of physical and/or
psychological exhaustion by caring and they have managed to find a place
[for their relatives] even in an unsatisfactory establishment. They are unlikely,
unless the problems are really quite dramatic, to do more than express
concern and take away an even bigger load of guilt and anxiety than they had
when they made the arrangements in the first place.’

The Mcleay Report recognised that the aged within residential facilities were a
particularly vulnerable group of people – impaired often in their ability to function as
rational, autonomous and moral agents, and impaired because of either personal or
structural impediments, or indeed both. The Report also took the first tentative steps
toward establishing a (human) rights based protection for nursing home residents,
but it was the Senate Select Committee Report of 1985 which powerfully and

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303 ibid, p 73.
304 ibid, p 74.
305 ibid.
effectively laid the groundwork for this philosophy.\textsuperscript{306} This \textit{Committee}, more than any other, revealed many nursing homes to be in dire need of reform. It reported serious concerns by staff, relatives of residents, and members of the general public, about the appalling treatment that was often meted out to those who lived as residents within such establishments, and who relied upon the staff (in their various roles) for ongoing care and protection. In citing concerns regarding ‘poor treatment of the patient, unsanitary conditions, poor food, inadequate control of drugs, improper use of restraints (both physical and medicinal), assaults on human dignity and reprisals against those who complain,’ the \textit{Committee} observed that ‘...the quality of care in some nursing homes...fall[s] far short of being adequate’ and in fact often contributed to the deterioration of the patient’s physical health.\textsuperscript{307}

The \textit{Committee} itself referred to research by other organisations which documented the appalling conditions under which residents of some nursing homes lived. Two pieces of research are instructive. One was a weekend ‘phone-in’ conducted by the Local Government Welfare Association in conjunction with the School of Social Work from the Western Australian Institute of Technology, in which numerous ‘allegations of inadequate care were lodged against a total of 25 nursing homes’ in Western Australia. Identified was a lack of privacy and lack of independence for residents, poor quality of food, poor staff/patient ratios, patients left for long periods of time in soiled beds, patients being showered before 0600 hours to reduce pressure on day staff and ‘patients left shivering naked outside showers waiting for nursing staff to return with towels.’\textsuperscript{308}

\textsuperscript{307} \textit{Ibid}, p 120.
\textsuperscript{308} \textit{Ibid}, p 121.
A similar survey was conducted following the Perth phone-in, this time under the direction of the New South Wales ‘Social Welfare Action Group’. Commenting on the results of this survey the Committee stated:

‘The authors of the survey noted that the nature of abuse reported during the phone-in was far more varied than anticipated, and ranged from actual physical mistreatment, such as rough handling and violence, to passive or psychological neglect and other less visible and more subtle forms of abuse, such as leaving residents tied to commodes for long periods of time, opening and scrutinising all their mail, failing to replace lost glasses and dentures, and generally ignoring both their physical and emotional daily needs.’

Given the above it was probably inevitable that the concept of ‘residents rights in nursing homes’ would emerge as a powerful philosophical force. Indeed it was precisely this emphasis that provided the rationale for what has become known as the Ronalds Report. This report, commissioned by the Department for Housing and Aged Care, had the specific aim of seeking the effective care and protection of residents in Commonwealth-funded nursing homes, hostels and geriatric assessment services and was in direct response to ongoing community debates about the need to effectively safeguard this group of particularly vulnerable people. As the Minister of the day, Peter Staples, made clear, the Ronalds Report demonstrated ‘...the Australian...Government’s firm commitment to social justice: enhancing people’s rights, ensuring that the benefits of a growing economy are distributed equitably, and improving equality of opportunity, in short, giving all Australians a fair go.’ In other words the way to social justice for all groups in the Australian community was

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309 ibid, p 122.
311 ibid, p v.
through the medium of rights. The concept of rights, and in particular human rights, would not only secure social, political and economic equality but it would also protect and secure the best interests of even the most vulnerable in the community. It has been this combination of needs and equality based interpretations of rights that has traditionally been the focus of human rights, certainly as far as their expression within Australia is concerned.

The *Ronalds Report* was the inspiration for the 1990 publication by the Commonwealth Government’s Department of Health, Housing and Community Services which addressed directly the issue of the rights of nursing home residents. Titled ‘*Your Guide To Residents’ Rights In Nursing Homes*’, the centrepiece of this publication was a Charter, which set out the individual’s ‘rights and responsibilities as a resident of a nursing home.’ It was based around notions of quality care that was appropriate to the needs of the individual, and a variety of civil, political, social and cultural rights which acknowledged not only the reality that nursing home residents are often physically and mentally compromised, but also that they are nevertheless the moral equals of all other Australians. In recent years this document has been revised and updated, no doubt in part to reflect the recent *Aged Care Act* of 1997, but also in part as a response to an industry that is perceived to be (still) largely in crisis and in crisis with respect to what we might refer to (still) as care and protection issues.

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313 As the document made clear, ‘a persons rights do not diminish when he or she moves into a nursing home, regardless of his or her physical or mental frailty or ability to exercise or fully appreciate his or her rights.’
314 Whilst this view would not be shared by either the then Minister for Aged Care, Ms Bronwyn Bishop, or her colleagues in the federal government, it would seem to be roundly supported by almost all other parties who have an interest in the care of the aged within nursing homes; nurses, resident groups, residents’ relatives, aged care support groups, the federal opposition, the media and the general public.
At the heart of the present Coalition government’s commitment to the care and protection of residents within nursing homes is the Charter of Residents’ Rights and Responsibilities [hereafter the Charter], a document which ‘details the rights and responsibilities of all residents [and] includes personal, civil, legal and consumer rights and responsibilities…’ The rights based protections enshrined within the Charter are fleshed out in a variety of other documents, in particular the publication by Robert Phillips as well as material published by the Code of Conduct and Ethical Practice Working Group of the Minister for Aged Care’s National Aged Care Working Forum, a working group under direct government supervision whose role has been both to introduce a Code of Ethics and a Guide to Ethical Conduct for residential aged care. These documents provide the basis for the protections currently offered to nursing home residents. They can be viewed as representing the human rights ‘promise’ to those in aged care facilities.

According to the Charter, the basis of the approach to the rights of nursing home residents reflects both a civil and political as well as a social justice component. In the preamble it is noted that ‘a person’s rights do not diminish when he or she moves into a nursing home or hostel, regardless of…physical or mental frailty or ability to exercise or fully appreciate his or her rights’. Indeed the Charter emphasises that ‘the personal, civil, legal and consumer rights of each resident…’ remains intact within the nursing home setting as do those principles of social justice which the Charter describes as; ‘…equal access to health care, housing and education, and

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315 The Charter is reproduced in: Robert Phillips, It’s Your Right: Living in Residential Care – A Guide for Residents of Nursing Homes and Hostels, Melbourne, Victoria, Residential Care Rights, March 2000, pp 23-25. The Charter reproduced in this document is largely similar to the original Charter published in the 1990 document by the then Department of Health, Housing and Community Services. There are differences but they are minimal and do not affect my comments.

316 Department of Health and Aged Care, Quality Care for Older Australians: Aged Care – Information Sheets, Canberra, ACT, July 1999.

317 Robert Phillips, op cit. [ fn 315]

equal rights in civil, legal and consumer matters.’ The main text of the Charter reflects both an ‘equality driven’ and ‘needs driven’ approach to rights and the first two rights are instructive in this regard. Residents are guaranteed both the ‘full and effective use of his or her personal, civil, legal and consumer rights’ as well as ‘…quality care appropriate to his or her needs.’

I do not intend to reproduce here each of the 21 individual rights contained within the Charter, yet it is important to be aware both of the language used and some of the specific rights embraced, especially when one considers that many in nursing homes are amongst the most helpless, powerless and dependent individuals in our society. Apart from the guarantee of civil, legal and quality of care rights, residents are assured rights to ‘…privacy; …to move freely both within and outside the residential care service; …to have…individual preferences taken into account; …to continue [with] cultural and religious practices; …freedom of speech; …personal independence; …to maintain control over…the personal aspects of his or her daily life, financial affairs and possessions; …to have access to information about his or her rights, [and] to complain and to take action to resolve disputes.’ Apart from these there are numerous rights that address the protection of one’s dignity and respect, the inclusion of the individual within nursing home activities, the establishing of social relationships, freedom from reprisals and so on.

The language of rights is the language of ownership, of moral entitlement, of action. It is the language of the rational, autonomous and self assured individual whose possession and practical implementation of her rights defines her as actor, as citizen, as rational and moral agent. The Charter, like most human rights documents, (and certainly those that apply to the mentally ill and residents in aged care facilities) is a reflection of this view of the individual as a rational, assertive, reflective agent who is capable both of identifying and claiming her own interests and this is emphasised in
two crucial features. One is of course the right ‘to complain and to take action…’,
which includes the right to seek redress for wrongs and to ‘resolve disputes’ and to
have ‘access to advocates’ to aid and support one in doing this, whilst the other
feature is the responsibilities that a resident has toward other residents. These
responsibilities include, naturally enough, a ‘respect for the rights and needs of other
people within the residential care service…’, but also the obligation ‘to care for his or
her own health and well-being as far as he or she is capable [and] to inform his or her
medical practitioner…about his or her relevant medical history and current state of
health.’

These two features reinforce the view of the individual both as agent with respect to
their own interests, and one who is capable of being attributed praise or blame. As
we have seen previously, these two qualities are important in making distinctions
between who is and who is not a moral agent. Moral agents identify and assert their
own interests and are held accountable both for what they do and for what they fail to
do, yet problems emerge if there are both structural or personal impediments
preventing them from acting so. Past reports into the management and day to day
running of nursing homes certainly raised numerous concerns about the care and
treatment of residents, but they also identified the problem of an imbalance in power
between proprietors and residents and to a lesser extent raised the issue of how
does one protect the best interests of those, such as the demented elderly, who
cannot speak for themselves.

If the language of rights is the language of action then what becomes of those who
cannot act, either to assert, to claim, or to demand their rights, or indeed simply to
complain that their rights have been transgressed? If such people cannot articulate
their grievances and if those close to them, family, friends or professionals, cannot or
will not speak for them, then what becomes of their well-being and how is it
protected? In considering the documents that seek to protect the rights of nursing home residents it is important to keep in mind the relevance and accuracy of language that assumes not only that all residents are rational, autonomous and moral agents (or have such agents to speak for them), but also that residents exist in an environment that encourages, or at least does not impede, the expression of their rights. As I shall argue in the next chapter these assumptions are quite wrong.

In discussing the rights of nursing home residents that are described in the Charter, Phillips notes that these rights can be grouped into seven categories, which he describes as; rights to quality care, rights to a secure and homelike environment, rights to privacy, dignity and respect, rights to choice, independence and individuality, rights to participation, to information and finally the right to complain.319 Under each heading the rights that accrue to residents are detailed in practical fashion. For example the ‘right to quality care’ entitles one to ‘quality care that is appropriate to your needs’ and involves a resident being actively involved in her health care assessment, receiving information about her state of health so as to make informed decisions about health care and the right to view her health and care records.320 With regard to privacy the resident is ‘…entitled to personal privacy and to be treated with dignity and respect.’ This covers issues such as confidentiality of records and personal information, the provision of a secure space for personal belongings, the ability to engage in personal activities in private, and the security of one’s own room and belongings.321

319 Robert Phillips, op cit, p 2. [fn 314 at p 167]
320 ibid, p 3.
321 ibid, p 7.
Of particular importance is the right to complain about anything that impacts on the life of the resident. To sustain this right ‘each aged care facility must have its own complaints process’ and must give assistance to the individual who wishes to make a complaint. Complaints can be made directly to the home in question or they can be made to the Complaints Resolution Scheme at the Department of Health and Aged Care, and the complainant can either represent herself or she can seek an advocate to act for her.\(^{322}\) In fact the rights of the aged are protected, according to information from the Department of Health and Aged Care, by a variety of processes; resident agreements, complaint resolution mechanisms, support from advocacy services and access to the Community Visitors Scheme.\(^{323}\) In the case of an inability to make complaints or if the complainant feels, or fears, victimisation, the advice offered is to contact Residential Care Rights. But also each resident has certain responsibilities. Thus Phillips comments that, ‘you are responsible for your own health and well-being (as much as possible) [and] you must respect the rights of other residents and staff.’ This involves adhering to house rules, respecting the rights and privacy of other residents and taking ‘responsibility to care for yourself as much as possible…’

The other document fundamental to the protection of resident’s rights in nursing homes is the *Code of Ethics and Guide to Ethical Conduct for Residential Aged Care*, hereafter referred to as the *Code* and *Guide* respectively. This document is of recent construction and can easily be seen as a direct response to the ongoing concerns in the community about the parlous state of care and protection offered the aged residents who occupy the nation’s nursing homes. Addressing these issues through a rights paradigm, the *Code* ‘…identifies those values that form the basis of an effective relationship between the providers of aged care, the staff and professionals that deliver the care, and the consumers of aged care services’, whilst the *Guide*

\(^{322}\) *ibid*, p 15.

\(^{323}\) Department of Health and Aged Care, *op cit*, [f/n 315 at p 167]
‘…expands on this to illustrate how these values should, in principle, be interpreted in the every day environment of an aged care home.’

Taken together, the purpose of the Code and the Guide can be seen as an ethical and moral adjunct to the legal requirements of the Aged Care Act of 1997 which embraces all parties within the aged care sector; proprietors of nursing homes, staff, residents and their families in a partnership aimed at mutual co-operation, care and respect - all part of a wider collaboration seeking to ‘serve the needs of frail, elderly Australians.’ Four aims are described. These are; to identify the values that sustain the practice of residential aged care; to ensure that provision of care respects what are described as ‘fundamental human values’; to set moral and ethical standards which providers of care as well as staff and residents are all expected to adhere to; and finally to provide the basis for individual organizations to construct written protocols which set out how they will deliver care with respect to the ethical and moral standards described under the Code and the Guide.

So as to ensure there is no confusion or misunderstanding with respect to the moral imperatives involved, both the Code and the Guide are firmly aligned with human rights principles. Thus the Code seeks to represent ‘the agreed values, expressed as human rights, to which the partners are committed and upon which their practice is based’, whilst ‘the Guide sets out for each partner the ethical obligations each has to the others if each is to respect the human rights of the other partners as set out in the Code.’ In this way both the rights that apply to the aged and the values that sustain those rights are firmly placed within the human rights paradigm. By referring to them as ‘human rights’ they are established as ‘fundamental human values’ whose

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324 Commonwealth Department of Health and Aged Care, op cit, p iii. [En 317 at p 167]
325 ibid, p 4.
326 ibid, p 5.
task is to ensure the care and protection of residents within aged care institutions, ‘...no matter how frail, physically or mentally disabled, or financially, socially or psychological vulnerable the resident may be.’

These ‘fundamental human values’, which underpin the human rights of nursing home residents, are described as follows:

\[\begin{align*}
  \text{i]} & \quad \text{the right of individuals to be treated with respect;} \\
  \text{ii]} & \quad \text{the rights of the individual to life, liberty and security;} \\
  \text{iii]} & \quad \text{the right of individuals to have their religious and cultural identity respected;} \\
  \text{iv]} & \quad \text{the right of competent individuals to self-determination;} \\
  \text{v]} & \quad \text{the right to an appropriate standard of care to meet individual needs;} \\
  \text{vi]} & \quad \text{the right to privacy and confidentiality;} \\
  \text{vii]} & \quad \text{the recognition that human beings are social beings with social needs.}\]

Within the *Code of Ethics and Guide to Ethical Conduct for Residential Aged Care* these seven rights are applied to three different groups of people; the providers of residential aged care, the staff who attend or care for the residents, and finally to the residents themselves, although of course the seven rights are interpreted in different ways depending upon whom they are applied to. Whilst it would be too tedious to examine each of the seven rights within each of their three formulations, I do however want to give at least some idea of the way that the concept of human rights is presented with respect to that most influential of players within the aged care

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327 ibid, p 2.  
328 ibid, p 1.
industry – the proprietors of residential aged care. Here I am interested in how these
human rights are actually fleshed out and how they impact upon the day-to-day world
of nursing home residents.

With regard to Value One - ‘the right of individuals to be treated with respect’,
providers are entreated simply to ‘promote an environment that engenders mutual
respect including respect for the dignity and rights of all concerned.’ Of particular
concern is Value Two – ‘the rights of the individual to life, liberty and security.’ Here
the provider’s obligation is more detailed. Amongst a number of requirements are
those to promote and provide emotional, physical, religious and spiritual security for
residents; to ‘assure residents that their independence will be encouraged’; and to
provide residents for mechanisms of complaint and redress to external agencies
‘without fear of reprisal’. With respect to Value Three – ‘the right of individuals to
have their religious and cultural identity respected’, the expectation is to ‘provide care
in an environment that supports the cultural and language needs of residents and
their families’, to adhere to religious and cultural preferences with respect to dietary
custom and to provide; ‘ease of access to spiritual advisors’ and a place for religious
observance.

Value Four addresses ‘the right of competent individuals to self determination’. This
right involves maximising the residents ‘potential for well-being’, respecting their right
to make ‘reasonable choices’ related to their care, encouraging them ‘to take
responsibility for their actions and choices’ and to ‘provide access to independent
social, legal or other advice and help.’ Value Five is probably the most important of
all rights when one considers that the majority of people who enter nursing homes do
so because they are in some way compromised with respect to matters of self care.
This is ‘the right to an appropriate standard of care to meet individual needs.’ Here
the provider is charged with numerous responsibilities, which include; determining,
prior to admission, whether or not the facility has the ability to offer an appropriate standard of care and protection; provide a standard of nutrition care and support that is ‘appropriate to the needs of the resident in order to maintain optimal health and well-being’; consulting with residents and their families (or their representatives) with respect to care needs; ‘provide appropriately qualified staff and staffing levels necessary for the safe, efficient and effective delivery of care’ and to provide building structures ‘fittings and furnishings’ that help to ensure ‘the optimal standard of care for residents.’ The final two values, ‘the right to privacy and confidentiality’ and ‘the recognition that human beings are social beings with social needs’, are mostly non-specific and are largely generalist in their approach although there is an intriguing right which states that providers should ‘enable married couples to live a married life’, presumably suggesting that some form of sexual contact between married couples, which is the norm in wider society, ought also be facilitated within the nursing home.

The current document that addresses the rights of nursing home residents [the Code of Ethics and Guide to Ethical Conduct for Residential Aged Care] may reasonably be seen as a response to what can only be described as decades of neglect, and in many cases the outright physical, emotional and at times sexual abuse, of an extremely vulnerable group of people. I have made some brief reference to the nature and extent of that neglect and abuse above. The rights model is one that has been widely embraced as the best means of securing the care and protection of those elderly in nursing homes, and not only by government but also by nursing home providers as well as professionals within the industry. Indeed within aged care in general the issue has not been to ask ‘how effective is the rights approach at protecting the aged’ so much as it has been to uncritically accept that this is the only
approach that can secure the care and protection of this particularly vulnerable population.\textsuperscript{329}

Few voices have challenged this orthodoxy and those that do are most reluctant to oppose the concept of human rights in its entirety. For the most part they are simply content to raise doubts as to the effectiveness of rights in all situations.\textsuperscript{330} It seems generally accepted that by assigning to vulnerable groups and individuals certain ‘fundamental human values’, couched in terms of individual human rights, we have arrived at the best means of providing not simply an effective standard of care and protection for such people, but also we have the best means of ensuring both social and political equality, satisfying issues of social justice and securing their moral rescue. By applying human rights concepts to the aged in residential aged care facilities we have tended to follow a process of normalisation. That is we have sought to establish what I have earlier referred to as ‘a fundamental sense of the moral equality of all persons’, and second we have sought to protect those who are vulnerable, those who are unable to act as agents in their own interests, from others [individuals and institutions] who potentially may do them harm. In the next chapter I will show these assumptions to be erroneous, but for the present I want to make comment about another group of particularly vulnerable people, the mentally ill.


\textsuperscript{330} For a cogent argument that cautions linking the care and protection of the elderly in nursing homes to notions of rights see; T. Carney, ‘“Righting” Wrongs for the Aged: a Bill of Rights?’, \textit{Australian Journal on Ageing}, Vol.16, No.2, May 1997, pp 73-78.
In using a term such as ‘the mentally ill’ I am aware that there is still debate about what constitutes such a category. Does the co-joining of these two terms ‘mental’ and ‘illness’ have any intellectual veracity or is it simply, to employ the language of the fiercest of its critics, a phrase that some people use to describe others whose behaviour they find offensive? This is a debate that I do not intend to pursue. It surely seems reasonable to say that some people are less able than others to negotiate their way independently through the world. Some people, by virtue of the behavioural displays they exhibit, come into contact with mental health services. Once within the jurisdiction of such services our interest becomes focussed upon the way these people are treated, and the sorts of relationships that are engaged between them and other figures within the psychiatric hierarchy. Whether their apparent inability to survive in the world is the result of psychiatric pathology or not, hardly seems the point. Whether or not these people are mentally ill in the traditional sense of that term, or else have simply constructed rather unusual ways to survive in an alien landscape, again hardly seems the issue. What is the issue is that they, and the often limited personal resources they possess, are confronted with a system of immense and often overwhelming power. How they survive within this environment is the issue. Can the notion of human rights protect them against individuals and forces that have the potential to threaten and overwhelm them? That is the point and

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331 I am of course referring here to Thomas Szasz, whose intellectual position appears to be predicated upon the idea that what some call ‘mental illness’ is nothing more than a metaphor to describe different types of behaviour that offend, in social, political or moral terms, the sensibilities of others. Szasz’s writings on the subject are many but his first book remains I think the most important statement of his ideas. Thomas S. Szasz, The Myth of Mental Illness: Foundations of a Theory of Personal Conduct, revised edition, New York, Harper and Row, 1974.

332 The debate is too varied and the protagonists too numerous to be able to give space to each and their particular arguments. Although Szasz is an ‘anti-psychiatrist’ he has little in common with others who we might place under that banner, particularly, Laing, Cooper, Basaglia, and even, perhaps, Peter Sedgwick. Some of these, whilst not denying that mental illness exists, are nevertheless critical of its conformist urges and tendencies to pathologies (capitalist) deviancies. For a critical reflection on traditional psychiatry the following is still an interesting book although now somewhat dated. David Ingleby [ed] Critical Psychiatry: The Politics of Mental Health, Harmondsworth, Penguin, 1981.
not whether or not such people can appropriately be described as ‘mentally ill’, or whether or not there is actually such a beast as ‘mental illness’.333

The application of human rights concepts to the care and protection of the mentally ill has, within the Australian context at least, received much currency in recent years. The impetus for contemporary concern about the treatment of the mentally ill has been the well-documented events at Chelmsford Private Hospital in New South Wales,334 Ward 10B of Townsville General Hospital in Queensland,335 and to a lesser extent those at Lakeside Hospital at Ballarat in Victoria.336 Yet such revelations have been simply the tip of a rather large iceberg, for the history of Australian psychiatry reveals a structure that has traditionally been beset by chronic under-funding, administrative incompetence, governmental neglect, more than occasional corruption at institutional level, and all too often the abuse and mistreatment of those whom the system has been charged with protecting.337 In discussing Australian psychiatry from a historical perspective, Cunningham Dax makes the point that;

‘The general standards of care of the mentally ill throughout Australia have been remarkably variable depending upon governments, finances and the calibre of staff employed. It has needed crises to rouse public opinion and to

333 It is clear that these comments will not satisfy those who harbour ongoing philosophical doubts about the concept of ‘mental illness’. Yet even if we rejected the notion of ‘mental illness’ as a nosological entity we would still have those whom we deemed to be in some way incapable of surviving in the world, who we thought were less than rational, who we might regard as a danger to themselves and others and who we thought were not completely responsible for their actions. Such people would no doubt still find their way [by voluntary or involuntary means] into institutional situations. Thus we would still be confronted with the issue of the care and protection of such individuals and no doubt issues such as ‘human rights’ would emerge.
335 W. J. Carter Q. C., Commission of Inquiry into the Care and Treatment of Patients in the Psychiatric Unit of Townsville General Hospital (Ward 10B) Brisbane, 1991.
drive the authorities to action, which in many cases only resulted in an inquiry or the formation of a committee or commission to postpone the day on which some action had to be taken.\textsuperscript{338}

And it is fair to say that Australian psychiatry has had both crises and commissions of inquiry in abundance. In fact since 1980 there have been some 23 inquiries at state and territory level into both the practice and administration of the Australian mental health system. Brian Burdekin, the former federal Human Rights Commissioner, reflects on this point. In the first chapter of his 1993 report into human rights and mental illness in Australia he writes that:

\begin{quote}
‘In NSW alone, there have been approximately 40 inquiries into psychiatric facilities and services since the first recorded case of mental illness in 1801. The majority of State and Territory investigations examined issues such as maladministration, under-resourcing, overcrowding, abuse and harassment, and inadequate legislation.’\textsuperscript{339}
\end{quote}

But, as Burdekin laments, ‘the only two which attempted to provide a national perspective essentially ignored the issue of the rights of those affected.’\textsuperscript{340} So it was to this end that the Report of the National Inquiry into the Human Rights of People with Mental Illness [hereafter the Burdekin Report] was directed. It is not possible within the context of this thesis to provide a historical summary of the practice of Australian psychiatry with respect to the treatment of those mentally ill who have come into contact with the mental health system. The issues are too vast and the historical landscape too broad. To do justice to such a review would ultimately

\textsuperscript{339} Human Rights and Equal Opportunity Commission, \textit{op cit}, p 5. [\textit{ibid} at p 4]  
\textsuperscript{340} \textit{ibid}.
detract from the main aim of the current writing which is of course to focus upon the idea of human rights. Yet some comment is called for if only to ‘place’ the idea of ‘the human rights of the mentally ill’ within a context, and we can achieve this by focussing on the Burdekin Report.

The Report itself was a response to what Burdekin described as ‘the revelations of serious abuses in psychiatric facilities in three different states.’ He was of course referring to events at Chelmsford, Ballarat and Townsville. Chelmsford was the most disturbing. At Chelmsford the issue was the use of a technique known as ‘deep sleep therapy’ which, in conjunction with electroconvulsive therapy – both of which were often given without lawful or even informed consent - resulted in the deaths of some 26 people in the period 1964 to 1978. At Townsville the issue was, as Lawrence describes it, ‘…the inappropriate application of social psychiatry, family/group therapy and therapeutic principles…[as well as] excessive, inappropriate and unsafe use of psychotropic drugs…’341 Lawrence describes these events as ‘regrettable’, and suggests that in both cases the abuses ‘stemmed not from a lack of knowledge, or poor facilities, but from the peculiar and idiosyncratic use of power by a small number of individuals’, a state of affairs that, she says, ‘can only be countered by outside independent peer scrutiny.’342 Burdekin however is rather less sanguine, both about the treatment of the mentally ill in general and the specific and well publicised instances of abuse such as at Chelmsford and Townsville.

‘Apart from those glaring examples…what the evidence …demonstrates…is a story of neglect, abuse, discrimination, inefficiency and injustice, and …it is

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342 *ibid*, p 654.
much more widespread than those localised examples which have had a
great deal of media attention. It is much more insidious.343

And later, in the opening chapter of the _Burdekin Report_, he restates his position, not only with specific reference to Chelmsford but also with reference for the wider practice of psychiatry in Australia.

‘Placed in a human rights context, the treatment meted out to the patients at Chelmsford represents one of the most systemic and sustained gross violations of human rights in this nation’s history. It was a disgrace to this country, a disgrace to psychiatry, a disgrace to the governments and bureaucrats who allowed it to happen. Many people lost their lives as is now a matter of public record. It would be comforting to think that what happened there…could not happen anywhere else. It would also…be extremely naïve.’344

One response of the Australian government to the revelations of the events at places like Chelmsford was to adopt a firm commitment to the idea of the human rights of those people who suffer from mental illness. Officially the association between the concept of human rights and the care and protection of the mentally ill goes back at least to the time of the foundation of the Human Rights Commission of Australia. Indeed the first Chair of that body, Roma Mitchell, had as early as 1983 aligned the Commission to the protection of the mentally ill from within a human rights paradigm. In a paper presented to the Royal Australian and New Zealand College of Psychiatrists she noted ongoing ‘doubts about the care and treatment, or lack of it, provided in some mental hospitals…’, and raised particular concerns about the

343 Brian Burdekin, ‘Mental Health – Your Right’, _op cit_, p 40. [fn 336 at p 137]
involuntary use of psychotropic medications, electroconvulsive therapy and psychosurgery and noted that these concerns and controversies ‘were fuelled by a stream of revelations about conditions in some mental hospitals’. Like so many, she saw within ‘human rights’ a promise to secure the care and protection of this particularly vulnerable group of people.

The commitment to the human rights of mentally ill persons emerged within the context of the National Mental Health Policy which was endorsed by the Health Ministers of all Australian States and Territories, including the Commonwealth Government, in April 1992. This policy sought a wide sweeping review of mental health services throughout Australia, and identified the steps to be taken by all levels of Australian government ‘in the areas of structural and system reform, standards, consumer rights, data, legislation and resource priorities.’ Three broad aims were identified, namely; ‘to promote the mental health of the Australian community and, where possible, prevent the development of mental health problems and mental disorder; to reduce the impact of mental disorders on individuals, families and the community; and to assure the rights of people with mental disorders.’ Sustaining these broad aims were a number of values, both implicit and explicit. Explicit values included universal access to basic health care, high quality service delivery, equitable health care financing, a mixed public/private delivery and financing system and efficiency with regard to resource allocation. But as Stephens and Warren point out certain implicit values were also embraced, chief amongst these being that ‘resource allocation and efficiency’ was aligned with ‘economic rationalism’ so that the inherent

tension between the functioning of modern capitalism and ‘the fabric of the welfare state’ was largely accepted.\textsuperscript{349}

This tension has created its own particularly unique problems within the Australian health care system in general and the mental health system in particular. Stephens and Warren allude to structural problems, such as the perpetuation of ‘the many forms of inequalities in service provision ranging from urban/rural differences, to gender, ethnic and age barriers’, not to mention pressures on mental health service delivery from the demands of a market-driven economy. Whilst these issues are important and bear serious consideration I do not intend to pursue them in this thesis. Certainly I agree with Stephens and Warren when they say that ‘any discussion of mental health policy not firmly placed in the socio-political and health care context would be futile’,\textsuperscript{350} but in this work I do not intend to review mental health policy in its entirety. Far from it. My interest is only in the notion of human rights and the application of that particular philosophical stance with regard to what must be considered the rather narrow perspective of the care and protection of the mentally ill. I will leave rather more broad socio-political analysis to others.

Current Australian commitments to the human rights of mentally ill persons reflect both the United Nations 1991 \textit{Principles for the Protection of and for the Improvement of Mental Health Care},\textsuperscript{351} and the Australian Health Ministers \textit{Mental Health Statement of Rights and Responsibilities} [hereafter the \textit{Statement}].\textsuperscript{352} It is this latter document that will be my focus in the remainder of this chapter, for it is this document

\textsuperscript{350} ibid, p 105.
that we may regard as driving the government's philosophical position within the
mental health area as far as the respective rights and duties of both the mentally ill
and those who care for them are concerned. That is, it is this document that holds
out to the mentally ill the 'promise' of human rights and defines exactly the terms of
that promise.

In her forward to the *Statement*, Professor Beverley Raphael recognises the past
abuses that the mentally ill have experienced at the hands of a system that is
charged with their care and protection, even if such recognition is only by oblique
reference. In profound understatement she observes that, 'until the relatively recent
past, people with [mental health] problems have often felt stigmatised and
discriminated against...[and that]...people with mental illness problems and mental
disorders, and their families, have not experienced the full recognition and support
they require.' And then she makes the inevitable association between issues of
need, equality, social justice and human rights by stating, with respect to the mentally
ill, that 'equity, access and social justice have frequently not been available to them',
and that the intention of the *Statement* itself 'is to promote social justice, equity,
access and a compassionate society with mental health as its primary goal.'

In the preamble to the *Statement* this sentiment is continued. The preamble notes
that all Australians, mentally ill or not, 'have certain fundamental human rights', but
further, that 'people who suffer from mental illness...should be protected from abuse
and neglect.' The mentally ill have rights to care, protection, treatment and
rehabilitation, but as well as these they have equal rights 'to health care, housing and
education, and equal rights in civil, legal and industrial affairs.' In other words human
rights reflect both equality and needs driven approaches. They are both claim rights

353 *ibid*, p iii.
and welfare rights. By embracing the human rights approach there is the dual assumption that the mentally ill are not only the moral equals of those who are not mentally ill, but also there is the recognition that they are inherently vulnerable. But in addition, there is the assumption that human rights is the appropriate means by which the care and protection of this particular group of individuals is ensured – and further, by awarding a whole raft of rights to mentally ill persons there is the assumption that such persons can access these rights. In other words, behind notions of human rights, certainly in their current format, is the image of the rational, autonomous and moral agent; the maker of claims, the claimer of rights, the assertive, independent and goal directed moral actor.

Under the chapter headed, ‘mental health statement of rights and responsibilities’, twelve ‘key rights’ are listed. They are worth reproducing in full here, and are as follows:

- ‘The right to respect for individual human worth, dignity and privacy’;
- the right equal to other citizens to health care, income maintenance, education, employment, housing, transport, legal services, equitable health and other insurance and leisure appropriate to one’s age;
- the right to appropriate and comprehensive information, education and training about their mental health problem or mental disorder, its treatment and services available to meet their needs;
- the right to timely and high quality treatment;
- the right to interact with health care providers, particularly in decision making regarding treatment, care and rehabilitation;
- the right to mechanisms of complaint and redress;
- the right to refuse treatment (unless subject to mental health legislation);
- the right to advocacy;
the right to access to relatives and friends;

- the right to have their cultural background and gender taken into consideration in the provision of mental health services;

- the right to contribute and participate as far as possible in the development of mental health policy, provision of mental health care and representation of mental health consumer interests; and,

- the right to live, work and participate in the community to the full extent of their capabilities without negative discrimination.\(^{354}\)

The above statement can be described as the basic context within which the rights of the mentally ill are conceived, and much of the remainder of the Statement is involved in placing these rights within a milieu that is relevant to mentally ill persons. Thus following sections consider the rights of the mentally ill with respect to assessment, diagnosis, treatment and rehabilitation; admission to a mental health facility or community program; standards of service delivery relevant to mental health consumers; mental health legislation; legal matters, and three sections which focus on the rights and responsibilities of carers and advocates, service providers and finally the wider community in general. The approach in framing the concept of rights in this way is clear. It recognises that there are a variety of situational locations within which the mentally ill find themselves, and it is within the boundaries of this contextual diversity that numerous potentials exist for undermining the moral integrity of those who suffer from psychiatric disorders. It recognises too, that the means by which challenges to this moral integrity are best countered is by the articulation [the asserting, the claiming, the demanding] of human rights.

\(^{354}\) ibid, pp 1-2.
These ‘situational locations’ are social contexts that are well known. Numerous commentators have pointed out that Australian mental health services have traditionally revealed a combination of, chronic under-funding; a tendency to direct funds towards institutions when most mentally ill live in the community; the increasing tendency to focus treatment in short stay units as in specialised wards in general hospitals, thus discriminating against people with chronic mental health problems; the location of most services in urban areas with the result that rural and, in particular, outback areas receive little or no support; numerous pockets of severely disadvantaged groups within the population of mentally ill persons (Aborigines, non-English speaking Australians, the aged, migrants and refugees, children and adolescents, forensic patients and prisoners) and finally an ongoing shortage of research funds despite the prevalence of mental illness within Australian society.355

In addition to these most obvious of contexts, the Human Rights and Equal Opportunity Commission Report of 1993 raised a variety of further areas where mental health issues were prominent (with regard to their impact on the mentally ill), yet under-recognised (with regard to structural responsiveness). Identified were the relationship between public and private mental health services; the place of boarding houses and other forms of accommodation where many mentally ill people reside; the problem of the homeless mentally ill; the care requirements of those with dual diagnosis (mental illness associated with HIV/AIDS, substance abuse, head injury, intellectual disability and the like), and issues of education, prevention and early intervention. Clearly the concept of human rights was being asked to bear a burden of responsibility of vast proportions.

Yet the Mental Health Statement of Rights and Responsibilities seeks precisely to address each of these areas of concern. Because of the complexity of the numerous issues confronting the reformers of a mental health system that quite clearly has enormous structural problems, the statement of rights have more than just a flavour of the banal about them. For example, under the heading of ‘assessment, diagnosis, treatment and rehabilitation’ – areas that address fundamental points of contact (and often conflict) between the mentally ill person, their families and friends and various professionals both within institutional and community based settings – the rights statement boldly asserts, in part, that the consumer has the right; to an integrated system of service delivery, with treatment that reflects the highest professional standards within a least restrictive environment free from harassment and abuse which is sensitive to the individual’s age, gender, and cultural background. The emphasis is on adequately resourced, multidisciplinary teams providing a high level of care, treatment, rehabilitation, support and education appropriate to the needs of the individual with, at all times, the recipient of care having access to mechanisms of complaint and redress and to appeal to decisions made regarding their treatment.356

Other sections of the Statement cover a similar mix of rights which deal with the bodily protection of mentally ill persons, the provision of effective service delivery, the education and training of mental health and allied professionals, resource allocation, and mechanisms of redress and compliant for the mentally ill or those advocates who act on their behalf. For all those who are admitted to a mental health facility or a mental health community based program, the rights based emphasis is on ‘voluntary admission’ wherever possible. Within this context the mentally ill have a right to ‘an explanation of their condition…to adequate discharge planning…to be informed of their rights and reasons for admission…’, to have someone to represent their

356 Mental Health Statement of Rights and Responsibilities, op cit, pp 11-12. [f/n 352 at p 183]
interests, ‘to appeal against continued detention and treatment and ‘to independent
review at regular intervals.’\footnote{357}

Moreover, all facilities and professionals within facilities are bound by certain
principles (moral, ethical and clinical) which again are expressed in terms of the
rights of mentally ill persons. These principles (or ‘standards’) are based upon the
recognition ‘that high standards of mental health care are essential for the treatment
and rehabilitation of people who have mental health problems or mental disorders.’
Thus the mental health ‘consumer’\footnote{358} has the right to ‘services which are resourced,
organised and administered to provide care as set out in this statement’; to expect a
‘regular review of standards’ and ‘evaluation of services’; ‘to mechanisms of
complaint and redress’; ‘to be informed and consulted about proposed changes to
services and standards’; ‘to quality assurance’ evaluations; and the right ‘to expect
governments to ensure adequate levels of professionally trained and qualified staff in
mental health services.’\footnote{359}

promises, human rights and vulnerable persons

The promise that human rights holds is a promise not simply of moral rescue but, and
more importantly, it is a promise of moral rescue that delivers strategic results in the
form of social, political and economic returns. For those who embark on a human
rights discourse at the level of the street [‘street level philosophy’ as I have called it],
it is outcomes that are sought, with these outcomes directed toward tangible benefits
in the way that ordinary lives are led. Human rights seek to protect those who are

\footnote{357} ibid.
\footnote{358} An interesting turn of phrase here. In Australia at least, the word ‘consumer’ has replaced the word
‘patient’, no doubt to emphasise the idea that one who ‘consumes’ is one who does so on the basis of
freely chosen decisions about how best to manage her life. How relevant this is to either those with
chronic mental illness or end stage dementia is a moot point!
\footnote{359} Mental Health Statement of Rights and Responsibilities, \textit{op cit}, [\textit{fn} 356 at p 187]
vulnerable against others [institutions and individuals] that would do them harm, and in this act of protecting, human rights seek to make lives better. This is surely to state the obvious. As already pointed out, if people were no better off with human rights than they were without them then there would be no point to invoking the concept in the first place.

We appeal to human rights for a variety of reasons. We do so primarily in order to protect vulnerable people. But we employ 'human' rights, rather than legal variants of rights, because of the oughts contained within rights discourse.360 Human rights are after all moral claims. Human rights are portrayed as those things possessed by humans regardless of whatever else is possessed. They are seen as a moral standard against which is measured our treatment of persons. To have human rights is a moral demand and expectation that one will be treated in a particular manner, that is in keeping with a standard that applies to all humans everywhere. No matter whether we are minimalist in our view of human rights [life, liberty and property] or we are maximalist, so that our view of human rights reflects, as some detractors might say, little more than socio-economic 'shopping lists', human rights are demands that humans be treated in certain specific ways. Failure to do so is to fail the test of moral virtue.

We appeal to human rights also because they establish vulnerable people as our moral equals. Although the vulnerable are disadvantaged by virtue of their vulnerability, they remain nevertheless our equals in terms of moral worth and value. Whilst some of us are vulnerable all the time, and many of us are vulnerable part of the time, what we all share all the time is a moral equivalence that transcends whatever state of vulnerability we may (temporarily) inhabit. By employing human

360 Indeed, whether or not legal rights are valid is often determined by measuring them against some standard of human rights.
rights talk we therefore seek to both minimise the disadvantage that derives from whatever level of individual vulnerability we may experience, whilst at the same time we seek to reaffirm our belief that all people, vulnerable or not, are to be regarded as (on a moral level at least) fully functioning members of society. Human rights thus assume that all persons are at least equal moral agents and one way of asserting this is to establish rights that individuals, or those that speak for individuals, can claim.

In this chapter I have considered two groups of people, those aged who reside in this country’s residential aged care facilities and the mentally ill in general. In both instances notions of human rights are often couched or framed within policy initiatives that seek to bind both caregivers and vulnerable within an institutional-organisational context. Within this context the idea of human rights seeks certain protections for the vulnerable. At one level they have sought to secure specific standards of protection for vulnerable people from those that care for them on a daily basis. On another level they have sought to make institutions themselves responsive to the individuals and the unique needs of those who come within their particular borders. The question therefore remains; how effective has a rights driven approach been at protecting the vulnerable on a day to day level of personal care, and how effective has such an approach been in ensuring that institutions are themselves both responsive and sensitive to the needs of the vulnerable? Of course, throughout this thesis I have answered these questions indirectly on numerous occasions. In the next chapter I will concentrate on responding to this question directly.
In this chapter I will argue that as a philosophy of rescue for vulnerable people, or indeed as a moral code by which the treatment of any person is automatically assured or guaranteed, human rights have largely failed. It is surely the case that even the most cursory review of events at both domestic and international level would encourage one at least to be sceptical about the ability of human rights to ensure the care and protection of vulnerable people. As one professional organization recently noted, ‘the history of human rights is that of the struggle against exploitation of one person by another.’\textsuperscript{361} And whilst there are numerous human rights protections for ‘all members of the human family’,\textsuperscript{362} from the initial Universal Declaration of Human Rights to the various covenants and conventions seeking to protect specific ‘at risk’ groups – women, children, the mentally ill, refugees, migrants and so on - the depressing reality remains that ‘…the world is inflicting injury on millions of people as a matter of routine oppression.’\textsuperscript{363}

In reflecting upon international politics in recent times we are all too familiar with ‘the phenomenon of the “disappeared”, the torture of political prisoners, summary killings and arbitrary arrests, the extortion of confessions by physical and mental abuse…the detention of prisoners without trial, the economic exploitation of adults and

\textsuperscript{362} Taken from the ‘Preamble’ to the United Nations General Assembly’s ‘Universal Declaration of Human Rights’ of 1948.
children…[and the] re-emergence of genocide in situations of armed conflict.\textsuperscript{364} With regard to this last comment one might cite the actions of those such as Pol Pot, or Hitler, or Stalin, or even more recent events in the former Yugoslavia or Rwanda or Chechnya. And if one approached human rights from the point of view of social, cultural or economic goods, still there remains little hope for optimism as (again) even the most brief investigation into the sorts of issues that impinge upon the third world; poverty, starvation, infant mortality, the spread of AIDS, the effects of environmental degradation, social and cultural dislocation and the like, would reveal little security or protection from a paradigm of human rights.

Even in the industrialised west the marginalisation in social, political and economic terms that some groups experience appear extraordinarily resistive to the supposed benefits of human rights and their emphasis on equality of choice, opportunity and treatment and their promise of social justice and protection from harm. Within Australia there are numerous groups that one might look to for examples to support this hypothesis; Aborigines, migrants, (particularly those from non-English speaking backgrounds), refugees, the disabled, the very young, the homeless, the mentally ill, those in aged care facilities who are frail or who suffer from the various forms of dementia and so on. The above list is by no means exhaustive and has the flavour of the arbitrary about it. Yet it does remind us first, that much of the business of human rights is the protection of vulnerable peoples and second, that human rights has too often failed those whom it is charged to care and protect. No doubt some may argue that human rights have a variety of functions and are not simply charged with protecting the vulnerable. That may be so, but it is hard to imagine any value being placed upon a concept that is impotent to protect the weak and vulnerable despite what other benefits it might have.

\textsuperscript{364} International Federation of Social Workers, \textit{op cit}, p 55. [fn 361 at p 192]
In this thesis my argument is that human rights fail the vulnerable because of three inter-related reasons; first, the concept fails to accurately portray what it means to be a human individual – and a vulnerable human individual in particular; second, the concept cannot describe or address the sorts of situations that vulnerable individuals often find themselves in; and third, because of the emphasis upon rights, notions of duty and obligation which may effectively engage us with the vulnerable, are minimised. By extension it follows that if our current conception of human rights cannot protect the vulnerable then we may reasonably question its usefulness for any of us for, as I have already pointed out, we are all at various stages of our lives, vulnerable to a greater or lesser extent. In the previous chapter I focussed on both the mentally ill and the frail aged in nursing homes as ‘metaphors’ for the vulnerable. In the latter part of this chapter I want to continue that discussion, but first I want to make some introductory comments about some of the inherent tensions within the rights paradigm that, in themselves, have tended to compromise the idea of human rights.

ii] problems with human rights: some opening remarks

A central problem bedevilling human rights is the tendency of one right to contradict another. For example, privacy rights may be viewed as a challenge to freedom of the press, cultural identity rights may undermine some notion of a global equality and rights to freedom of speech may compromise the freedom to engage in what others might view as restrictive religious practices. In the day to day business of social life, human rights claims often do conflict. The right to the ownership of traditional lands made by indigenous groups, based upon prior occupancy, spiritual connection and cultural affiliation, may be at odds with similar claims made by European settlers, although based upon a more recent tradition of legal ownership and economic development. Dworkin’s notion that human rights are in some way to be regarded as
fundamental and pre-eminent moral entitlements over and above all other claims is naïve. Our determination of what we regard as ‘human’ rights, and the way we resolve disputes between competing rights, that is what human rights predominate over other human rights, is very much the stuff of politics and policy.

But rights theorists may argue that at least the articulation of such seemingly irreconcilable positions establishes a framework for discussion wherein opposing groups can formalise their claims and articulate their respective opinions. Yet human rights claims may be little more than a demand that all public debate cease. Often it appears that human rights have become increasingly politicised – used as a moral lever to achieve political ends by powerful interest groups who see the moral authority of rights as justifying claims that may not otherwise be regarded as socially valid. This is what I have referred to earlier as the rights paradox, where the concept is employed as a strategic weapon within the course of political debate to realise ends that otherwise may not stand the scrutiny of moral assessment. Jeremy Bentham saw within the assertion of natural rights a dubious moral authority that came at the expense of a rational and considered reflection. ‘The language of natural rights’ wrote Bentham, ‘require nothing but a hard front, a hard heart and an unblushing countenance. It is from beginning to end so much flat assertion.’365 And he went further; accept the plea of natural rights and ‘...you are an honest fellow, a true patriot: question it or so much as ask for proof of it, you are whatever is most odious, sinning equally against truth and against conscience.’366 Behind the supposed moral authority of men’s ‘natural rights’ Bentham saw the shadow of the guillotine.

366 ibid.
But human rights theorists may counter that, whilst there are indeed conflicting and perhaps even irreconcilable ambitions embedded within competing rights claims, nevertheless the articulation of such claims at least enables us to engage in moral talk and thus construct a set of moral principles by which we can develop a prioritised response to social, political and economic issues. This argument also has problems. It is true that rights inevitably embrace a moral dimension and may also help us to prioritise our values, but it is clear that we do not need rights talk to engage in moral debate, despite a tendency to collapse all moral and ethical discussion into talk about rights. There is more to moral discourse than human rights.

The implication is that it is frequently the case that human rights add nothing to moral debate that could not be achieved by other means. In this respect I agree with Frey who suggests that moral rights (of which human rights are but one variety) are either non-existent or if they do exist are superfluous. No matter which they are Frey suggests that, ‘I cannot see that anything is lost by giving up claims to moral rights altogether.’\(^{367}\) In the following I have made some obvious changes in order to reflect my own attitude, nevertheless it remains a fair representation of his position.

‘If such rights are superfluous, we do not require them in order to discuss our treatment of [vulnerable people]; and if there are not any, or it cannot be affirmed that there are, surely we would do better to concentrate directly on our treatment of [vulnerable people] and upon the task of working out among us both principles of rightness and justification of [the way we ultimately treat those who are vulnerable]…’\(^{368}\)


\(^{368}\) ibid.
Moral rights, and in particular human rights, are often either irrelevant (superfluous) or they are may in fact be actually harmful to those who are vulnerable. With regard to the issue of ‘superfluity’, we might refer to the example of the right to life which surely is the most fundamental of all moral rights (on the basis that if one does not have a right to life then no other right has any value). In the general course of a normal human life we all agree that to take the life of another is morally wrong. But why do we think like this? Is it the case that we do not wantonly and indiscriminately kill others because we have a deep respect for their fundamental and inalienable rights, or is it simply because we recognise that such acts are morally wrong? As Gower explains

‘...the belief that killing a person is wrong in that it violates his right to life
...(is)...equivalent to the belief that killing is wrong, but we need no doctrine of rights in order to defend that belief, therefore the right to life is a dispensable moral notion for it does no work that cannot be done more adequately in other ways.’

With regard to the issue of harm, it often appears that we have become seduced by the belief that human rights will resolve all the social and political dilemmas that we face. A commitment to human rights has often become a panacea for all manner of social, political and economic woes. But often by ascribing rights to vulnerable peoples all we really do is free ourselves from the responsibility to take truly firm and decisive action. Also, we free ourselves from the moral responsibility to account for the actions that we take or fail to take. By ascribing to all manner of powerless and vulnerable people a whole range of rights and freedoms (and the mentally ill and those with dementia are a good example of this) we hope, or assume, that such

groups of individuals will automatically be protected from all forms of abuse and neglect. We are thus freed from a more serious and considered appraisal of the impact that either the form of disability they suffer, or the consequences their social location has for them. We are also freed from a sincere and reflective consideration of how we, as agents, ought to engage those among us who are vulnerable within the day to day contacts we have with such people, a point I will develop in the final chapter. Human rights may simply encourage a degree of moral smugness and do nothing to address the many complex factors that act upon the vulnerable.

The above comments may be challenged, in part, by the assertion that duties often conflict with each other. Moreover, confusion and uncertainty about when and how to act may contaminate duties and obligations. Can we, then, derive any advantage by embracing a focus upon duties? My response is to say that a duties focus does provide an opportunity to engage the vulnerable in a particularly powerful way, a way that rights often overlooks because its attention is directed toward the right holder rather than upon those who are called to discharge duties. This 'change of focus' is crucial. Traditionally, within rights, we direct the moral spotlight to those who have entitlements, to those who are the recipients of rights, rather than focusing this spotlight on those who are required to act. A duties approach shifts this focus from those who are vulnerable, who are powerless, and directs it to those who stand in regard to them and who are called upon to discharge duties.

This change of focus, as I have called it, should not be underestimated. It represents a cultural shift. Currently the language of health care is a rights based language. This is not, altogether, inappropriate. But what is inappropriate is the exclusion of a duties based dialogue that addresses directly a culture of obligation; obligation in respect of those who are called upon to care and protect the vulnerable. The issue might be seen as one of balance or of complementary voices. Even though a
dialogue of rights expresses the sentiment of vulnerable well being, only when it is complemented by a dialogue of duties, a dialogue that can be embraced by caregivers, can the voice of the vulnerable be truly heard. I develop these ideas later in the thesis, particularly in chapter six, where I suggest possible avenues for engaging vulnerable people using the concept of the 'Other'. For now, I would make two final points. First, we need to address the institutional contexts within which the vulnerable find themselves so that institutions themselves are sensitive to the needs of vulnerable people. An emphasis upon a culture of duties at least provides us with a starting point to do this. Second, we must realise that such an approach will not solve all the problems we face. Some will still assert that duties are no answer, and other conflicts will remain, but all will no doubt agree that a crucial way to make vulnerable lives better is to make institutions, and those actors within institutional contexts, sensitive to the plight of vulnerable people. A focus on duties does turn the moral spotlight onto those who have the power and opportunity to make vulnerable lives better.

iii] the case against human rights: the main argument

In the remainder of this chapter I want to explore two ideas. First, that the image of man contained within the human rights paradigm powerfully overstates the degree to which individuals are rational, autonomous and moral agents, and second, that the concept of human rights cannot address the sorts of social situations that vulnerable individuals often find themselves in. My intention here is not to suggest that humans are not best described in terms of their rationality or their potential for rationality. Indeed they are. But this rationality is not without its limitations and qualifications. In crucial ways the image of man as a rational reflective agent is at odds with the image of man that confronts us from within the confines of his vulnerability and this reality
impacts upon the options and choices man has in terms of the social locations within which he, as vulnerable person, lives out his life.

on vulnerable individuals

The first question I want to address is this: how accurate is our assumption that individuals construct their world out of a rationally considered autonomy? Consider the following hypothetical from Meehl.

‘Suppose that you were required to write down a procedure for selecting an individual from the population who would be diagnosed as schizophrenic by a psychiatric staff; you have to wager $1000 on being right; you may not include in your selection procedure any behavioural fact, such as symptom or trait, manifested by the individual. What would you write down? So far as I have been able to ascertain, there is only one thing you could write down that would give you a better than even chance of winning such a bet – namely, “Find an individual X who has a schizophrenic identical twin”.'

The comment by Meehl remains as pertinent today as when he first proposed it over 40 years ago. If it tells us anything it tells us that much of the sorts of behaviours that individuals exhibit have their antecedents located within structures of genetics and biology that are often, and to a large extent, beyond conscious control. Take for example those collection of behaviours that are generally agreed upon to be clinical examples of a particular nosological entity referred to as schizophrenia. It is clear that at the heart of the schizophrenic syndrome lies an important genetic component.

This is not to say that schizophrenia is all genetics, clearly it is not. Yet there is overwhelming evidence to support the hypothesis that schizophrenia is an illness that is firmly located within a genetic environment. This is clearly demonstrated by the figure below.371

![Lifetime risks of developing schizophrenia among relatives of an affected individual](image)

The information in the diagram represents 'aggregated rates [for schizophrenia] based on about 40 European studies conducted between 1920 and 1987…[that]…were chosen for their similarity of diagnostic criteria and ascertainment procedures.'372 As the evidence suggests, the lifetime risk of an individual developing schizophrenia is about 1%, with this risk increasing the closer an individual is, in genetic terms, to one who has been diagnosed with the illness. In general the risk to first degree relatives is about 12% whilst the risk to second degree relatives is around 4%. What is most interesting in the above figure is the information

372 *ibid*, pp 247-248.
provided by twin studies. Monozygotic (MZ) twins are genetically identical whereas dizygotic (DZ) twins share on average only 50% of their genes. As Prescott and Gottesman point out, ‘if the proportion of MZ pairs similar for a disorder (concordance) is higher than that among DZ pairs, some degree of genetic influence is implicated.’ And the evidence suggests that if one MZ twin suffers from schizophrenia then there is almost a fifty percent chance that the other twin will also suffer from the illness. As an interesting adjunct to the above author’s report on data concerning MZ twins reared apart with little or no postnatal contact and where one twin has been diagnosed with schizophrenia. Only 12 such pairs of twins had, at the time of publication, been identified in the literature, and of these pairs seven were also affected with schizophrenia, resulting in a 58% concordance.

Whilst genetic factors are clearly crucial in the development of schizophrenia they are not the whole picture. After all, concordance for MZ twins is only about 50%. Factors such as birth trauma, maternal infection during gestation, social class, stressful life events and a variety of neuroanatomical and neurophysiological abnormalities are all implicated in the schizophrenic picture. Yet it is clear that much of what constitutes the illness lies within the realm of what we might describe as ‘biologically determined’. But schizophrenia, like all mental illnesses, is diagnosed by behaviours. That is, one makes a judgement of schizophrenia on the basis of identifiable and observable behaviours. These behaviours may be the self report of sufferers who describe auditory hallucinations, delusions, ideas of reference, paranoid thoughts, disturbance of body image and the like, or else odd, unusual or even bizarre actions that lead one to infer that schizophrenia may be present. What is at issue is the extent to which these behavioural displays that emerge from within

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373 ibid, p 248.
the context of mental illness, in this case schizophrenia, can be seen as an example of a rational, autonomous and moral agent making reflective sorts of decisions about how to live her life. I will return to answer this question directly but for now I want to address another aspect of this idea that people’s behaviour is often incompatible with a ‘reflective agency’, the kind of which lies at the heart of the human rights view of man. To do this I want to briefly address the idea of attachment and what might be considered ‘disorders’ of attachment.

The work by Levy and Orlans provides an excellent summary of the current understanding of the literature on attachment and I have cited them at some length below. They describe attachment as ‘the deep and enduring connection established between a child and caregiver in the first several years of life [that] profoundly influences every component of the human condition – mind, body, emotions, relationships, and values.’ They write that ‘attachment is not something that parents do to their children; rather, it is something that children and parents create together, in an ongoing and reciprocal relationship.’

This idea of attachment, which is ‘rooted in millions of years of evolution’, fulfils a number of crucial functions for children apart from the obvious one of ‘providing safety and protection for the vulnerable young…’ These functions include the ability to successfully regulate later adult behaviour; the establishment of a ‘prosocial moral framework’ that encourages and facilitates empathy, compassion, concern and caring for others; the development of a social conscience, and as well enables the emergence of a mature identity that manages ‘a balance between dependence and autonomy’. To be securely attached to another individual is to encode within the

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376 *ibid.*
caregiver/child relationship a feeling of ‘...nurturance, protection, availability, dependability, and empathic understanding, especially in times of stress or danger.’\textsuperscript{377}

But what of the consequences of ‘disrupted attachment’? Levy and Orlans write that, ‘children who begin their lives with compromised and disrupted attachment (associated with prenatal drug and alcohol exposure, neglect of physical and emotional needs, abuse [and] violence) are at risk for serious problems...’ such as low self esteem, antisocial attitudes and behaviours, a lack of empathy, behavioural and academic problems at school and poor self control. Such people are often needy and clingy, unable to develop and maintain friendships and are incapable of genuine trust, intimacy and friendship.\textsuperscript{378}

And the intergenerational consequences are profound. The literature in this regard is unequivocal. ‘Children lacking secure attachments with caregivers commonly grow up to be parents who are incapable of establishing this crucial foundation with their own children.’ Typically these parents, instead of protecting, loving and nurturing their children, ‘abuse, neglect and abandon’ them.\textsuperscript{379} The social consequences of disordered attachment are similarly profound and are manifested in what has come to be known as ‘affectionless psychopathy’ or, ‘the inability to form meaningful emotional relationships, coupled with chronic anger, poor impulse control, and a lack of remorse’.\textsuperscript{380}


\textsuperscript{378} Terry M. Levy and Michael Orlans \textit{op cit}, pp 1-2. [Fn 375 at p 202]

\textsuperscript{379} \textit{ibid}, pp 4-5.

\textsuperscript{380} \textit{ibid}, p 4.
Traumatic childhood experiences often set the path for later ‘dysfunctional’ adult behaviour. Reviewing the literature on the relationship between ‘pathological childhood experiences’ and later self destructive behaviour such as self inflicted injury and suicide attempts, Dubo et al identify predictive indicators such as parental neglect, parental separation, early physical trauma, and physical and sexual abuse. The authors cite research by Van der Kolk et al who ‘...found that histories of childhood trauma, particularly sexual abuse, and histories of childhood neglect were highly significant predictors of chronic suicide attempts, cutting, and other self injurious behaviour.’ Other predictors for poor adult outcomes are domestic violence and substance abuse. As Mitchell and Finkelhor point out, ‘children in families in which domestic violence is occurring have been shown to be at risk for a variety of adversities including behavioural, emotional and cognitive functioning, …and long-term developmental problems...’ This is not surprising, as parents who are preoccupied with their own safety cannot be effective, compassionate, warm and responsive caregivers themselves. Inevitably ‘children who have witnessed conjugal violence exhibit elevated behaviour problems at home and in other settings...’ In school-age males, violent, disruptive and aggressive behaviour is typically observed, whilst in females of a similar age, passive, clinging, withdrawn and dependent behaviour is the norm.

My comments on the above areas of the biological basis of schizophrenia and issues within the attachment and parenting literature are of necessity only cursory, but I think we can make two fairly brief statements with some degree of confidence. First,

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385 ibid.
I think we are entitled to say that there are a whole range of biological determinants that underpin the sorts of behaviours that people exhibit and which set the framework within which behavioural displays can be understood in general; and second, that the sorts of ways people are treated in their formative years has profound implications for the sorts of people they later become and thus for the sorts of ‘choices’ they later make with respect to the lives that they live.

These observations are surely not unwarranted. With regard to my brief comments on schizophrenia, it is clear that the subjective experiences that schizophrenics encounter and which themselves are the basis on which people with schizophrenia both interpret their world and form their (often quite irrational) responses are in no small way genetically determined. With regard to my comments on parent-child attachment, it seems perfectly reasonable to suggest that in general ‘pathological’ childhood experiences set the scene for later adult behaviour that may be described in similar terms.

What does this say about the possibility that human action is both rational and autonomous, that is, that people make informed, reasoned and reflective judgements about the sorts of lives they want (that is choose) to live? Does the paranoid schizophrenic entertain suspicious and hostile ideas directed at ‘others’ because she has reached the perfectly valid and reasonable conclusion that these ‘others’ (who can read her thoughts and are planning to do away with her) are in fact a threat to her own personal safety and security? Or are these beliefs a part of the symptomatology that describes the world of the schizophrenic and over which she has little or no control?

And if, as the literature asserts, that the best predictor of a parent who abuses or neglects his own child is a child who has suffered abuse and neglect at the hands of
his own parent, then what does this say about the possibility that one ‘chooses’ - in the sense of ‘rational, reflective choice’ - one’s own life? Or is it simply a coincidence that those who ‘choose’ to neglect or reject their own children were themselves neglected and rejected (presumably again by parents who ‘chose’ to neglect or reject)? What I am touching on here is how we view humans with regard to their social environment. Do humans rationally and intentionally select the lives they lead, or do the sorts of environments from which people emerge constrain the choices that people embrace? And if it is true that environments constrain or limit choices then what does this say about the picture of humans as rational, reflective and autonomous agents, who are free to choose the particular lives they lead from a whole range of possible choices? Yet the human rights paradigm, particularly the liberal perspective, both emerges from and supports this ‘master narrative’ which describes humans in terms of their ability to function as rational, autonomous and moral agents.

My intention in the above is to suggest that theories of human rights are implausible only to the extent that they portray individuals as rational, autonomous agents without accounting for those periods in people’s lives when they are particularly vulnerable and thus unable to assert or engage notions of rights. My intention is thus not to rebuke theories of human rights but it is to rebuke such theories to the extent that they focus on individual rights without accounting for the circumstances of people who cannot declare or claim their rights. How do the vulnerable claim their rights? My assertion is that without a strong emphasis upon notions of duty on behalf of caregivers then such people are effectively cast adrift. By using the term ‘caregivers’ I am meaning at least those who are charged with the care and protection of the vulnerable, in particular - as far as the frail aged with dementia and the mentally ill are concerned – I am referring to various health and allied health professionals as well as owners of facilities and those in government and bureaucracy. Notions of
human rights need to address not simply these people and their responsibilities to
the vulnerable, but also they must set out the terms and conditions, that is, the extent
of their duties and obligations. Without a strong notion of duties it is impossible to
either account for the lives of vulnerable people or to engage those lives.

There has traditionally been a current of thought within liberal democratic theory that
views the individual as a rational autonomous actor, able to stand beyond social and
political existence and judge for herself notions of right, justice and rational self
interest and act accordingly. Whilst such a view has advantages for those able to
purposefully and forcefully claim their rights, it says little for those whose judgements
may be impaired, who may be irrational, or who are not adept at making good
decisions about their lives, even if such impairment and irrationality and poor
decision making are only temporary. For a whole range of people, in particular
children, the chronically mentally ill, the intellectually disabled, and many aged and
infirm (particularly those within nursing homes), the ownership of a whole range of
rights and freedoms is largely irrelevant. For many mentally ill, for example, their life
is one of marginalisation, discrimination, disempowerment and stigmatisation.

Mental illness may impact upon various aspects of an individual’s existence,
disrupting schooling, employment, the formation of adult relationships, family life and
an ongoing and integrated sense of self. Whilst mental illness certainly affects
different people in different ways, its influence has often dramatic consequences for
both the personality and the cognitive performance of the individual, and thus of
course for the quality of choices that such individuals invoke with respect to the lives
that they lead.

386 There is much literature written both on stigma in general and stigma associated with mental illness.
I do not intend reviewing this. The classic work remains; Erving Goffman, Stigma: Notes on the
Management of Spoiled Identity, Harmondsworth, Penguin, 1963; but also see Megan-Jane Johnstone,
‘Stigma, social justice and the rights of the mentally ill: Challenging the status quo’, Australian and
Characteristically people with mental illness are isolated, alone, and often regarded not simply by their families but also the wider community as social, political and economic pariahs. This bleak picture is reinforced by Lawrence et al who observe that ‘people with psychiatric disorders find it more difficult to obtain and keep regular employment, have fewer friends, may be cut off from family members, and may drift into a lower socio-economic status and lower standards of living.’\textsuperscript{387} Yet as Hohfeld knew, one claims one’s rights. That is, one claims, or asserts, or demands them. This is an active and not a passive exercise. Indeed it is the purposeful, assertive and active claiming of rights that makes people powerful. But the problem is that those who cannot engage in such activity can be effectively excluded from any benefits that may accrue from the rights debate. In other words, the ‘master narrative’ of the assertive, reflective rights bearing creature has little or no relevance for those individuals who are defined in terms of their vulnerability, and particularly so when this vulnerability is at the extreme end. In such cases the narrative itself effectively bypasses the vulnerable in our midst.

\textit{on vulnerable locations}

In the previous chapter I considered the ‘promise’ that the concept of human rights held out for vulnerable populations. As an example of two vulnerable populations I focussed on the aged in this country’s residential care facilities and those people who come into contact with mental health services, that is the mentally ill. Ostensibly both of these groups are protected by a comprehensive array of rights that acknowledge, not only the sorts of personal impediments that such people face, but also reveal a sensitivity to the sorts of contextual locations within which their day to day lives are played out. With respect to these two groups of people we may therefore ask: does

\textsuperscript{387} D. Lawrence, C. D. J. Holman and A. V. Jablensky, \textit{Preventable Physical Illness in People with Mental Illness}, Perth, University of Western Australia, 2001, p 1.
the concept of human rights provide a powerful social and political force for the protection of such vulnerable individuals, or is this idea of human rights with its traditional focus on individual moral entitlements largely indifferent to the fate of the vulnerable within these particular locations? In answering this question I want to first consider the plight of the aged within residential facilities such as nursing homes, hostels and boarding houses and then I will focus on the position of the mentally ill.  

As Kapp points out, ‘the language of rights is the most common form of communication in the United States today, and its invocation particularly within the health and social service sphere is pervasive.’ Increasingly this is becoming the case in Australia as well. The *Charter of Residents’ Rights and Responsibilities* is that document which seeks to protect the rights of those elderly in residential aged care facilities, and although there has been an undoubted shift in the configuration of aged care services over the period 1985-1986 to 1996-1997, nevertheless nursing homes and hostels still play a major role in the aged care landscape. They are often places of last resort, especially for those who are frail, have a physical or mental impairment, have no social or family supports, or who are impoverished.

Distinctions are often made in the literature between residential facilities that are privately owned and run for profit, and those termed ‘not for profit’. With regards to standards of care and a resulting rights based discourse these distinctions are irrelevant. All residential care facilities, whether they operate as commercial ventures

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388 Making a distinction between the aged in residential aged care facilities and the mentally ill is somewhat arbitrary for it is clear that the population of such facilities consists in no small way of many people who suffer from mental illness. The purpose of making the distinction is simply to facilitate ease of discussion.
or as charitable concerns, exist within the same fiscally constrained environment that is bounded by the realities of limited budgets, the expectation that operating costs will be kept to a minimum and the requirement to deliver a standard of care that is economically sustainable.\textsuperscript{392} What is of crucial importance with respect to residential care facilities is the underlying cultural dynamics at work and the way these dynamics impact upon both residents and carers, and it is to these ‘dynamics’ that I now turn.

In the previous chapter we saw that the human rights identified and protected by the rights documents address issues such as quality of care, full information, individual privacy, freedom of movement, control over ones personal affairs and the right to be treated with dignity and respect. What are some of the dynamics that compromise the enjoyment of such rights? The first concerns the reality that those who enter residential care facilities are often unwilling and reluctant to do so. Research by Thomas makes it clear that few Australians actually want to enter a nursing home or hostel. In his study ‘a significant proportion of elderly residents perceived that they had been coerced into entering a home’, with the decision often being made by relatives, who ‘usually carry out this task with much pain and guilt and only when care is needed desperately’, or else it is made by the doctor of the respective individual concerned.\textsuperscript{393} Thomas cites examples of a 78 year old male who stated; ‘I had no option, it was all my son’s doing’, and an 86 year old male who said he had moved into the home because; the ‘doctor said I should...before I lose my marbles’, and a 93 year old male who reported;


\textsuperscript{393} Trang Thomas, \textit{A Place To Call Home: Life Satisfaction in Residential Care Facilities for the Elderly}, Melbourne, Centre for Applied Social Research, Royal Melbourne Institute of Technology, 1995, pp 9, 10.
'My nephew looked for this place, I had nothing to do with it…I'm not keen on this place…I'd rather be home with someone looking after me, but that's impossible I guess…I don’t know whether I’m in here for good or not.'

As Pinkerton-James points out, ‘for many elderly people, involuntary admission to an aged care institution can be the ultimate denial of human rights.’ It understates their helplessness and emphasises their dependence on the decision making power of others. But what is of equal concern is the resultant consequences of an involuntary admission. As she makes clear ‘the level of dependency and corresponding loss of power experienced is often without parallel.’ In the institutional setting it is often the case that ‘lives have to be adjusted to accommodate a set of routines imposed by a hierarchical structure in which the patient is at the bottom of the heap.’ This ‘adjustment’ often incorporates ‘the transition from person to patient’ and the resultant impact upon the individual’s integrity which, claims Irurita, causes ‘varying levels of “vulnerability”…’ But those who are ‘relocated’ to a nursing home in later life are often already vulnerable, as this move is commonly preceded by declining health, a loss of economic independence, a degree of cognitive impairment and emotional trauma such as the death of a spouse. Further, entry to a residential aged care facility may often come following an acute illness or a period of hospitalisation. Thus whilst nursing homes often encourage a powerless dependency this dependency may have begun prior to admission.

394 ibid, p 99.
396 Vera F. Irurita, ‘Factors affecting the quality of nursing care: The patient’s perspective’, International Journal of Nursing Practice, 1999; 5, p 87. Her description of vulnerability revolves around the ability of the individual to maintain personal integrity, ‘being an individual; remaining whole, intact, undiminished (physically and emotionally or psychosocially).’ p 87
The concept of ‘a set of routines’ identifies the reality that both nursing homes and hostels are structures that run according to disciplines, such as nursing, that are themselves overwhelmingly medically inspired and task orientated. As Hegyvary so astutely points out, ‘…nursing, like other health professionals, defines the world, including outcomes, through the lens of its own discipline’, and so the values and priorities that drive the discipline (like other medical disciplines) may be directed toward professionally derived (or institutionally derived) goals rather than any goals patients may have chosen for themselves.\textsuperscript{399} Nursing in particular has traditionally been orientated to hospital and institutional care\textsuperscript{400} where the emphasis has been upon specialised functions, hierarchical authority, routine and regimentation, all of which ‘…limit the capacity of the services to tailor assistance to individual needs’ and in particular those needs that fall outside the scope and content of medically based interventions.\textsuperscript{401} Whilst it is no doubt true to say that ‘the greatest protection for the older adult resident’s rights and autonomy is the policies of the nursing home’\textsuperscript{402} still it often seems that the task orientated regime of residential aged care institutions function to undermine a sensitivity to individual difference. The day to day routine of the nursing home in particular (and to a lesser extent the hostel) may consist of waking the residents up, dressing and showering them, changing those who are incontinent, feeding those who cannot feed themselves and giving out medication at prescribed regular intervals during a 24 hour period. In addition to these regular daily duties, the role of nurses and carers in general involves monitoring those who present with behaviour problems and attending to those who are particularly frail or

\textsuperscript{399} S. T. Hegyvary, ‘Outcomes research: Integrating nursing practice into the world view’, in. \textit{Patient Outcomes Research: Examining the Effectiveness of Nursing Practice}. Proceedings of conference sponsored by the National Centre for Nursing research, USA, 11\textsuperscript{th} – 13\textsuperscript{th} September 1991, Rockville, USA. National Institutes of Health, 1992, p 17.

\textsuperscript{400} M. Crouch and C Colton, \textit{The Course of Community Health in New South Wales}, University of New South Wales, Australian Studies in Health Service Administration, 1983.

\textsuperscript{401} Michael Fine and John Stevens, ‘Innovation on the Margins: Aged Care Policies Since White Settlement’, in. Celia Bevan and Basseer Jeeawody [eds] \textit{op cit}, p 84. [En 159 at p 101]

sick. The demands of feeding, toileting, changing and bathing often appear never ending. This is a schedule that demands adherence to tasks and times rather than the diversity of individual needs and differences so that individual rights, even individual ‘human rights’, are often sacrificed for the smooth running of institutional routines.\footnote{Perry Whalley, \textit{op cit.} [fn 395 at p 211]}

Caring for the aged is physically and emotionally taxing, yet the reality is that those who are employed in nursing homes, hostels and indeed boarding houses are mostly without professional qualifications. Once again human rights considerations are undermined. As Fine and Stevens state, ‘…over 57 percent of the workforce directly responsible for caring for elderly people are untrained assistants in nursing or personal care attendants.’\footnote{\textit{ibid}, p 85.} Concerns such as these go to the heart of the provision of a high standard of care for the elderly in residential accommodation. Staffing levels in such institutions have been of considerable concern to professional groups. The Australian Nursing Federation [ANF] has long been campaigning not simply for more staff but also for what is described within that profession as an appropriate ‘skills mix’, that is, to have appropriate levels of experienced staff caring for the most physically and mentally impaired residents. According to the ANF the aged care industry is characterised by an exodus of registered and enrolled nurses. In a recent survey conducted by the Victorian branch there were more than 2400 vacant shifts in responding nursing homes.\footnote{Fiona Armstrong and Heather Witham, ‘Aged Care: Time to stop the exodus’, \textit{Australian Nursing Journal}, May 2001, Volume 8, p 26.} Partially the staffing shortage is because experienced nurses can earn up to $130.00 a week more in the public hospital sector and partially it is because nurses have been reduced to quasi governmental bureaucrats.\footnote{Sally Moseby, ‘The stress of aged care documentation’, \textit{Australian Nursing Journal}, May 2002, Vol 9, No.10 p 27. Moseby writes that the excessive documentation required by registered nurses in aged care ‘…frequently exceed the capacity of nursing staff to physically fulfil the task without creating work overload; reducing time … for clinical nursing practice [and that] RNs often perform}
‘…overwhelmed with paperwork and…frequently unable to meet even the basic needs of their residents.’ 407 This exodus has seen ‘reduced staffing levels and inappropriate skill mix in many facilities, where staff who are paid less are substituted for more costly staff.’ 408 Thus economic imperatives often effectively override human rights considerations with the consequence being that standards of care suffer.

The above comments point to a general abandonment of the aged when it comes to the provision of specialist services. Of particular interest are those aged who suffer from mental illness. Referring to the American situation, Zarit and Knight comment that ‘in many ways, nursing homes have become the mental hospitals of the 1990s [but whilst] in most facilities, a majority of residents have significant psychiatric symptoms…typically little or no treatment is provided.’ 409 Numerous studies have pointed not simply to the high numbers of residents in nursing homes who suffer from problems of mental illness such as dementia, depression, anxiety and panic disorders, but also to the paucity of psychiatric services available for such people. 410 With regard to the Australian context, Snowden notes comparable rates of mental illness amongst nursing home residents; that is, dementia above 80% with 25% to 50% of sufferers having psychotic symptoms, depressive symptoms displayed by 30% to 50% of residents, 13% having mild anxiety symptoms and a point prevalence of 6% to 7% for delirium. 411 Snowden uses the term ‘forgotten people’ to refer to the aged in nursing homes with mental health problems. In commenting on nursing homes surveyed in the Sydney area he notes that only 19% received specialist documentation duties at home in order to remove themselves from the distractions and demands of residents’ needs.’

407 Fiona Armstrong and Heather Witham, op cit. [f/n 408 at p 215]
408 ibid.
410 Catherine Selth Spayd and Michael A. Smyer, ‘Psychological Interventions in Nursing Homes’, in. Steven H. Zarit and Bob G. Knight [eds] ibid, pp 243- 244.
psychiatric or psychological services for three or more hours a month and that ‘at least 28% (of facilities) provided no ongoing education to their staff about dementia or other psychiatric problems.’\textsuperscript{412} In commenting on Snowdon’s criticism of residential aged care in Australia, Arie writes, with no attempt to conceal sarcasm, that ‘…the familiar ‘inverse care law’ operates – in nursing homes the concentration of psychiatric morbidity is highest, whilst involvement of, and access to, psychiatry is often least’,\textsuperscript{413} and Edmond Chiu observes that Australian aged care policy demonstrates, ‘…a continuing neglect of mental health issues of our most vulnerable elderly citizens in residential care.’\textsuperscript{414}

Another factor that functions to typically undermine the notion of human rights within residential aged care facilities is the inappropriate mix of residents. This is a perennial problem. \textit{The Burdekin Report}, for example, noted the tendency to place dementia sufferers in nursing homes and boarding houses and often amongst those who do not experience the degree of cognitive and behavioural impairment that is so characteristic of that disorder. Many dementia sufferers are ‘physically well and inclined to wander’ and thus their intrusive behaviour can seriously compromise the personal privacy of those not similarly afflicted. As one submission to the \textit{Burdekin Report} made clear;

‘In a nursing home situation someone with dementia can…rummage in somebody else’s locker or dressing table. They can get into the wrong bed. And the normal aged get very upset by this sort of behaviour…because that

\textsuperscript{412} \textit{ibid}, p 110.
\textsuperscript{413} Tom Arie, ‘Commentary 1’, \textit{Australasian Psychiatry} Vol.9, No.2, June 2001, p 112.
\textsuperscript{414} Edmond Chiu, ‘Commentary 2’, \textit{Australasian Psychiatry} Vol.9, No.2, June 2001, p 113.
bed and that dressing table is their only private space left in that time of their life.415

The dual problems of staffing levels and an inappropriate mix of residents is most marked however within privately run boarding houses and hostels. In recent years the Victorian Community Visitors have drawn attention to these facilities and in particular to those facilities at the lower end of the residential aged care market which target individuals who have few personal resources, little family support, are in a crisis situation, and who are economically poor.416 Within the Victorian health care system these facilities ‘have become places of last resort for many of the most disadvantaged in our community’,417 and so the diverse mix of residents has become a feature of these facilities. Within such establishments there are ‘frail older people, individuals with acquired brain injury, younger people with a mental illness, as well as residents with intellectual disabilities.’ In addition there are also ‘many residents who suffer dual or multiple disabilities and have even more complex and high level care needs.’418 Yet despite the fact that many residents have ‘multiple and complex disabilities’, the Report notes that ‘the vast majority of the staff who work in (these facilities) have had little training to equip them for this task.’419

The combination of an inappropriate mix of residents with multiple problems, poor staff-resident ratio and staff with inadequate training, seriously undermines the quality of life of residents in these privately run boarding houses. Some examples from the Report by the Community Visitors is instructive:

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415 page 513
417 ibid, p 1.
418 ibid, p 8
419 ibid, p 31.
‘Often Community Visitors are concerned to note that there is only one member of staff on duty – someone who is doing a multitude of tasks such as cooking, cleaning, providing personal care, answering the phone, dispensing medications and much more.’\(^{420}\)

‘…Community Visitors have gone to facilities and found that the one staff member on duty cannot speak English but is in charge of a home with predominantly English-speaking dependent residents.’\(^{421}\)

‘Community Visitors were surprised to note on a recent morning visit to an “up-market” facility for 30 frail aged residents that 11 staff were on duty. These included the manager, personal care attendants, cleaners, laundry staff, kitchen staff and office staff. The contrast with the previous facility…was stark. In this [previous facility], home to 28 residents with varying but quite complex needs, the proprietor was the only person on duty and was attempting to provide personal care, clean, prepare the lunch and much more.’\(^{422}\)

‘Community Visitors have noted that in one facility a staff member is rostered from 6.00 am until 10.00 pm seven days a week. In another facility, the personal care attendant is listed on duty for seven days of the week. There are further examples of night sleep-over staff who have been on duty since 4.30 pm the previous afternoon staying until 10.00 am the next morning to serve the breakfast and shower the residents.’\(^{423}\)

\(^{420}\) ibid, p 32.
\(^{421}\) ibid, p 33
\(^{422}\) ibid, p 32.
\(^{423}\) ibid, p 34.
What is the resultant impact on the quality of life of the residents? In particular with regard to low fee private facilities, the Victorian Community Visitors have noted serious concerns with cleanliness, hygiene, nutrition and the degree of social isolation experienced by residents. Social isolation is a feature of residential care facilities in general. It is manifested in a variety of ways. First, by the fact that many residents are unwilling participants in residential life. Second, by being separated from environments, family and friends that are familiar to them, residents are effectively confined to a social space that is often alien and frightening. Third, because of demands that residential care facilities are managed with a close eye to the economic bottom line, there is frequently little latitude for proprietors to provide full activity programmes run by occupational therapist or psychologists. Boredom is a well documented feature of care facilities and particularly so with the more dependent residents who cannot come and go as they please. Thomas reports one 83 year old widow as saying, 'I used to count cars passing in the street when I first came here, then the red cars, then how many cars passing in a minute.'

The diverse mix of residents in aged care facilities is not conducive either to social interaction or the expression of individual preferences. At the end of their lives a whole variety of people with different views, values, interests, backgrounds, likes and dislikes are often thrown together into residential life. Problems emerge from the vastly different needs (based upon disability and level of frailty) that each individual presents with. Problems are magnified when residents, who may have lived alone all their life or with one spouse from who they are now separated, are forced to share a room with people they have never met and indeed, and if not for their inability to function by themselves, would never choose to spend time with. Single rooms in aged care facilities, particularly for the very frail and sick, are few. Rather, the tendency is for dormitory style accommodation of two or four beds to a room. This is

424 Trang Thomas, op cit, p 108. [En 396 at p 212]
in line with the view that the frail aged are more easily (with respect to economic determinants) 'managed' in dormitories where fewer staff are required for the task orientated routines of daily life. And the result of residential culture for those frail aged who rely on others for their survival is grim. As Coleman recently and pointedly commented;

‘old ladies dread their loss of dignity as time-pressed aides, frequently male, fail to attend promptly to their need for help with toileting. Day rooms are crowded; the disabled unable to feed themselves, must wait until time can be made for their feeding.’

Little wonder that the ‘stated position’ of ACT Disability Aged Care Advocacy Service is that ‘aged care facilities are institutions [which are] inherently abusive.’

In the above I referred in passing to those in residential aged care facilities where the incidence of mental illness is disturbingly high. In the following I want to focus more directly on the experience of the mentally ill within some other institutional contexts. These contexts are diverse and may include the acute hospital setting, community psychiatric clinics, outpatient contacts, hostels, boarding houses as well as prisons and other places of detention. The obvious starting point for a discussion of this sort is the Burdekin Report which, although completed now some nine years ago, remains the benchmark for any understanding of the way that location impacts upon the mentally ill within Australia.

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426 Standing Committee on Health and Community Care, Elder Abuse in the ACT Report No. 11, Legislative Assembly for the Australian Capital Territory, August 2001, p 18.
The Report made it clear that those who come in contact with the mental health system are confronted, on both a structural and a personal level, by an institutional context that is fundamentally corrosive of the ethos of care and protection. On a structural level the Report described numerous inequities within the system; a lack of mental health crisis teams in areas beyond metropolitan centres; a related paucity of mental health professionals for rural and regional locations; the tendency for police to be seconded as mental health workers particularly with respect to emergency transportation to hospital - with the result being that mental health problems tended to become 'criminalized'; the inadequacy of existing community based services to treat people with a mental illness in a least restrictive environment; and problems in gaining access to hospital beds, for either voluntary or involuntary patients, to forestall breakdowns, due to inflexible and rigid admission criteria.428 Thus Burdekin concluded that,

‘people affected by mental illness are amongst the most vulnerable and disadvantaged in our community. They suffer from widespread, systematic discrimination and are constantly denied the rights and services to which they are entitled’,429

and he identified a variety of particularly disadvantaged groups such as; children and adolescents, the elderly, the homeless, women, Aboriginal and Torres Strait Islanders, people from non-English speaking backgrounds and prisoners, all who bear the burden of already existing social disadvantage in addition to 'seriously inadequate specialist services.'430

428 These issues are addressed throughout the Report but are summarised within chapter 31 ‘general findings and recommendations’, pp 908-947.
429 p. 908.
430 ibid.
On the personal level of day to day interactions between sufferers of mental illness and those professionals who are charged with their care and protection, the Report noted numerous instances of neglect and downright abuse directed at the vulnerable. This abuse and neglect was not simply confined to psychiatric hospitals but common throughout the entire mental health system. Inpatient services were a particular concern. With respect to this traditional way of caring for people with a mental illness, Burdekin declared that, ‘the fact remains that the very large body of evidence received concerning inpatient treatment was overwhelmingly negative.’

Evidence presented to the Inquiry described ‘harassment, intimidation and physical abuse’, as well as evidence that the mentally ill were ‘devalued, dehumanised and their views ignored.’ Reference was made to the ‘frequent neglect’ of ‘the physical well being of people in psychiatric hospitals’ and it was clear from the many submissions to the Inquiry, from patients to carers to professionals, that a denial of respect for the worth and dignity of the individual, surely the essential constituent elements of any human rights ethos, was a daily occurrence. In summarising the experience of being an inpatient within the mental health system in Australia, Burdekin noted that:

‘…the extensive evidence submitted by consumers, clinicians and carers who have experienced inpatient hospital “treatment” clearly indicates that insufficient planning and seriously inadequate resources have been devoted to providing appropriate care. The loss of dignity and respect suffered by consumers represents a clear denial of their fundamental human rights.’

Relationships between staff and patients within psychiatric facilities present a difficult problem for documents such as the Report. For a start the evidence presented was

431 p 236.
432 p 237.
433 p 238
uniformly bleak. Of particular concern was a ‘considerable body of evidence’ pertaining to staff assaults on patients which, in some cases, included sexual assaults. The Report noted that ‘many of the consumers who gave evidence of sexual assaults in hospital emphasised that they had been unable to subsequently pursue the matter, because staff claimed they had been deluded or fantasising due to their mental illness.’ And herein lies the dilemma. Mental illness, especially that severe enough to warrant hospitalisation, is often characterised by delusional ideas and so there may seem to be compelling reasons to dismiss the claims of those who suffer from major mental illness, especially when there is no corroborating scientific evidence or corroborating statements from other mental health professionals. Yet in so doing one simply marginalizes the mentally ill even further and banishes them to some outer world where their every experience is regarded as invalid.

But apart from assertions of serious physical and sexual assault there were more ‘routine’ concerns directed, for example, at the inappropriate use of medication. The Report received much evidence that medication was often used as a behaviour management technique, and as well was often administered by threat, coercion or force. Burdekin noted evidence from many patients who reported forcible injections from nursing staff:

‘Witnesses described being held in headlocks, being sat on, having both arms and legs held down, being punched, pushed, pulled, held up against walls, and wrestled to the floor during these instances.’

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434 p 273.
435 pp 239-246.
436 p 246.
Whilst Burdekin noted that, in some instances, there was a need for compulsion as regards treatment, he nevertheless pointed out that fundamental human rights issues were raised concerning the forcible administration of medication, and suggested that ‘a culture of acceptance has developed in some hospitals and ward environments, so that staff become insensitive to the extreme dehumanisation implicit in such “treatment” ’, and further he noted that;

‘…it is clear that one of the main problems associated with large institutions is that they foster a custodial mentality – associated with a lack of accountability – ultimately reflected in a lack of respect for the individuals they are supposed to care for.’

And within mental health institutions, as within aged care facilities, the quality of the sorts of lives that are lived by patients (or residents) is determined in no small way by the staff who are employed. Their power is all encompassing. As Parsons reminds us;

‘…service users can quite typically be in situations where they are reliant on staff for the realisation of virtually all their rights. This can give staff, and services generally, a considerable degree of power in determining which rights will be safeguarded and which will be forfeited.’

The Report demonstrated the inability of ‘human rights’ to effectively challenge a mental health system wherein the vulnerable are confronted with numerous powerful authority figures, such as doctors, nurses, psychiatrists, psychologists and so on.

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437 p 247.
438 p 273.
Whilst human rights proposes the idea that all people are essentially equal (fundamental and inalienable rights) in terms of social and political being, the experience of the vulnerable is often quite the opposite. Particularly as patients within the variety of locations wherein such people often find themselves, the mentally ill are enmeshed within a political culture that is particularly hostile to the expression of social and political equality.440 One way of thinking about political culture is to consider the sorts of loyalties and priorities that impinge upon people. If, for example, the psychiatric nurse is an advocate for patients’ rights, as some current theories suggest,441 what implications does this have for other relationships when human rights issues emerge? The nurse is also an employee of an institution, a co-worker with other nurses, part of a mental health team incorporating psychiatrists, medical doctors, social workers and psychologists. Political culture may demand the nurse puts loyalties to the employer, co-workers, or the mental health team over a patient’s ‘human rights’, however they may be defined. For professionals who challenge institutional political culture the results can be costly. As Baldwin and Barker wryly comment, ‘most services do not appear to have reached the state of evolution whereby in-house critics, or other dissident voices, are rewarded for their contribution to the promotion of good practice.’442

But apart from such instrumental problems, advocacy has philosophical problems as well. At the heart of the human rights ‘narrative’ is the commitment to the idea that rational, autonomous individuals define and articulate their own particular conception

440 By ‘political culture’ I refer to Verba’s idea of a ‘system of empirical beliefs, expressive symbols, and values which defines the situation in which political action takes place.’ L. Pye and S. Verba [eds], Political Culture and Political Development, Princeton, New Jersey, Princeton University Press, 1965.
of the good. When ‘the good’ is articulated on one’s behalf, at best it dilutes the moral force that accompanies human rights and at worst it denies authenticity by giving voice not to the voiceless but to interlocutors who ‘claim’ to speak for the voiceless. Harding puts advocacy into perspective when she writes that,

‘we have heard entirely too much from men about women and gender, from whites about Blacks and race, from heterosexuals about lesbians, gays, and sexual preference, and from economically powerful people about workers and why the poor are poor. Claiming to adopt the critical persona of the Other in the name of her emancipation is unlikely to earn the applause of the Other.’

Of course for the mentally ill themselves there are costs associated with the assertion of rights. The unhappy reality for many mentally ill is chronicity or at least episodic admissions to hospital. The Burdekin Report noted the reluctance of consumers to identify themselves in case they had to return to the same hospital and thus possibly confront staff about whom they may have made complaints. In other words ‘they feared repercussions, should they be admitted, for having spoken out about nurses or doctors.’

Thus evidence was given to the Inquiry by residents from a group home in Victoria who described staff as ‘at times cruel and sadistic’ with documented corroboration not only of violence from staff but also accompanying threats that if there were complaints then ‘they [the patients] would receive similar treatment.’

As imbalances of power and the sorts of relationships such imbalances engender undermine complaints by mental health consumers, (or even ensure that such complaints are not made in the first place), so similar obstacles can confront

444 p 258.
445 ibid, p 259.
professionals at institutional or departmental level. In 1995 the *Reconvened Inquiry into the Human Rights of People with Mental Illness (Victoria)* was released. As its title suggested, this report looked at developments in Victoria since the original national inquiry into the human rights of mentally ill people was conducted. This report documented numerous instances of intimidation and retribution by the Department of Health and Community Services towards a whole range of individuals and organizations within the mental health area in Victoria. This intimidation was directed towards psychiatrists, psychiatric nurses, public servants and members of mental health advocacy groups, indeed any organization or individual who spoke out against what they saw as shortcomings within State government management of mental health, either in terms of policy or practice.

Intimidation and retribution allegedly took the form of the removal of senior mental health nurses from departmental committees, forcing critics into retirement or redundancy, the removal of people with mental health experience from positions of responsibility within the Department and replacing them with generalist managers, and the disciplining of health workers at Department level. As far as advocacy and non-government groups were concerned, such intimidation and retribution focussed on funding cuts, thus severely limiting such group’s ability to function. The issues that were often the source of this conflict were those that are seen by the supporters of ‘human rights for the mentally ill’ as going to the heart of issues relating to care and protection. These involved the reduction of services for the mentally ill and reduced funding to mental health programs. The resultant impact for mental health care can be found within areas such as staffing levels on wards with acutely

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447 *ibid*, pp 13-19.
disturbed patients, bed availability for those mentally ill in crisis situations and quality of service delivery.\footnote{ibid, pp 20-23.}

In more recent times it has become clear that context remains a powerful challenge to human rights claims. In mid 2001 the St Vincent de Paul Society released its long awaited assessment on mental health and social justice in Australia.\footnote{Colin Robinson, \textit{A Long Road to Recovery: a social justice statement on mental health}, Petersham, New South Wales, St. Vincent de Paul Society, July 2001.} Within this report the issues confronting the mentally ill bore a striking resemblance to those that confronted Burdekin in the early and mid 1990s; large numbers of mentally ill accommodated within hostels and refuges; overly strict admission criteria preventing the mentally ill from gaining access to inpatient care – thus forcing already overburdened and under resourced sufferers and families to cope unsupported; a lack of follow up and counselling for patients discharged from hospital; scarce and difficult to access respite care and supported accommodation particularly for patients with complex problems, and community based resources that remain under funded and fragmented – and this whilst, as the St. Vincent de Paul document noted, there has been a 60% decline in psychiatric beds available in New South Wales over the past ten years.\footnote{ibid, p 6.} As Burdekin had previously observed, the process of deinstitutionalisation sanctioned by the Richmond Report was never accompanied by government commitment, in terms of either financial or human resources, for community based options.\footnote{New South Wales. \textit{Inquiry into Health Services for the Psychiatically Ill and Developmentally Disabled, Inquiry into health services for the psychiatrically ill and developmentally disabled}, Department of Health, N.S.W., Division of Planning and Research, Haymarket, N.S.W. :Department of Health, N.S.W., Division of Planning and Research, 1983} The underlying message here is that human rights have found it impossible to overcome the political and economic hurdles that stand in their way.
In terms of context I want to make one final brief comment and this has to do with the numbers of mentally ill in the Australian prison system, which can in fact be considered the third major institutional repository of mentally ill persons in this country.\textsuperscript{452} The mentally ill have generally fared poorly when they have come into contact with either law enforcement agencies or the criminal justice system in general. For example, more than a third of those shot by police in Australia during the years 1990-1997 were identified as being either depressed or as having had some form of psychiatric illness.\textsuperscript{453} The prison system itself is characterised both by a preponderance of mentally ill and intellectually disabled people, and a noticeable lack of specialist services to attend to the needs of these people. According to New South Wales figures, 13\% of inmates have an intellectual disability, 21\% have attempted suicide and 40\% meet the diagnosis of Personality Disorder. With respect just to the female population 23\% are on psychiatric medication and 73\% were previously admitted to psychiatric or mental health units.\textsuperscript{454} A 1997 report into inmate health in the NSW prison population revealed that 50\% of women and 33\% of men had received some form of assessment or treatment by a psychiatrist or psychologist at some time in their life, and of these some 36\% of women and 34\% of men had previously been admitted to a psychiatric unit or hospital.\textsuperscript{455} And in evidence given to the NSW Legislative Council Interim Report on the Prison Population, Associate Professor Susan Hayes reported an increase in the prevalence of adult prisoners with an intellectual disability, from 12.5 per cent in 1988, to 17.5 percent in 1998 and 19.3 per cent in 1999.\textsuperscript{456}

\textsuperscript{452} Of course the other two are designated psychiatric facilities and nursing homes.
\textsuperscript{454} Annual Report of the Department of Corrective Services, NSW for the year ended 2001, Sydney, New South Wales, Department of Corrective Services, October, 2001.
\textsuperscript{455} New South Wales Corrections Health Service, Inmate Health Survey, November 1997.
\textsuperscript{456} Select Committee of the Legislative Council of New South Wales, Interim Report: Issues Relating to Women, Sydney. July 2000. The evidence tabled by Hayes (27\textsuperscript{th} March, 2000) has been disputed by the Department who claim that the incidence of intellectual disability in NSW prisons is actually much lower; see pp 53-54 of the report.
The above evidence tends to support the belief that ‘...our prisons [are] becoming the new psychiatric institutions of NSW’, particularly with the increasing tendency to imprison people for offences related to mental illness, homelessness and poverty.\footnote{Dr. Eileen Baldry, Press Release from the University of New South Wales’ School of Social Work, 16\textsuperscript{th} October 2001.}

Mullen concurs with this view. In noting ‘...an increasing willingness to imprison the mentally ill’, he comments that, ‘arguably the mentally disordered are being preferentially selected into the new prison populations.’\footnote{Paul Mullen, \textit{A review of the relationship between mental disorders and offending behaviour and on the management of mentally abnormal offenders in the health and criminal justice services}. Canberra, Criminology Research Council, 2001, p 28.}

Why this is so is unclear,\footnote{Mullen suggests a number of plausible reasons; a greater willingness to incarcerate those individuals who commit the sorts of crimes typical of the mentally ill – public nuisance, social security fraud, repeat thefts, drug related crimes, breaches of suspended sentences or supervision orders for example.\footnote{For each state and territory the prison population numbers with special forensic service components available in prison-hospital units are: NSW 7697 (90 beds); QLD 4466 (nil); VIC 2858 (15 acute, 30 non-acute); WA 2352 (nil – unit is planned); SA 1385 (nil); NT 635 (nil); TAS 314 (25 beds); ACT 199 (nil - unit is planned). Paul Mullen, \textit{op cit}, p 30.}} but what is clear is that once in prison there are precious few specialist resources to care for, protect or treat this particularly vulnerable group. For example in NSW with a prison population of 7697 there are 90 specialist forensic prison hospital unit beds. In the Northern Territory, Queensland, Western Australia and South Australia there are none and in Victoria, with the third highest prison population of 2858, there are only 15 acute beds and 30 longer term beds.\footnote{Jenny Green, ‘Experiences of Inmates with an Intellectual Disability’, in. David Brown and Meredith Wilkie [eds], \textit{Prisoners as Citizens: Human Rights in Australian Prisons}, Sydney, Federation Press, 2002, pp 49-63.}

Green notes both the paucity and fragmentation of services available for inmates with an intellectual disability, in addition of course to the ‘threatened and actual physical and sexual violence...’ within the ‘...hostile prison environment...’, where the rights of the intellectually disabled are often disregarded and in some cases actually violated.\footnote{And as a general comment Ogloff writes that; ‘Despite the prevalence of mentally ill people in the criminal justice system and the difficulties that surround them, few services exist to help identify and...}
treat those offenders who suffer from a mental illness. Fewer resources exist still to help ensure that when released the mentally ill offenders will receive the services they require in the community to help them become re-integrated and to reduce the likelihood that they will return to gaol.\textsuperscript{462}

\textbf{v] \ the case against human rights: some concluding remarks}

In the preceding two chapters I have discussed first, what promise human rights hold for vulnerable people, that is the aged with dementia and the mentally ill, and second, how this promise has been enacted. It is clear that in those social contexts wherein vulnerable people live out their lives, the residential aged care facility and the variety of locations where we typically find the mentally ill (hostels, nursing homes, psychiatric hospitals, prisons), a variety of factors conspire to undermine the integrity of the individual and render the notion of individual rights as largely irrelevant. I am here focussing on institutional contexts. How do we make institutions sensitive to the rights individuals have so as to enable vulnerable lives to flourish? My assertion is that we need to focus upon the duties and obligations that caregivers within such structures have in order to engage notions of rights and make them relevant. In Australia, and particularly with the aged and the mentally ill, we have paid little attention to such an approach.

Henry Shue deals directly with the issue of making rights relevant.\textsuperscript{463} Shue maintains that, in general, the dichotomy between negative rights (rights to be left alone) and positive rights (rights to be provided with goods and services), is misleading. The position Shue is arguing against is that which sees negative rights (often referred to


as security rights) as somehow more valid and more basic than positive rights (often referred to as subsistence rights). Positive rights, so it is claimed, are rights that require people, mostly states, to act in certain ways to provide goods and services, such as schools, food, shelter, health care, clean water, pollution free air and so on, whereas negative rights only require individuals and states to for bear – to ensure the safety and security of citizens and then to stand aside and let people live their lives as they see fit. The former require intervention in the life of the individual and state regulation of social and economic life, whilst the latter maximise individual freedom and reduces the intrusive and coercive power of the state.

Shue argues, convincingly, that the dichotomy is false. Rights cannot be easily divided into positive and negative. Even negative rights (to safety and security) involve taking what he calls ‘a wide range of positive action’ such as ‘police forces, criminal courts, penitentiaries, schools for training police, lawyers, and guards, and taxes to support an enormous system for the prevention, detection, and punishment of violations of personal security.’\footnote{ibid, pp 37-38.} All rights are in fact a combination of positive and negative interactions and thus all rights involve individuals in a mix of acting and refraining from acting. In this way we may say that for any right at all to be enjoyed there must be an inexorable mix of rights and duties. Thus Schue suggests that for the enjoyment of a right, whether positive or negative, whether rights to security or rights to subsistence, whether rights to for bear or rights to be provided with any variety of goods and services, there are three essential types of duties which can be seen as correlative. These are duties to avoid depriving (a person of their security or their means of subsistence); duties to protect people from being deprived (of their
security or their only available means of subsistence); and duties to aid those so
deprived (of either their security or their subsistence). 465

The above duties of course apply to different people in different ways depending
upon the context within which those threatened with deprivation and those charged
with protection exist. But it is only when the rights/duties dichotomy is in fact seen
not to be dichotomous are we beginning to appreciate the complexity of interactions
and engagements that sustain rights. There is clearly an interdependence here with
rights depending upon duties and duties depending upon rights in a subtle way that
makes dichotomous interpretations implausible. There is an interdependence of
benefits and responsibilities so that, as Schue points out, 'no one is assured of living
permanently on one side of the rights/duties coin.' 466

Shue’s argument clearly has important implications for the way institutional contexts
are arranged so as to maximise human rights protections for individuals. The way to
protect human rights is to ensure that institutional arrangements are sensitive to
rights/duties interrelationships. Pogge is in agreement with this but I think Pogge
introduces a dimension that personalises notions of rights and duties in a way that
Shue and Rawls do not. As Pogge points out, it is the government that is most
usually regarded as the primary guardian of human rights. A country’s constitution,
the structure of its courts, its legal and political system, the attitudes of politicians,
bureaucrats and policemen, all these are crucial in shaping, sustaining and protecting
human rights. It is within constitutions and laws that rights are articulated and it is the
attitude of social and legal institutions that are crucial in determining whether or not
there is official respect or official disrespect toward rights. That is, is the government

465 ibid, pp 52-53.
466 ibid, p 64.
a sincere or a cynical actor with regard to rights? Does it offend rights or does it tolerate an offence of rights by various groups or individuals?\textsuperscript{467}

But there is another point by Pogge that I am most interested in. Whilst he acknowledges the role of government and institutions in the securing of rights, he says that ‘…it makes more sense to think more broadly here [for] what is needed to make the object of a right truly secure is a vigilant citizenry that is deeply committed to this right and disposed to work for its political realisation.’\textsuperscript{468} And in expanding on this he writes:

‘More reliable than a commitment by the government, which may undergo a radical change in personnel from one day to the next, is a commitment by the citizenry. This latter commitment tends to foster the former – especially in democratic societies which tend to produce the strongest incentives for government officials to be responsive to the people.’

This is the part of Pogge’s work that engages and speaks to individual people in a context that is personal and private. Human rights, he asserts, entail moral duties, but the duties are complex and entail obligations to act that are diverse and wide ranging. But it is also individual. Thus ‘the human right not to be subjected to cruel or degrading treatment gives me a duty to help ensure that those living in my society need not endure such treatment.’\textsuperscript{469} And he adds that the ‘responsibility for a person’s human rights falls on all…who participate with this person in the same social system. It is their responsibility, collectively, to structure the system so that all

\textsuperscript{467} Thomas Pogge, \textit{World Poverty and Human Rights}, Cambridge, UK., Polity, 2002. In particular see chapter two ‘How should human rights be conceived?’
\textsuperscript{468} \textit{ibid}, p 62.
\textsuperscript{469} \textit{ibid}, p 66.
its participants have secure access to the objects of their human rights.470 In other words I have an obligation to act to ensure that social systems themselves respect the rights of individuals and I must not sustain systems that are coercive of individual's rights. The call is thus for an emphasis upon duties and obligations in a very personal sense of individual engagement.

My comments above with respect to Schue and Pogge are brief but I acknowledge them in order to introduce my final chapter. It is their emphasis upon rights being sustained by duties and obligations, rather than rights and duties being opposite (distinct and separate) sides of the same coin, that I wish to reflect on. I agree that duties sustain rights. I agree that rights are made whole by a focus upon duties. I agree that institutions can be made ‘human’ by ensuring that they acknowledge and respect the rights that individuals have. In the Australian context, with respect to the aged and the mentally ill, rights have been made vague and clumsy, and duties optional. In the final chapter I want to reflect on what we might call a philosophy of duties. What sources and inspirations might we adopt in order to bring duties to life and make rights meaningful and relevant in our day to day lives? In this sense I wish to draw on some culturally relevant images that might inspire and support a commitment to duties. In the final chapter I want to consider virtue theory, Christian theology and what I call ‘the narrative of everyday lives’.

470 ibid.
i] on rights, duties and relationships

I want to begin by making a general observation about the relationship between rights and duties. In his book *Natural Law and Natural Rights*, John Finnis poses the question, are duties ‘prior’ to rights? His answer, like so many who in similar vein address this relationship, is to reflect upon the development of the idea of human rights from historical perspective. Finnis considers the history of the word ‘right’ and its various meanings and how those meanings have, within different historical periods, been part of a cultural and linguistic metamorphosis that has led to our present understanding of the term. In particular he notes the transition from the notion of right (jus), referent to what ‘is just in a given situation’, to the notion of a right as a power ‘which a person has’, thus establishing the individual as the subject (rather than the object) of social and political life. Haakonsen suggests [convincingly I think] that the idea of rights as we now know them, that is rights as in ‘human rights’, has become gradually disentangled from allied concepts of duty and obligation so that they now tend to stand isolated and remote, *sui generis* - beyond the framework of rights - duties - obligations they were originally embedded within. This is not to say that in our modern understanding of the relationships between people, duties or obligations no longer have meaning, rather it is to acknowledge that we live in a culture wherein the focus is almost exclusively on rights and where

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473 John Finnis, *op cit*, p 207.
‘…duties tend to exist either as the pale correlates of rights or as the fiercely contested dictates of an oppressive state or overbearing moralists.’

Despite the writings of a number of modern philosophers which have cast doubts on the muscular pre-eminence of individual rights, there remains, in an intuitive sense at least, good reason for subscribing to a view of the primacy of rights. After all we speak of ‘fundamental and inalienable rights’ possessed by all humans everywhere regardless of race, religion, gender and social and political affiliation. We do not refer to ‘fundamental and inalienable duties’ that people owe to others, rather, we tend to infer that such duties exist only because certain rights exist. On this reckoning at least it would seem obvious that rights are ontologically or epistemologically dominant and duties in some way merely derivative. Yet there is a sense in which duties may be reasonably regarded as ‘prior’ to or ‘antecedent’ to rights, and that is in the logic of their implementation. In other words in what we might refer to as the ‘instrumental’ sense we can certainly make a case for duties being regarded as prior to notions of rights and I want to explore this idea in the following.

the narrative of rights, duties and everyday lives

Within discourse on human rights there is an inevitable point of focus centred on the relationship between the individual and the state. Paradoxically, state structures and

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475 Whilst the history of the idea of human rights certainly reveals the gradual hegemony of the notion of prior individual moral entitlement, the ascendancy of the autonomous subject freed from the chains of a medieval social, economic and political order, it would be wrong to see all philosophy and philosophers supporting this view. Many liberal writers have drawn on Kant in an attempt to link rights and duties in a more formal sense, for example; Hans Kelsen, Pure Theory of Law, [translation from the second (revised and enlarged) German edition by Max Knight], Berkeley, University of California Press, 1967. Hegel of course develops from Kant a non liberal republican theory of rights and duties; G. W. F. Hegel, Philosophy of Right, Oxford, Clarendon, 1949; and drawing on Hegel, T. H. Green has an emphasis upon duties and obligations and less of a direct focus on rights; T. H. Green, Lectures on the principles of political obligation, London, Longmans, 1924. MacIntyre, in After Virtue [f/n 12 at p 13] of course dismisses the whole notion of individual human rights.
institutions are often seen on the one hand as being a potential threat to such rights, whilst on the other they are viewed as the only forces powerful enough to effectively guarantee them. The human rights debate seems thus co-opted from the ordinary lives of ordinary people, and we are introduced to the meta-narrative of an increasingly global political discourse with its emphasis upon national, trans-national and supra-national actors who play out a dialogue that seems (in fact is) powerfully removed from the everyday discourse of everyday lives. Such a perspective has a validity, yet it obscures the degree to which human rights are part of a much more focussed, localised and personalised narrative. The reality of human suffering is a lived experience at the level of everyday lives. As Poe reminds us, it is the case that ‘the true wretchedness, indeed, - the ultimate woe, - is particular , not diffuse…and the ghastly extremes of agony are endured by man the unit, and never by man the mass…’ Thus I want to concentrate on a ‘micro-narrative’ wherein we engage the other and wherein our acts and actions can have a powerful and immediate effect upon the other. It is at this level of human interaction that the mix of rights and duties is most clearly and consistently played out.

When I employ the term ‘everyday lives’ I am referring to the numerous face-to-face small scale exchanges and interactions that constitute the ongoing social dialogue that humans are engaged in within the course of the lives they share with others. We can understand this by the use of a brief example. A nurse working on a dementia specific ward is responsible for the care and protection of many aged and infirm

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residents who, because of the level of cognitive impairment that inevitably accompanies dementia, is required to do for those residents many of the activities of daily living that people without dementia do easily (and almost unthinkingly) for themselves. Such activities of daily living include feeding, dressing, showering, toileting and other tasks that we do without even knowing that we do them, for example turning from side to side in the bed ('repositioning' in nursing parlance).

For those with dementia, repositioning has an enormous impact upon the individual’s quality of life. Loss of motor activity, muscular wastage and urine and faecal incontinence are obvious features of dementia, and are major threats to quality of life in moderate to severe dementia and particularly so in 'end-stage' dementia. People with end stage dementia are typically anorexic and inactive. They may lie immobilised in the bed unless repositioned, usually hourly is required, by nursing staff. Pressure on the bony protuberances of the body (heels, ankles, buttocks, shoulders and hips in particular) is great and this combination of immobility, body wastage and urinary incontinence (combined of course with an inability to ask for help) produces what are referred to as decubitus ulcers, or more commonly, bed sores. Skin integrity is easily destroyed in those with advancing dementia and a constant regime of skin care, a fundamental part of the overall care of any bedridden patient, is of particular importance for those who have end-stage dementia.

Now one might argue, and plausibly so, that a dementia patient has a right (that is a legal, a moral – even a human right) to be treated in a particular way by the nurse on duty that will minimise the likelihood of becoming ulcerated, and with a resultant reduction not only in physical health but also in quality of life. As a nurse caring for such patients I pass by the bed of a helpless individual with end stage dementia. I know that the individual needs to be turned. I know that they have been incontinent. I know that unless they are repositioned in the bed the risk of suffering from bed
sores will be increased. But I also want to go for my break. I am tired and not feeling particularly energetic. The ward is under-staffed (as is typically the case in dementia specific units) and I have been doing more than my fair share of work this evening. What factors impinge upon my decision to place the interests of the bed ridden resident ahead of my own desire for a rest? I would suggest only one factor is instructive and that is - where does my duty lay? It is true that the bedridden individual may be able to ‘claim’ a variety of rights from me (if only they could speak), but in the final analysis what generates action on my behalf is my sense of duty, my sense of what a nurse ‘ought’ to do given the situation that he is confronted with.

Such a state of affairs is not limited to nursing. It applies to the vulnerable in general, but in the debate about rights and duties the actual contours of the landscape upon which such scenes are played out are all too often obscured. Consider the rights of the child. The three month old baby is protected, ostensibly, by a whole range of rights and freedoms encapsulated within the concept of ‘children’s rights’. These rights are incorporated within numerous documents at state, federal and even international level. The fact that this child is a rights bearing agent and as such is entitled to a special moral regard, a special degree of care and protection, is emphatically stated even at the level of United Nations legislation. Yet it is clear that unless those who care for the baby have a well established notion of their own duty, obligation and moral responsibility, then the life of the baby is precarious indeed. No matter what rights seek to secure this baby’s survival, the ongoing safety and security of the infant will only be ensured to the extent that those who care and protect have a sense of duty. Indeed no matter what rights are held by vulnerable individuals, in general their effectiveness depends upon the sense of duty held by others, by those who are charged with care and protection. As Pogge has observed, human rights without the commitment of significant others who hold a strong sense of duty are rights in name only.
What I am suggesting here is that rights talk, that is simply rights talk without a correlative emphasis upon duties, lacks authenticity in terms of the moral narratives that we employ when confronted with everyday social interactions. Of course we embrace rights talk in much that we do. We employ statements such as ‘you have no right to….’ or, ‘I have a right to….’, referent to actions, behaviours, entitlements and so on, yet there is a sense in which such talk has a limited authenticity as a connection between justificatory remarks, reasons for acting and notions of virtue or justice that we might all embrace in the course of ordinary lives.

When we act we do so in ways that do not borrow from notions of rights in anything other than superficial (perhaps strategic) justifications. Thus if asked why I treated another person in a particular way, I generally do not justify (or explain) my actions by recourse to rights. I do not say, ‘I stopped to help her change the tyre on her car because she had a moral right to expect my help’, even if I had said to her before we set out on our respective journeys, ‘if your car gets a flat tyre I promise I will help you.’ Such statements are of course formal reasons for enacting rights. Still, when I see her stranded I do not say, ‘I must help you because I promised and that promise generated a right and because you hold a right against me I am morally bound to discharge a correlative duty’. And if I chose not to stop I would never say to myself (or anyone else for that matter), by way of mitigation, that ‘after all considerations I could not sustain any argument that could successfully assert that she had any valid claim to make against me that I should stop to give her aid’. I suspect one would never actually talk that way at all, let alone think in such terms. If I help I do so because it is the decent way to act, it is the ‘proper’ thing to do. Even in the unlikely event that I had never heard rights talk before I would still know that, according to a reasonable moral sense, I ‘ought’ to stop and help, and even if I had never seen her
before and we had no prior agreement it would still not be the morally correct thing to
do to go past and leave her stranded. And if I drive by and do not help I may, later,
after suffering a pang of conscience, rebuke myself and say ‘I ought to have helped’
and, ‘I have acted badly’. That is, I would remonstrate with myself in terms of a moral
discourse that owed little or nothing to ‘rights’ and mostly everything to how I ‘ought’
to have acted, with this ought being firmly located in a sense of duty.

The same sort of moral reasoning applies with my previous example of the nurse
who is torn between a desire for a break from his task orientated routine and the
demand to care for the incontinent dementia patient. I suspect that the nurse might
wrestle with his conscience as in, ‘ought I go for a break, or ought I care for the
patient’, but would never say to himself, ‘can this patient claim a right from me’ or, ‘do
I have a right to put my interest in a break ahead of his right to be cared for by me?’
The language is important for it betrays an underlying orientation and that orientation
speaks to a moral discourse that is minimally embedded in rights and primarily
embedded within the moral language of duty. My point is that rights talk is not (or at
least is seldom) authentic. In the most part it does not represent the way that we
carry on a moral discourse in the ongoing narrative of our day to day lives.

*self regarding versus other regarding concerns*

Part of the reason why rights talk lacks authenticity is that, within the discourse of
everyday lives, it is generally one-dimensional. Rights talk addresses a particular
sort of interest, an interest that is self regarding. We assert our rights, we demand
our rights, we claim our rights, for they reflect our interests, or at least our interests
as we define them. Duties, however, express what we ought to do, where this ‘ought’
is generally reflected outward and impacts upon others and their well being rather
than ours. Indeed to fulfil our duty and to benefit others may require a substantial
cost on our behalf, a cost that might never be in harmony with any articulation based upon statements such as ‘it is my right to…’ Duty is other regarding. This is why notions of duty have traditionally been held in such high esteem within the caring professions, for these professions ‘…are undeniably other-orientated in their care for the ill, the vulnerable, and the voiceless [and they] express traditions of duties that are embedded in particular and substantive visions of the goods intrinsic to professional practice.’

Human rights fail the vulnerable then, not simply because the rights paradigm poorly represents what it means to be human and to be a vulnerable human at that, nor because the paradigm cannot protect the vulnerable from the sorts of social contexts in which they find themselves. In a very real sense they fail because the sort of talk inevitably embraced by rights has to do with the making of claims, and vulnerable people have a profoundly reduced ability to make claims and to ensure claims develop into outcomes. Duties, on the other hand, whilst often being correlative to rights, are nevertheless moral expectations and demands we acknowledge as placing upon ourselves certain expectations to act, or certain constraints upon acting, which are directed towards others.

As I suggested in the previous chapter, there is a shift in the moral focus when we embrace duties talk. In rights talk, rights and duties tend to be correlative but our focus remains fixed on the right holder. It is her rights, her entitlements, her desserts, what is owed her that we are concerned with. In such situations we direct our attention to what the holder of the right is owed and how it will benefit her, and whilst we acknowledge those who have a duty, it seems our sights are set most squarely upon the person who has the right. This certainly seems the case with our

478 Courtney S. Campbell & B. Andrew Lustig, ‘A Call to Respond: Duties to Others’ in. Courtney S. Campbell & B. Andrew Lustig [eds] Duties to Others, op cit, p ix. [f/n 31 at p 37]
focus on the demented elderly and the chronically mentally ill. Yet as we have found such people cannot engage their rights. They have numerous rights but still lead desperate lives. But if we shift our focus to duties, the duties owed by caregivers and those individuals and institutions [I am reflecting Pogge and Schue here] who have the responsibility to care for the vulnerable, then we can ask questions such as: ‘what are my duties’, and ‘what do I owe to those in my care’, and ‘how can I frame these duties’, and ‘how can I discharge these duties’ and ‘how will I be held accountable for such acts towards those who have rights?’

Of course having duties does not mean that I will discharge them. But when the moral spotlight falls upon me and it is revealed that I have failed to do my duty then concepts of embarrassment and shame and failure and humiliation come into play. Professionals who care for the vulnerable have duties and the same may be said for them. That is if they fail their very precise and well defined moral duty to the vulnerable then they are liable to shame and moral censure. And if those duties are not simply moral duties but are also moral and legal duties then they can be held doubly accountable. In such circumstances the costs of failure are not so easy to ignore. But first of course we need to establish just what those duties consist of.

The obligations and duties we owe to others forms a central theme within morality and within systems of morality, transcending more than can be encompassed by notions of rights alone. I think Williams is correct when he says that, ‘in the morality system, moral obligation is expressed in one especially important kind of deliberative conclusion – a conclusion that is directed toward what to do governed by moral reasons and concerned with a particular situation.’ These questions of ‘what to do’ and ‘how to act’ are central to the way ordinary people live their lives. As Williams

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points out, we are continually confronted with ‘ought’ sorts of questions – referent to our own ways of behaviour with respect to other persons, with these ‘ought’ questions being generated inside us, sometimes (to be sure) in response to the rights of others and sometimes simply out of consideration about how one ‘ought’ to behave. It would be very odd if these sorts of questions only ever arose when someone else presented us with a right that we were obligated, either legally or morally, to respond to. It would be very odd indeed if our moral obligations or duties only ever reflected the rights of others just as it would be very odd indeed if the sum of ‘the rights of others’ was exactly equal to the sum of moral judgments in general. In this way notions of duty can be seen as more encompassing. Responding to rights often but not always. Sometimes standing alone as an invitation to engage (care and protect) the other.

But those who assert the primacy of rights might still suggest that the reason why we focus on any notion of care and protection toward the vulnerable is because the vulnerable are, after all, humans in need of assistance and humans have an intrinsic right to be regarded as morally deserving, whether or not we acknowledge this in our use of language. This point of view does not undermine my general argument in this thesis, that what is needed as far as human rights are concerned is a strong commitment to a notion of duties or obligations. Human rights, I suggest, can only be effective protectors of vulnerable people if they are matched by an equally important and enthusiastic commitment to duties. By themselves they are, as I have outlined, illusions – the illusion of empowerment for those who are most vulnerable. The way to ‘operationalise’ rights is to talk about duty.

However, the ‘primacy of rights’ perspective misses the point when it asserts that the only reason we care and protect is because the vulnerable, as humans, have a right to be cared for and protected. There are I think many instances when we care and
protect in the absence of any rights. If a tired and exhausted puppy collapses at my door do I have a moral obligation to help it? I suspect that I do, at least in the short term in order to sustain its life and prevent further suffering. Does the puppy have a moral right to demand from me my assistance? I suspect not. Then if I help why do I do so? Do I have a moral obligation to care and protect the environment? If I do then unless we fall into the dubious position that the environment has a right to care and protection, or the equally suspect position that our duty to the environment is really because of rights held by future non-existent generations, we must acknowledge that we often act in ways that go simply beyond the articulation of rights as a reason for moral action.

ii] a sense of duty and the moral engagement

O’Neill notes that in general, modern writings on ethics prioritise the recipient’s perspective over the agent’s. The question is mostly, ‘what are we or what am I entitled to’, rather than, ‘how should I or how should we, behave’. This position is usually expanded to embrace what human rights there are and what in particular are my human rights, but always the focus is ‘on recipience rather than on action, on rights rather than on obligations’,480 on what one is entitled to rather than a focus on how one is expected to behave according to notions of justice, or virtue or simply ‘good neighbourliness’. By describing all required actions between people in terms of rights, one is encouraged to the view that if a person can sustain no claim of right then another has no required duty. The problem of reducing all moral action to rights and correlative duties is that, if there is no right that demands we must help another, and all we have are the rights that people can claim from us, then no-one is actually obligated to help anyone else beyond the rather narrow assertion of a right. We are on the path of cold virtue, fulfilling our required obligations to others simply because
they hold rights against us – but as for those who cannot either identify a right or, indeed, [and perhaps more importantly] press their claim against us with any convincing resolve, they are effectively abandoned to their own resources, and for the vulnerable this may mean a very miserable life indeed.

But helping others is an important virtue and cannot be limited simply to a paradigm of rights and duties. We do not simply help because another has a right against us. We often help, indeed I suspect we mostly help, because we are sensitive to notions of how we ought to behave. This is not to say that others do have a right against us, but what inspires us to help, I suspect, is not the rights that people have, but the duties that we may acknowledge or think it good, or appropriate or virtuous to discharge. If this is so then we are led to a moral dialogue that is embedded within what we might describe as ‘agent relative values’. In other words, when people assess the moral oughts of a situation, they mostly act from principles internal to their own conception of the good as they see it. When people think about the ways to behave in any given situation I suspect that they think about how they ‘ought’ to behave, with this ‘ought’ having little or no predication upon ideas of rights, except of course to diminish someone else’s claim (as in ‘you have no right to do that’) or to maximise their own claim (as in ‘I have a right…’) and so on. Rather, and for the most part, thinking about moral action can be thought of as a narrative which is expressed in terms of ‘what ought I do…’ or, ‘how should I behave…’, referent to any particular situation that an agent finds herself in. The answers to such narratives (and thus the ways that agents act) emerge from and reflect the sorts of values that people have about the type of conduct that is appropriate for them to engage in.

And if the ‘what ought I do’ and ‘how should I behave’ is derived from factors other than notions of other people’s rights, as I suggest is (mostly) the case, then what can

we use as a basis to begin thinking about how we ought to act towards the vulnerable in our midst? What sort of an agent and what sort of moral principles are those that will secure the best interests of the vulnerable? If human rights (rights as rights) have failed the vulnerable, how can we best approach issues of care and protection? In other words, how can we engage notions of duty needed to fulfil the promise of rights? In the following I want to consider this question. My discussion will be of necessity tentative: I simply want to suggest certain possible directions that those who have an interest in the care and protection of the vulnerable might take in order to maximise their chances of success.

agent relative values

The notion of agent-relative values establishes the context within which discussions on the relationship between the vulnerable and those charged with their care and protection may take place. This concept of agent relative values reveals a number of themes. First, it emphasises the reality that the vulnerable are characterised, to a greater or lesser extent, by degrees of powerlessness and dependence; that there is a disparity with respect to the ability to articulate interests and to achieve desired outcomes between those who are vulnerable and those who are not, and in particular between the vulnerable and those who stand in regard to them and have a duty or obligation to care and protect. It is clear that the rights paradigm is of little use to those who, by virtue of their vulnerability, (their powerlessness and dependence) are either unable to claim their rights (by reason of their vulnerability), or are prevented from claiming their rights by forces (circumstances or individuals) beyond their influence and control. To codify rights for the vulnerable is simply to codify the illusion of empowerment. The first aspect of agent-relative values, therefore, is to recognise this disparity in power and options.
Second, the term agent-relative values recognises that the moral focus needs to be shifted from those who are vulnerable to those who are, in either a moral or a legal sense, charged with their care and protection. Rather than emphasising the illusory rights that vulnerable people may be said to possess, we are required to emphasise duties and obligations – the duties and obligations of those charged with the care of vulnerable persons. Whether or not these duties and obligations are the moral or legal correlates of rights is not our concern. The focus is squarely on the ‘oughts’ attached to caregivers, whoever we take those caregivers to be.

Third, and following on from the above, the demand is to consider what sorts of values and what sorts of sympathies and sentiments it is appropriate for agents to have when considering the protection of vulnerable persons. Our attention is directed toward the carer. When we are thinking of protecting the vulnerable we are thinking of the person who protects and what sort of values, from a moral and ethical standpoint, we expect them to embrace. In this way we might be seen to be responding to the question once put by Socrates of, ‘what sort of a person ought one be?’ Agent relative values focuses on the agent who does the caring and so, as with virtue theory in general, its advantage is that it ‘…gives primacy to character in the sense that it holds that reference to character is essential in a correct account of right and wrong action.’481 Our focus is on the character of the one who stands in regard to the vulnerable and has a duty or obligation to care and protect, and so we may focus on the those character traits amongst carers that we find typically admirable482 and also typically effective in caring for vulnerable people.

One way of beginning this discussion might be to pose the question of why we might care for others in the first place? It would seem that the obvious and immediate answer to this question is that in some fundamental way it is human to do so. This suggests that caring is antecedent to thinking about caring. Evans suggests that a moral sense or foundation is crucial or fundamental to certain occupations (doctor, nurse, pharmacist and so on).

‘If I am to be a good doctor or nurse I must not merely be a loyal employee and a careful and technically skilled practitioner (for) there is something in the very nature of the work I am to do and the subsequent relationship with those whom are the subject matter of my work which has a moral dimension…’

He writes that, ‘to ignore this dimension…will render one morally culpable and a positive danger,’ yet I think he overstates the relationship between occupying a particular role and the degree to which a special moral consideration is to attach to that role. That is I do not think there is any good reason for thinking that moral considerations are more important for doctors or nurses than they are for say, lawyers, truck drivers, financial advisors or travelling salesmen. I suspect that doctors and nurses have a different sort of moral concern, or perhaps we could say that the moral concern they do have is expressed in a different way, but to say the moral imperative is more prominent or important with respect to medical people is to miss the point. And the point is that to be human is to occupy a moral space. As David Hume makes clear, the moral and ethical concern that we feel as humans is located within what we might now days call an instinctual drive. It is embedded

within ‘...some internal sense or feeling, which nature has made universal in the whole species.’\textsuperscript{484}

Why is there this concern about men’s character, about the moral and ethical foundations upon which men build their lives? Why do we need to know that men do care about each other – that at the basis of human action there is a sympathy or sentiment of caring that takes into account (or displays to some degree at least) a sensitivity to the way other people are? Part of the reason is because we realise that if no such urge or instinct was present then human life would be very uncertain and doubtful. The reason that nature has made moral and ethical concerns such an integral part of being human is that without it human social life would be non existent. And whilst we may find ample justification from within the writings of those such as Kant, Bentham or Rawls of why we \textit{ought} to help or care for others,\textsuperscript{485} such argument itself often seems to be based upon an already pre-existing moral sentiment that says, ontologically, that even the simplest interactions would become impossible without such moral sentiment.

In saying this I am agreeing with Noddings who maintains that the fundamental nature of caring is emotional. Ethical caring, the way in which we confront the other morally, arises from what she calls ‘natural caring’, an affection or sensitivity that emerges ‘out of love or natural inclination.’ The act of caring and a concern for caring is an ideal that begins with human emotion rather than human intellect. We care because as humans it seems natural to care and be cared for. And what of those who do not care, who seem in some way to be beyond the ability to care for, or consider, others on this level of emotional sensitivity? What of those whose


\textsuperscript{485} See my discussion in chapter one.
behaviour reveals ‘…a pervasive pattern of disregard for, and violation of, the rights of others…’; who display ‘…deceit and manipulation … a repetitive and persistent pattern of behaviour … [characterised by] aggression…destruction of property, deceitfulness or theft, or serious violation of rules…’ with an accompanying indifference to the consequences such actions have for their fellows?”486

The description above conforms in part to the ‘diagnostic features’ of someone who is described, in terms of psychiatric pathology, as suffering from antisocial personality disorder. Whilst we may recognise such an individual within the confines of psychiatric nomenclature as occupying a clinical identity, to be confronted with such a person is to confronted with a real threat to one’s survival. Writes Noddings;

‘one either feels a sort of pain in response to the pain of others, or one does not feel it. If he does feel it he does not need to be told that causing pain is wrong…[but] for one who feels nothing…we must prescribe re-education or exile.’487

Thus there is a degree to which one either cares about others or does not care. In this way ‘an ethic of caring locates morality primarily in the pre-act consciousness of the one-caring.’488 And it is upon this ‘pre-act consciousness’, this fundamental sentiment of caring and regard for others, this basic attentiveness to the ‘oughts’ that both sustain and scrutinise one’s acts and actions, that we characteristically graft rationally based principles and judgements of ethics. As Mill said ‘it really is of importance, not only what men do, but also what manner of men they are that do

488 ibid, p 28.
it.\textsuperscript{489} And it is within ‘the manner of men’ that we look for those values and
sentiments that will support and sustain the vulnerable. It is upon certain agent
relative values that we graft principles of action that guide our engagement with those
amongst us who are vulnerable. Our approach to the vulnerable is not a triumph of
sentiment over rationality. What guides our approach to caring for and protecting the
vulnerable is the recognition of ‘sentiment’ or some ‘internal sense or feeling’ as an
appropriate starting point for teasing out the sorts of responses and the sort of values
that we might encourage agents to embrace.

\textit{the role of the vulnerable in Christian philosophy}

In thinking about our relationship to the vulnerable and particularly with respect to
how we ought to engage them in matters of care and protection, we may begin by
invoking the image of the stranger and the role the stranger plays within Christian
philosophy The basis for this ‘engagement’ has been succinctly described by
Traherne: ‘charity to our neighbour is love expressed towards God in the best of His
creatures.’ Traherne implores us to love our neighbour because our neighbour is, as
are we, made in the image of God, thus we are to consider our neighbour as if he
were ‘the sole individual friend of God…’. In general our neighbours are to be
regarded ‘as high and sacred persons …[as] ambassadors representing His person,
in whom He is injured or obliged.’ This is, writes Traherne, our ‘glorious duty’.\textsuperscript{490}
Thus our obligations to our neighbours are based upon wider obligations that we hold
to the Divine, and based also upon the fact that we are each one of us His creatures.
The rationale for reflecting upon a Christian account of our relationships to the
vulnerable stems not simply from the importance Christianity philosophy (as opposed

\textsuperscript{489} J. S. Mill, \textit{On Liberty}, op cit, p 59. [f/n 44 at p 42]
\textsuperscript{490} Thomas Traherne, \textit{Christian Ethicks (The Way to Blessedness)} (1675), [Edited and introduction by
to religion or dogma\textsuperscript{491} plays within the Western intellectual tradition, but also in its direct focus on relationships between people. The Christian tradition is firmly centred in a world where relationships between people are paramount and reflective of a narrative embedded within everyday lives. Often these relationships are part of a wider aspect – between the individual and God for example – but there is an attitude of Christian virtue that directs itself to real lives in a real world, rather than disembodied lives abstracted (as it were) from their social reality. The approach that Christian philosophy adopts toward the way we ought to regard the vulnerable in our midst is based not in notions of the rights that people hold, but in the duties and obligations that we owe to each other – in fact by which we are bound to the other. These duties or obligations are themselves derivative of wider duties and obligations that we owe the Divine. Crucial to the Christian approach is the idea that we are all neighbours, that human life is expressed in its connections and commitments [interdependence rather than independence] between peoples of seemingly disparate and diverse backgrounds, and that divisions which portray people as strangers or aliens or as ‘others’ are illusory and artificial.

The Biblical texts make much of the idea of all persons having equal moral value and thus as deserving of equal moral treatment – an idea much later developed by human rights theorists. ‘When an alien lives with you in your land, do not mistreat him. The alien living with you must be treated as one of your native-born.’[Lev. 19:33]\textsuperscript{492} And the Bible reminds the Hebrew people that they were once aliens and outcasts and as God treated them with compassion and ensured their care and protection so they must act in like fashion. ‘Love him [the alien] as yourself for you

\textsuperscript{491} I think one can assume that Christianity, like all the great religions, is a mix of philosophy, religious dogma [the laws or tenets of the Church] and spirituality. It is the notion of philosophy that I wish to reflect upon in this discussion.

were aliens in Egypt. I am the Lord your God.’[Lev. 19:34] And again: ‘Do not oppress an alien; you yourselves know how it feels to be aliens, because you were aliens in Egypt.’[Ex. 23:9] This moral equality of Jew and alien is established by God’s concern for both. ‘The Lord watches over the alien and sustains the fatherless and the widow,’[Ps. 146:9] and so the alien may be the poor or the oppressed or the vulnerable in their many presentations, nevertheless the entreaty is the same. One owes a compassion, a degree of care and protection in a positive sense of taking responsibility for others less able to care for themselves: ‘Do not go over your vineyard a second time, or pick up the grapes that have fallen. Leave them for the poor and the alien. I am the Lord your God.’[Lev. 19:9] And this concern represents not just a moral equality but, and from that, a civil equality. ‘You are to have the same law for the alien and the native born: Laws apply to all equally.’[Lev. 24:22]

Throughout the texts the same theme is emphasised. The old divisions that saw people separated into groups or tribes that were distant and distinct are artificial. Within God’s kingdom such divisions have been broken down. As Paul made clear to the Galatians, Christ died for all and so the barriers between people have been obliterated: ‘there is neither Jew nor Greek, slave nor free, male nor female, for you are all one in Christ Jesus.’[Gal.3:28] And to treat the vulnerable with care and protection is to treat Jesus in the same way. To reject the vulnerable, to ignore them or pass them by is to do the same to Jesus. To deny the vulnerable is to deny oneself. This is powerfully put in the parable of the sheep and goats where the entreaty is our responsibility to care for the vulnerable in our midst, and in so doing it is to discharge our moral responsibility to the Divine. Only those who act with compassion toward the vulnerable will attain eternal life.

‘For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed
clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.' [Matt. 25:35-36]

As Jesus makes clear, ‘I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me.’ [Matt. 25:40] In this portrait of the overriding obligation and moral responsibility to those in need, as Tubbs suggests, the stranger or the vulnerable may be regarded as the Son of Man himself.493

The most powerful image of Christian responsibility to the vulnerable in our midst is undoubtedly the parable of the Good Samaritan. When Jesus is confronted by one who asks him how to ensure eternal life, Jesus responds by posing the question, ‘what is written in the law?’ The answer is given: ‘Love the Lord your God with all your heart…and, Love your neighbour as yourself.’ The response is undoubtedly in harmony with teachings but nevertheless another question is put to Jesus. ‘And who is my neighbour?’ [Luke. 10:25-29] The response to this is the story of the man who, whilst travelling from Jerusalem to Jericho, was set upon by robbers and left for dead. Ignored by priest and Levite, help came in the form of a Samaritan who not only cared for the man but also took him to an inn and paid for his lodgings until he was fully recovered. [Luke. 10:30-37]

The background to appreciating the moral impact to this story is the social, political, religious and ethnic distance that traditionally existed between Jew and Samaritan, with the former regarding the latter as being polluted or ‘unclean’. There is surely no greater distance between peoples than the distance that is built upon some notion of cultural pollution. The alien in this case is more than just a stranger in a strange land, he is a vile thing, an outcast, one to be hated, shunned and rejected. Yet even

here, indeed especially here, Jesus demands that we call such people our brothers
and love them as we love ourselves and as we love God. The connection we
have to each other is a powerful reinforcement of the connection we have to God. It
is a connection based upon Divine love: ‘This is the message you heard from the
beginning; We should love one another’ [1 John 3:11]. But above all it is a
connection that is engaged by action. As John says ‘…let us not love with words or
tongue but with actions and in truth.’[1 John 3:18] Thus not only are the distinctions
between ourselves and these others, whether Samaritan, or alien or vulnerable,
broken down, so that we are to regard them with the same moral courtesy that we
justly demand for ourselves, but also this is a programme that calls upon the agent to
reflect upon her actions. In this way the Christian approach is based not upon any
notion of prior rights and derivative duties, but on an essential sense of moral
equivalence with this equivalence being based upon a recognition of the proximate
engagement between persons of equal moral worth. This is a program of action,
action based upon reflection, to be sure, but in the final analysis it is action that
counts.

The Biblical story of the Good Samaritan suggests, that moral responsibility always
presupposes some kind of social proximity. ‘To be a neighbour one has to become
involved, one has to become ‘actively and voluntarily familiar’ with the alien, with the
vulnerable, with the ‘other’. The source behind this involvement may be Divine
command, but this Divine command may itself reflect the wisdom that, (as with
Nodings’ comments previously), ‘…we want to be recognised and valued as persons,

494 John tells an occasion of Jesus asking a Samaritan woman for a drink, to which she replies: ‘You
are a Jew and I am a Samaritan woman. How can you ask me for a drink?’ (For Jews do not associate
with Samaritans).’[John. 4:9] In a footnote the NIV Study Bible says that ‘the point…is that a Jew
would become ceremoniously unclean if he used a drinking vessel handled by a Samaritan, since the
Jews held that all Samaritans were ‘unclean’. ’
as social beings, as members of humanity in general.\footnote{Otto Kallscheuer, ‘“And who is my neighbour”? Moral Sentiments, proximity, humanity (Rescue: The Paradoxes of Virtue)’, \textit{Social Research}, Spring 1995, Vol. 62.} Thus the reason we care for the vulnerable is not sustained by nor justified by their ‘rights’, human or otherwise, but on a shared and common humanity expressed either as the will of the Divine, or the shared emotional connection ‘an affection or sensitivity’ (natural caring) inspired by the nature of what it means to be human.

This idea of the stranger, or alien, or other calls us to acknowledge the French Jewish philosopher Emmanuel Levinas. Writing in \textit{Totality and Infinity} Levinas observes Western philosophy’s preoccupation with Being and asks us to think beyond the narrow confines of a world defined by Being and Other. The Other, for Levinas, is that which is not us. It is transcendent, external and infinite. The voice of the Other is not our voice and cannot be reduced to what we assume or know or think. Levinas writes of ‘the strangeness of the Other, his irreducibility to the I, to my thoughts and my possession….\footnote{Emmanuel Levinas, \textit{Totality and Infinity}, translated by Alphonso Lingis, The Hague; M. Nijhoff, 1979, pp 33-34.} Levinas critics Western philosophy as tending to describe ethics as a set of propositions where Being and Other are reduced to Same, but in his work the Other is given an existence, a reality and a voice. It is in our encounter with the Other and our recognition of the Other as valid beyond ourselves, that genuine freedom, grounded in responsibility and obligation, is obtained.\footnote{To give a concrete example. It seems that we look for ourselves when we encounter others. Thus we have in Australia the spectre of the Iraqi refugee who is ‘accepted’ as Australian because he plays cricket, follows Australian football, eats meat pies and adopts our slang. To assimilate one denies one’s self. The other is obliterated into the I. We are the Same. Yet a true encounter with the Other is to accept him as different and not expect him to adopt our customs, yet to still treat him with respect and dignity. This is engagement.}

Reflecting Levinas, Lyotard addresses this idea of a voice and the humanising aspect of interlocution. The example is concrete but the implications are profound. He observes that the oppressed do not have a voice and in being denied a voice they
are denied dialogue, and denied dialogue they are denied experience and ultimately existence. Writing on the Nazi death camps he says:

‘They were not spoken to, they were treated. They were not enemies. The SS or Kapos who called them dogs, pigs, or vermin did not treat them as animals but as refuse. It is the destiny of refuse to be incinerated. The ordeal of being forgotten is unforgettable. It reveals a truth about our relationships to language that is stifled and repressed by the serene belief in dialogue. Abjection is not merely when we are missing from speech, but when we lack language to excess….Excluded from the speech community, the camp victims were rejected into the poverty, the misery of this secret.’

The Other, the alien, the stranger represents an invitation and an opportunity to dialogue. It is to tell their story. But if they have no voice they have effectively no story. The implication for our approach to the vulnerable is clear. Whether as parents of young children, or as nurses or doctors, or social workers or psychiatrists, or bureaucrats or politicians, or indeed as anyone who cares for the vulnerable, we are called upon to respond in a manner that recognises a common moral equivalence yet a different moral existence. We are charged with treating the vulnerable in a manner that we too would want to be treated if we too were vulnerable. What duties we have to the vulnerable are reflective not of their rights but of the necessities of our own moral engagement. And this is based upon their existence and their life story.

Aristotle, the agent and virtue theory

As with Christian theology, Aristotle’s virtue theory emphasises the nature or character of the agent as one who acts and acts for reasons that are morally valid. I am here not providing a detailed defence of virtue theory. In discussing Aristotle I simply want to reflect on those aspects of the theory that may provide a basis for justifying our care and protection of the vulnerable, beyond any attachment to the flawed notion of the rights the vulnerable may (or may not) be said to possess. Of course Christians also act for reasons that are morally valid, even if the determination of moral validity appears to lay in adherence to a set of prescriptions that lie outside the agent. That is, the agent acts morally to the extent that she adheres to Divine command, or to be more precise, her interpretation of Divine command (which may or may not be the same thing). Within virtue ethics the agent acts morally when she acts in a way that is consistent with what it means to be virtuous.

To be virtuous is assumed by Aristotle to be so within the confines of the social world. Like Christian philosophy, and unlike the contract theorists – particularly Rawls - Aristotle’s virtue ethics is grounded in the reality of the social engagement. Like Christianity this is the micro-narrative of everyday lives. The emphasis in virtue ethics is on ‘…the cultivation of those virtues which presupposes that I am closely interacting with, and dependent upon, my fellow men…’ In other words ‘man…is defined as a social being, and most of the fulfilment of which he is capable requires the cultivation of harmonious patterns of thought and feeling which enable him to enter into rewarding civic and personal relationships.’ And so the virtues assumes those character traits that enables one to engage others on a level that facilitates the development of humanly flourishing lives, whether this is the life of the individual or

the lives of others. In both virtue theory and the Christian texts, primacy is given not so much to actions or outcomes (although both are important), but to the character of the person who is acting, and this applies no matter what particular conception of virtue theory one might embrace.

We ought not make too much of the dichotomy between actor and actions. Virtue ethics focuses upon ‘agents’ rather than ‘actions’, but one cannot easily separate the two. Agents produce actions and agents are assessed on the basis of the actions they engage in. Virtue ethics does not consider character in isolation from its manifestations. The emphasis is upon a virtuous character so that virtuous acts may flow. ‘In the end, a comprehensive account of the good life must consider both character and personal achievement, our selves and our creations.’ But what constitutes the virtues? Aristotle describes a virtue as ‘…a deliberative and permanent disposition, based on a standard applied to ourselves and defined by the reason displayed by a man of good sense.’ The emphasis is upon one who, with rational reflection, adopts a particular behavioural repertoire designed to maximise the good. This repertoire consists of certain qualities which are in and of themselves conducive to the good, with this ‘good’ being explained in terms of human flourishing. The emphasis upon rational reflection is important for virtue is arrived at only by education and training. This is the contemplative life: ‘perfect happiness is a

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500 Virtue theory thus negates the idea that one can flourish at the expense of others. That is, debauched or depraved people cannot be said to flourish for they inflict misery and suffering upon others; see Richard N. Boyd, ‘How to be a moral realist’ in. Geoffrey Sayre-McCord [ed] Essays on Moral Realism, Ithaca, Cornell University Press, 1988, pp 181-225.

501 In saying this I am following George Sher’s discussion that virtue theory can be subdivided into Aristotelian (virtues as humanly flourishing lives), deontological (virtue as doing one’s duty), and perfectionist (the virtues are traits that are good in themselves). George Sher, ‘Knowing About Virtue’, in. John W. Chapman and William A. Galston [eds] Virtue: Nomos XXXIV, New York, New York University Press, 1992, pp 91-116.


contemplative activity' Aristotle wrote. That is, ‘none of the moral virtues arises in us by nature...rather we are adapted by nature to receive them, and are made perfect by habit.’ The virtuous person is one who acts rationally and reflectively and who perfects and internalises the sorts of actions which have as their aim human excellence and flourishing – his own and those of his fellows.

But what does the behavioural repertoire of the virtuous person consist of? What virtues are embraced by the virtuous person? Virtue theory, in opposition to relativist theory in general, holds that some ways of living are (always and everywhere) preferable to some other ways: that courage is preferred to cowardice, sensitivity to brutality, compassion to indifference, tolerance to bigotry, kindness to viciousness, knowledge and wisdom to ignorance, and a sense of trust to enmity. Virtue reminds us that reaching out one's hand to the vulnerable is preferable to stepping over them and continuing on in casual disregard. We embrace these virtues because reason dictates that we do so. They facilitate the Aristotelian notion of arête or excellence, which enables us to develop our inborn capacities and achieve a life of eudaimonia or happiness.

On the face of it this position is certainly in harmony with the sorts of moral and ethical values we try to bring about in our children, and in harmony too with the sorts of people we hope our children will become. In their formative years we teach the young how to behave in general terms; we teach them what constitutes being ‘a good girl’ and ‘a good boy’, where ethically appropriate action is most often couched in terms of ‘oughts’. We teach them notions of goodness (Aristotelian virtue or Christian charity), the inculcation of certain habits, sensitivities, perspectives and moral orientations which are themselves often framed in notions of duties. My duty

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504 Nicomachean Ethics, Book X Ch VII, VIII.
505 Nicomachean Ethics, Book 11, Ch 1.
to my siblings, to my parents, my family, my school and my society – not rights, for
doubtless would recoil in horror at a child well versed in his rights but without any
moral sensitivity grounded in the oughts of his duties. And why this emphasis on
duties and a secondary (derivative) focus on rights? The answer, as both Christ and
Aristotle knew well, is that before we can assert ourselves we must engage the other.
Before being independent (or rather interdependent – for independence is surely a
myth) we are dependent.

It may be then that this emphasis on duties and obligations is conducive to species
survival, after all if a parent felt no moral obligation to care the child would surely die.
Further, human social life itself may demand a certain suppression of one’s own
interests [self interest being the business of rights] in order to engage the other on a
level that facilitates the continuance of community. Such engagement recognises
first; that a society built solely on rights runs the risk of descending into the
Hobbesian state of nature where ‘to have all, and to do all is lawfull for all’, with life as
a result being ‘…nasty, brutish and short’; and second, that whilst rights are a key
element of liberal democracy, nevertheless for those who cannot articulate, or
demand, or claim their rights, life can often be very bleak indeed – especially with no
counterbalancing strong commitment to duties.

But also within Aristotle’s notion of virtue we recognise that there are some values
that appear to lie at the heart of what it means to be human. This does not mean that
there is only one way to live a human life. Virtue theory is not incompatible with
pluralism. In any given historical epoch there are many ways to express one’s
humanity. Indeed, what Aristotle is maintaining is that there is ‘…a single objective
account of the human good, or human flourishing…’ that transcends cultural or
This raises obvious points of debate. Still, I agree with Sher, that within the normal course of a human life, with all its variations and possibilities, with all its twists and turns and choices and paths eventually chosen, there are some beliefs and values (virtues) that sustain and encourage flourishing. As he points out, ‘...justice, courage, and honesty are crucial to our ability to participate in practices as diverse as painting, football, and the study of physics...’ for they link into personal qualities and attributes that facilitate human knowledge and development on a variety of diverse levels. And we may reasonably assert that whilst there are certain biological urges that transcend history and culture may there not be values as well? Are there really any societies that value dishonesty, hatred, murder, incest, a lack of respect or compassion for others; that value cowardice, enmity and distrust and promise breaking? Of course this is straying from my brief, for my concern is only how we engage the vulnerable and seek their protection and this inherently implies that we will be naturally predisposed in any case toward values that we might identify as virtues.

We might also add, of course, that there is a degree to which notions of rights themselves appear suspiciously close to pre-existing notions of virtue. That is, rights to justice, fair treatment, equality, respect and dignity and the like, are surely a reflection that to act justly, fairly and to treat others as moral and political equals are sentiments (virtues?) that one ought reasonably embrace. And so it is within the context of the numerous face-to-face interactions that humans are engaged in within the course of the lives they share with others that it is possible for the virtues to be both revealed and perfected:


507 Not the least being, can we view some sentiments or character traits as common to the species and necessary for survival (in both a personal and social sense) as much the same way as we might view biological requirements?
‘for it is from playing the lyre that both good and bad lyre-players are produced. And the corresponding statement is true of builders and of all the rest; men will be good and bad builders as a result of building well or badly…This then is the case with the virtues also; by doing the acts that we do in our transactions with other men we become just or unjust.’

The virtuous person, in either the Christian or the Aristotelian sense, is revealed in the course of the acts she engages in, within the course of the everyday life she lives.

It is true that virtue theory has been the subject of much criticism, not the least being that it is charged with being too vague to be able to instruct us as to how we ought to act in any particular given situation. We may all agree that we ought to act ‘virtuously’, but precisely what does this mean with respect to the variety of often confusing and contradictory situations that agents regularly find themselves in? Like virtue theory Christian theology is open to the same charge. Moral action may be obedience to Divine Command but how do we know precisely what Divine Command entails? These are relevant criticisms, still similar problems envelop rights-based theories. We may all agree that we ought to respect another’s ‘human rights’, but when there are conflicts between rights whose rights ‘trump’, and what about the endless debates about what social and political goods are rights, and what of situations where rights abound but injustice endures – I am thinking here of the rights of the child, of refugees, of the mentally ill, of the disabled, of the frail aged in nursing homes? All these groups have rights, both generic and specific, yet injustice prevails.

508 Nicomachean Ethics, Book II Ch I.
509 For a general criticism of virtue ethics and their applications within the practice of medicine see: Lynn A. Jansen, ‘The Virtues in their Place: Virtue Ethics in Medicine’, Theoretical Medicine, 2000, 21, pp 261-276.
The question thus emerges. How can we ensure that duties can effectively engage rights and thus ensure the care and protection of vulnerable people? How do we get relevant agents both to recognise and to assume their caring obligations as the reciprocal of the rights of the vulnerable? The difficulty is, how do we induce those who care for the vulnerable, as citizens of a secular democracy, to accept either virtue ethics or a Christian understanding of the calling to care for the vulnerable? It is this I want to address in the final part of this chapter.

iii] duty, vulnerable people and the practical response

The difficulties of engaging duties are that to try and describe a world where our approach to the vulnerable is based upon an ethos of duty, rather than an ethos of rights, is to endeavour to describe a world that does not exist, or exists only in an embryonic state. Yet we are called upon to at least challenge the prevailing rights based paradigm, for as is clear, and for reasons I have outlined in the preceding pages, this rights based paradigm, as it currently stands, has all too often failed the vulnerable and in particular it has failed those whose vulnerability is extreme.

A narrative of duties and obligations presents a different aspect from one based upon rights. The term ‘narrative’ refers to the meanings and explanations we give to the ways we act, the sustaining assumptions which provide the foundation upon which we base our lives with respect to our personal decision making and with respect also to the way we structure our institutions. From this comes an understanding of the choices we embrace, the sorts of people we are, and the many and varied situations we find ourselves in, in both a personal and a wider social context. Some cultural narratives we take for granted and are so ingrained within our psyche that we regard them as axiomatically valid. For example narratives such as ‘democracy’, ‘freedom’, ‘liberty’ or ‘tolerance’ (however defined), provide the unquestioned norms which
direct the ongoing ‘conversation’ of our cultural life. The narrative of individual rights, and in particular individual human rights, is another that we regard as axiomatically valid. We tend not to question the prevailing emphasis. We tend to assume that it is inherently valid, and the assumptions about people that it incorporates into its world view we again tend to regard as an accurate reflection of both the world in which we live and the relationships between the various actors in that world. Yet as I have argued in this thesis many of these assumptions are quite wrong.

Yet changing narratives is a challenging task. Pogge for example argues that the task is to humanise institutions to make them sensitive to the needs and interests of ordinary people. He identifies a need for a vigilant citizenry that is deeply committed to the idea of rights and is thus disposed to work for their political realisation. The same criticism could be directed at Pogge. But how does this come about? I think Pogge’s solution reflects part of the answer. It is based upon the recognition that narratives do not arise beyond any human input, involvement or influence. We are not passive bystanders in the emergence of the narrative. And whilst it is clear that narratives are often particularly resistant to change, it is also clear that they can and do change and they can change quite rapidly and dramatically. Previous moral narratives, as Finnis and Haakonssen have pointed out, presented notions of rights and duties as inexorably linked to wider notions of virtue, justice and man’s

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510 Rom Harrê, *Personal Being: A Theory for Individual Psychology*, Cambridge, Cambridge University Press, 1984. The notion of ‘conversation’ refers to the diversity of material - oral, written and as extensions of this, symbolic - which inform the way we conceive of our social world and which provide the assumptions within which we discuss and debate that world.


512 Take the recent, in historical terms, narrative that could be described as the ‘White Australia Policy’. A dominant and cultural axiomatic narrative that reflected both the attitudes of a people and the structure of its institutions has now been altered to one that is diametrically opposed and described in terms of ‘multiculturalism’. This is a classic example of how government policy can go a good deal of the way to challenge and change community values.
‘place’ in the social network. Earlier narratives made no mention of rights yet emphasised duties and obligations as foundations for a moral order.513 The point surely is not simply that narratives can and do change, but also that we can change them – or at the very least we can influence them.

Thus a narrative of duties and obligations begins with a reflective examination of the sorts of reasons and values that agents have for acting. Ethical conduct is after all based upon ethical standards. But the reasons and values that support our actions are themselves based upon a recognition that central to our professional life, that is our life as doctors, psychiatrists, nurses, administrators and bureaucrats, is our concern for the other, the vulnerable, and the particular obligations we owe the other. The other is both a moral being who is in need of care and protection, and is one whom we have promised to care for and protect by virtue of the fact of the special relationship we have to them. There is also the acknowledgement of certain personal attributes that we must embrace in order to maximise the best interests of the other, but crucially there is the realisation that the other is not distinct or separate from us, rather that we all are in some ways different aspects of the other. The linkages here to virtue ethics and Christian charity are clear. Narrative change thus begins with a change of culture and that change begins at the level of personal involvement.

Such a narrative is given voice and authenticity by the expression of both law and social policy which inevitably helps to reinforce and sustain certain reasons and beliefs. Practice must inevitably follow theory, but practice also guides theory. That is, not simply does a narrative begin with the personal commitment of individuals, but it is reinforced and sustained by the attitude of professional groups and bodies and

513 I am referring here to the narrative embedded within early Christian (Old Testament) notions of duty that were, for example, contained within the Ten Commandments.
also at the level of public policy. Pogge and indeed Schue are correct to see narratives as guided by a democratic citizenry committed to change but the relationship between democratic citizenry and democratic institutions is an interdependent one. Governments guide social policy as well as being sensitive to changes and shifts in the values and ideals of a concerned public. Professional bodies influence public policy. And it would be wrong to assume that all professional bodies are uniformly cynical in their aims and ambitions. It is natural that professional bodies seek their advancement but ‘the caring professions’, as they are so called, are ultimately populated by people who choose to care as a career choice. Their ability and potential for social change is great. I suspect that what has been missing is a cultural anchorage. We have tended to be suspicious of deeply held beliefs as a form of cultural relativism has pervaded our civic life. Yet the caring profession, certainly of medicine and nursing, are steeped in values that propose self denial and community service. Perhaps these values need to be re-examined in the life of these relevant professions.

From the perspective of social policy we can be precise about the duties that we see as engaging the rights that the vulnerable have. For example, and with respect to the mentally ill, we may establish rigid guidelines for spending on mental health research; in identifying a level per capita spending in mental health care that matches other developed countries; outline the number of acute and non-acute beds required per 100,000 of the general population; establish quantitatively identifiable standards for clinical care within individual mental health establishments (such as staffing levels, the number of psychiatrists and psychiatric nurses on duty) and indeed through the whole range of mental health areas, for the aged, adolescents, Aborigines, migrants and so on.
With respect to the frail aged and those generally within residential aged care facilities, we can make similar rigid guidelines the legal and moral norms for government, the owners of facilities and those workers (clinical specialists, allied health workers and general carers) who are employed to care and protect. Again such guidelines would address staffing levels, the numbers of residents per room, levels of clinical medical care and psychological supports, cultural (religious and ethnic) sensitivities, access to the expertise of social workers, dieticians, occupational therapists and so on. The way to change a cultural narrative may begin with legal requirements that people discharge their duties in certain ways.

The intention in my comments above is to give structure to the underlying ethical stance. Virtue theory and Christian charity give a focus on the values of the agent as well as placing the other at the centre of the agent’s concerns. They provide a moral spotlight which asks agents to account for their actions. The practical aspect of this position is to incorporate within the work that we do as health care professionals a moral and legal imperative that sees us structure our professional lives according to the welfare of the vulnerable. But such a position is not without apparent problems. A criticism of this approach would almost certainly be that it is economically unsustainable. This may be the rationale that government has for its reluctance to enforce codes of conduct and practice within the aged care industry. In particular the Australian federal government has tended to distance itself from proactive involvement to secure the well being of the aged, content to leave this well being as an outcome of negotiation between owners and proprietors on the one hand and residents on the other.514 Yet as I have made clear within this thesis, residents in aged care facilities (and their families) are amongst the most vulnerable (powerless)

in our community. The idea that they can sit at the table with the owners and proprietors of facilities and resolve differences is absurd.515

But can economic imperatives intrude into the relationship we have with the vulnerable? On the surface this does appear plausible. But if human rights are ‘trumps’ then they cannot be trumped by economics, and if they are trumped by economic issues they are not ‘trumps’ in the first place. Whilst the government has made much of the linking of reforms in both aged care and psychiatry to human rights principles, it is already clear that the federal government has a rather unconventional view of what exactly constitutes human rights. Waldron has pointed out that the economic argument is one that governments often employ simply to justify inaction, considering it either impolitic to raise taxes to pay for genuine reforms or, and perhaps more importantly, to direct funds away from powerful interest groups who may have the ability to generate electoral damage.516 This reinforces previous comments about rights and rationality. That is, the human rights paradigm tends to benefit those groups and individuals who are described in terms of a rational, assertive capacity, who are able to identify their interests and powerfully assert them and who are able to deliver costs to those who ignore their responsibilities. But for those groups and individuals who are not so described; who are not organised, who are powerless, who do not have access to political lobbyists or access to a sympathetic media and who cannot deliver electoral damage if their interests are not satisfied – that is, in particular, those who are profoundly vulnerable – the concept of ‘human rights’ is often of little use.517 At the very least this tells us that as far as the

515 Yet this is what the federal government seems to expect and Valentine’s criticisms [fn 519] seem to be born out by the government’s own review of recent aged care reforms subsequent to the 1997 Act. Len Gray, Two Year Review of Aged Care Reforms, Canberra, Department of Health and Aged Care, Commonwealth of Australia, 2001.
most vulnerable amongst us, it is time to change the narrative. And the changing of
the narrative, that is, the realisation that only by embracing duties and obligations,
can human rights fulfil their true potential, begins with personal change at the level of
individual action – whether the individual is citizen, health care professional,
administrator or bureaucrat. To ignore this reality is to condemn the most vulnerable
among us to remain abandoned, excluded and voiceless.
Conclusion:

In this thesis I have argued that the way to engage the human rights that all individuals have is by a commitment, on behalf of caregivers, to duties and obligations. My special interest in this work has been our relationship to vulnerable people. As metaphors for the vulnerable I have focussed on the aged with dementia and the chronically mentally ill. In recent years in Australia we have increasingly viewed these individuals through the prism of the rights yet, as I have shown in the preceding pages, we have repeatedly failed to ensure the well being of such people. That is, although such groups and individuals have been awarded the protection of a whole variety of rights, their lives often appear to remain uniformly bleak and to fall short of standards of well-being that we might regard as acceptable in a developed and affluent liberal democracy. The reason this state of affairs exists is, as I have suggested, because within the rights debate we have failed to provide an adequate focus upon notions of duty and obligation that we, as caregivers, are required to embrace in order to ensure that rights are realised. To emphasise rights and ignore duties is to render rights meaningless. The way to engage rights for the vulnerable is to focus upon our duties. We have neglected duties. Often we have made them optional. In this way we have failed the vulnerable.

It may be argued that the approach I propose (engaging rights by emphasising duties) still does not solve the problem of how you are actually instrumental in getting people to act in this way, that is, to act out of a consideration of their duties. However this 'yes….but' objection is unfair. It can apply to any writer and any position. We may all agree that Schue and Pogge and Levinas or even Nussbaum and Sen offer powerful arguments for treating people fairly and with a dignity, respect and justice that protects them and ensures their well being, but we still have the
‘yes….but’ issue. How do you actually ensure that in the everyday engagements of everyday people, the actions acted and the behaviours embraced realise the care and protection of the weak and the vulnerable? Rawls of course escapes such a dilemma. In his approach to human rights, he proposes a ‘politically neutral’\(^{518}\) view of the individual and individual action that does not depend ‘on any particular comprehensive moral doctrine or philosophical conception of human nature…’.\(^{519}\)

Rawls, instead, asserts a theory that might be regarded as a rational and logical means for establishing a just and fair society. It is a template for the establishing of such a society. This is both Rawls’ power and at the same time his failure. As Levinas might say, in order to address the issue of the vulnerable we must first hear their voice. In Rawls the voice of no-one is heard.

So if the above is fair comment then why is my approach any different? The answer, as I have outlined in the preceding pages, has to do with the shift in focus. By emphasising duties we focus not on the right holder, but on the bearer of duties. In this way it seems that the rights debate often misses its mark, and not simply because human rights are mostly negotiated social and political outcomes between actors at (in particular) the level of international politics. Importantly, human rights addresses the voiceless, the powerless and the vulnerable and ignores the major players – the ones whose acts and actions impact upon the vulnerable. Rights talk addresses the mentally ill and not the psychiatrist. It addresses the child and not the parent. It addresses the frail aged in nursing homes and not the owner of the facility, or the nurse, or the general practitioner, or the aged care bureaucrat, or the politician. We need to shift our focus: our moral focus, our political focus and our legal focus to


\(^{519}\) \textit{Ibid}, p 68.
hold those who have duties to account both for what they do and for what they fail to do.

It is true that we can legislate to guarantee certain benefits for the mentally ill and the aged. We can ensure that respective wards are adequately staffed, that dementia specific units are staffed by specialists in the area of dementia care, that the mentally ill in prisons have access to adequate standards of psychiatric help, that all mentally ill in crisis have access to 24 hour crisis intervention, that those with challenging behaviours secondary to dementia are not placed in the same facilities (and often the same rooms) as those who are simply frail and aged. The list is seemingly endless. We can also legislate for tolerance, humanity, acceptance and compassion but something more is required to enable us to effectively care for and protect the vulnerable. That ‘something more’, I have suggested, is a commitment to duty and obligation grounded in, for example, virtue ethics and Christian theology – and that cannot be legislated for. It must be freely acknowledged and embraced by each concerned agent.

But why virtue ethics and Christian theology? The answer is that particularly in these approaches the locus of concern is with the agent who acts. As Kapp has pointed out, within the health and social service sphere, those areas where we typically encounter the vulnerable, it is a rights culture that is particularly pervasive. But this rights culture, whilst implying correlative duties, still largely ignores the terms and conditions of these duties. We need an approaches that speaks directly to those who act. My argument is that to ensure this rights culture delivers the benefits it promises, we need to balance it with a duties culture. Certainly duties form an essential part of Christian philosophy. They are also implied within Aristotle’s virtue ethics and I assert that these two approaches to ethical life are closely connected with the morality we embrace within everyday lives. Within everyday lives we make
moral judgements about how people act, not so much about what others are entitled
to expect. On what can we base a culture of duties? As Pogge has made clear, the
way to enshrine and protect rights within our society and its institutions is by ordinary
people embracing a commitment to duties and thus, and by extension, influencing
government. Pogge’s argument is powerful and engaging. In the final chapter of this
thesis I have tried to develop this aspect of Pogge’s thought and anchor it to a reality
that ordinary people might connect with and employ on a personal level.

How can we ensure the success of our project? The answer is that we cannot. But
then no approach can. However by focusing our attentions on the duties that those
individuals who engage the vulnerable have, and by calling agents into account for
their actions, then at least we can encourage an awareness of what we do and why
we do it. Both virtue ethics and Christian charity have the agent who acts as the
centre of their world. At the heart of these two views of moral action is the
engagement of other people and the sorts of personal values that one might embrace
in order to fulfil that engagement. At the heart of these philosophies is the keenly
heard voice of the other. There is a liberating capacity within their approach. To
engage the other is in some way to fulfil the promise of a more developed notion of
what it means to be an moral agent oneself.

This thesis then has sought to critically inquire into human right discourse. The
ultimate aim has been to infuse such discourse with a strong concept of duty and
particularly so in reference to those who are especially vulnerable. These
individuals, like all humans in general, do of course possess fundamental and
inalienable rights, human rights if you will, but the paradox is that without a strong
concept of duty to operationalise them, such human rights are largely irrelevant. The
paradox of rights, either legal or moral or, as one form of moral rights – human rights
- is that such rights can only be made relevant by a focus on duty. It is to this end that this thesis has been directed.
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