DUTIES TO ANIMALS: RAWLS' DILEMMA

In his A Theory of Justice John Rawls observes that his theory of "justice as fairness" is not a complete ethical theory because, among other reasons, it "would seem to include only our relations with other persons and to leave out of account how we are to conduct ourselves toward animals and the rest of nature."¹ In an earlier essay Rawls is less qualified in excluding animals from the protection afforded by principles of justice. In "The Sense of Justice" he maintains that it is a necessary and sufficient condition of falling under principles of justice that one be a person or that one "be capable, to a certain minimum degree, of a sense of justice."² If having this capacity is a necessary condition of being owed the duty of justice, and given the plain fact that animals fail to satisfy it, then animals are not owed the duty of justice. That is the teaching of the Rawls of "The Sense of Justice." In A Theory of Justice, however, Rawls states that he has "not maintained that the capacity for a sense of justice is necessary to be owed duties of justice" (p. 512), which seems to soften his earlier position.³ But Rawls does not go on to claim that animals are owed duties of justice. Rather, he observes that "it does seem that we are not required to give strict justice" to creatures who lack a capacity for a sense of justice (Ibid., emphasis added). Why this only "seems" to be so is not fully explained by Rawls, except for the fact that animals are creatures who lack a "sense of justice" and/or are not "persons," in his sense.

We have, then, what appear to be two positions concerning the relationship between animals and justice. The strong position, set forth in "The Sense of Justice," is that, since animals are not persons, they are not owed justice. The weak position, set forth in A Theory of Justice, is that, because animals are not persons, it seems that they are not owed justice. Neither position, I believe, is defensible, not only because both are at odds with what seems to me to be a superior, non-Rawlsian account of justice and our duties of justice to animals (a very long story) but because neither is consistent with Rawls' own views about natural duties (a shorter one: the topic of this essay). This will become clearer once we have explored his views about such duties.

After having noted, in A Theory of Justice, that "it does seem that we are not required to give strict justice" to creatures who are not persons, Rawls goes on to state the following.

(1) It does not follow that there are no requirements at all in regard to them (i.e., animals). Certainly it is wrong to be cruel to animals and the destruction of whole species can be a great evil. (p. 512)

Thus, though animals are not persons, and so are not owed, or at least it "seems" that they are not owed, strict justice, we do have duties in their case, in particular the duty not to be cruel to them. If we assume, for the present, that this latter duty is a duty we have directly to animals rather than, as Kant for example maintains, that this and other duties regarding animals are "indirect duties towards humanity,"⁴ then Rawls' position comes to this: We have some direct duties to animals, despite the fact that they are not persons, but we do not have a duty of justice to them, or at least it "seems" that we do not.

This difference between those to whom we owe the duty of justice, on the one hand, and those to whom we owe the duty not to be cruel, on the other, is at odds with what Rawls
says about these duties elsewhere in A Theory of Justice. In section 19 of that work ("Principles for Individuals: The Natural Duties") Rawls offers two characteristics of what he calls natural duties. First, "they apply to us without regard to our voluntary acts" (p. 114), and second "they hold between persons irrespective of their institutional arrangements," "obtaining) between all as equal moral persons" (p. 115). The first characteristic distinguishes natural duties from those duties, such as the duty to keep a promise, which arise as a result of the performance of a voluntary act; the second distinguishes natural duties from those which we have as a result of our occupying a given place in an institutional arrangement (e.g., the duty of an employee to an employer).

Rawls lists examples of natural duties. Of particular importance for present purposes is the fact that the list includes both "the natural duty not to be cruel" (p. 114) and the duty of justice" (p. 115). The dilemma Rawls must face should already be apparent. Natural duties, he says, hold between persons - "between all as equal moral persons." But animals are not persons, which is why we are not required, or at least "it does seem that we are not required," "to give strict justice" to them. If, however, both the duty not to be cruel and the duty of justice are natural duties; if natural duties hold equally between all persons; and if the fact that animals are not persons casts doubt upon or undermines our having the natural duty of justice to them; then the fact that animals are not persons should also cast doubt upon or undermine our having the natural duty not to be cruel to animals. On the other hand, if the fact that animals are not persons does not by itself show or raise the suspicion that we do not have the natural duty against being cruel to animals, then this same fact cannot by itself show or raise the suspicion that we do not have the natural duty of justice to them. Yet Rawls denies that we have the duty of justice to them (the strong position) or (the weak position) affirms that it at least "seems" that we do not. The dilemma that Rawls must face, then, is that he simply cannot have it both ways. Either being a person is a decisive consideration for determining those to whom we have or "seem" to have natural duties, in which case he cannot believe that we have a natural duty directly to animals not to be cruel to them, or being a person is not a decisive consideration, in which case he cannot advocate either his strong or his weak position regarding animals and the duty of justice. Whichever alternative Rawls should choose, it must be one or the other, not both.

Three replies which seek to defuse this dilemma are worth considering.

1. It might be objected that the duty of justice can only obtain between individuals who can have this duty to each other and that this is a relevant difference between this duty and the duty not to be cruel. In the case of this latter duty, this objection holds, we have it to animals despite the fact that they do not have it (or any other duty) to us. In the case of the duty of justice, however, we do not have it to animals because they cannot have this duty to us.

This reply goes no way toward defending a disanalogous understanding of the two natural duties in question. What one wants is an explanation of why the fact that animals cannot owe the duty of justice rules out their being being owed this duty (or at least "seem" to) if the fact that they cannot owe the duty not to be cruel does not rule out (or "seem" to rule out) their being owed that
duty. The objection just sketched fails to provide such an explanation, and it is difficult to imagine what such an explanation might look like. What might appear to be the two most promising kinds of explanation are not available to Rawls, given his analysis of natural duties. We cannot say that we have no duty of justice to animals because they stand outside certain actual political or other types of arrangements; natural duties do not depend for their binding force on such arrangements. Nor can we say that we have no duty of justice to animals because we have not ourselves, as actual persons in in the actual world, entered into any "agreement" with them; natural duties do not depend for their existence on the performance or non-performance of any voluntary act on the part of anyone in the actual world. This much granted, it should be clear that no appeal to our acts or our institutions can provide grounds for disenfranchising animals, when it comes to the natural duty of justice or to any other natural duty.

II. The second reply ignores the contingencies of the actual world and refers instead to the hypothetical situation of the "original position." Animals are owed the duty against being cruel, but not the duty of justice, according to this second reply, because this is the judgment that would be reached by those in the original position. After all, since the original contractors are self-interested persons who know they will be human beings, when they are "incarnated" in the actual world, if we might put matters in these terms, they will view the duty of justice in a way that is calculated to forward their self interest as the human beings they know they will become. Thus, to exclude animals for those to whom the duty of justice is owed can hardly be contrary to the self interest of the original contractors.

This objection merits two replies ((1) and (2) below), the first of which engenders two critical replies of its own ((1) and (2) below). (A) To allow that the original contractors know that they will become human beings, when they are "incarnated," is to prejudice the question of who is owed the duty of justice in favor of human beings and against animals from the outset. This prejudicial backdrop of the original position not only offends against the requirement that we be impartial in our assessment of relevant interests; what is more, to allow the original contractors to know that they will be human beings but not animals runs counter to what the "veil of ignorance" is supposed to accomplish. That veil cannot be thick enough if, while denying those in the original position knowledge about, for example, what race or sex they will be, when they come to be in the actual world, it nevertheless allows them to know the species to which they will belong.  

(1) Perhaps it will be objected that the supposition that any person in the original position could become a non-human animal would render the very point of the original position incoherent. Since persons in that position are being asked to choose basic principles of justice, principles which, among other things, are to lay the foundation of social and political institutions which will govern the distribution of harms and benefits to those who can meaningfully be said to be beneficiaries in their own right, animals can be excluded from consideration. Whatever else we might want to say about animals, it might be claimed, they cannot have "a good life" and thus cannot be beneficiaries in the relevant sense. To deny that they are owed duties of justice thus is not arbitrary.
Now, this response has a point, up to a point. It is doubtful at best that we can reasonably view, say, grasshoppers or fleas as themselves either having or not having a life which fares well or ill for them considered as individuals. However, the situation with respect to other animals -- let us call them "higher animals" -- is importantly different. The case can be made, I believe, for regarding mammalian animals in particular as being conscious and sentient; as having desires or preferences which they may either satisfy or have frustrated; as having various higher order cognitive capacities, including memory and the ability to form beliefs, including beliefs which relate to their own future; as agents in the world, in the sense that they can act intentionally or purposively, on the basis of their beliefs, to bring about the satisfaction of their desires or preferences; and as individuals who have a psychophysical identity over time.\(^6\) In the case of these animals, therefore, it makes perfectly good sense to view them as having an individual welfare -- as faring well or ill during the course of their experiential life, logically independently of whether anyone else happens to value what happens to them. Mammalian animals (and possibly others, including birds, though where one draws the line in this regard is admittedly difficult and controversial) thus can have a good life, relative to their nature, and thus can be beneficiaries in the relevant sense, even if it is true that because of their limited intellectual capacities they themselves are unable to form a conception of their welfare, have a sense of justice, or adopt a rational life plan. Accordingly, assuming that the principles of justice to be selected by those in the original position concern, among other things, the distribution of those harms and benefits which are essential to an individual's having a good life, the selection would exclude only some animals from being owed duties of justice. Higher animals (and these are the animals I have in mind henceforth) would, or at least should, be covered by the principles which are chosen. The charge of arbitrariness has not been met.

(2) It might be objected that it is not justice but metaphysics that excludes even higher animals from being owed duties of justice. To suppose that a person in the original position could be "incarnated" as a higher animal, it might be claimed, is to violate standard metaphysical views about identity. Metaphysically, a dog or a chimpanzee just can't be the same individual who once occupied a place in the original position. It is not arbitrary to exclude animals from being owed duties of justice, therefore, since even the original contractors may be permitted to know metaphysical truths, including the truth that, whatever else might transpire in the actual world when they are "incarnated," they simply can't turn out to be a (non-human) animal.

Problems of identity are admittedly serious problems, but their seriousness cuts both ways in the present case. If it is true, as Rawls allows, that any given person in the original position might turn out to be a human idiot or worse when he comes to be in the actual world, and still be the same individual he was in the original position, then the possession of the central characteristic definitive of moral personality (a sense of justice) cannot be a criterion of personal identity. That being so, what a priori reason can there be against a person in the original position being "incarnated" as a dog or chimpanzee? It would be a palpable double standard to affirm that a human idiot can be the same individual as one of the persons in the original position despite the fact
that, as an idiot, he lacks a sense of justice, but to deny that a dog or chimpanzee can be the same individual as one of the persons in the original position because, given their cognitive and moral poverty, these animals lack a sense of justice. Moreover, to attempt to avoid this display of arbitrariness by supposing that persons in the original position "just know" that they will be human beings, however handicapped, begs the question rather than answering it. For the question at issue is how animals can be non-arbitrarily excluded from those who are owed duties of justice. To attempt to avoid the point of this question by assuming that the original contractors "just know" what species they will belong to, when they are "incarnated," is to repeat the problem rather than to resolve it. Thus, neither of the anticipated objections ((1) and (2) above) to the charge that the "veil of ignorance" arbitrarily allows those in the original position to know what species they will belong to succeeds in nullifying this charge.

(B) A further difficulty inherent in appeals to the original position in the present case also merits mentioning. If, following Rawls, we assume that those in the original position know that they will be human beings, when they are "incarnated" in the actual world, we need to ask what possible basis the original contractors can have for agreeing that there is a natural duty not to be cruel which is owed directly to animals. The duties these contractors will recognize must be contingent upon what duties are in their self interest to recognize. But if, ex hypothesi, those in the original position will never become animals, and know this, then they cannot possibly have any self-interested reason to recognize a direct duty not to be cruel to animals -- a duty, that is, owed directly to animals independently of human interests. Thus, if the duty not to be cruel is a natural duty, which is what Rawls says it is, and if we have this duty directly to animals, which is what he evidently believes, then the grounds for our having this duty directly to animals are not to be found by asking about the supposed "outcome of a hypothetical agreement" (p. 115) struck between the self-interested persons in the original position, as Rawls understands this. A contract which includes direct duties to animals, including the direct duty not to be cruel to them, cannot be forthcoming if the only basis for selecting duties is the yardstick of human interest.

In view of the two objections ((A) and (B) above) raised against the second reply, therefore, Rawls cannot be spared the pain of the dilemma urged against him by having recourse to what does or does not transpire in the original position.

III. A third attempt to defuse this dilemma is to credit Rawls with the view that we have no direct duties to animals, something we have been assuming he would accept from the outset. But the view that we have no direct duties to animals is not only implausible in its own right, for reasons I have adduced on other occasions and shall not repeat here; more importantly for present purposes, it is also at odds with the general tenor of what Rawls himself says about our duties regarding animals. For Rawls explicitly states that "(t)he capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose some duties on us, including the duty not to be cruel to them (p. 512). But if it is these facts about animals themselves which impose certain duties on us, then these duties must be grounded in these facts, and not based on speculations, as in Kant's view, about how our treating animals in certain ways
will lead us to treat human beings, the good or ill effects of this latter treatment for human beings constituting the supposed grounds of our duties regarding animals. All the available evidence supports reading Rawls as agreeing that some of our duties regarding animals, including particular our duty not to be cruel to them, are duties we have directly to animals themselves.

The dilemma posed above thus seems recalcitrant to attempts to amputate or dull its horns, and though there may be other attempted defenses which have not been considered here it seems fair, in view of the failure of the defenses which have been considered, to force the dilemma home and require Rawls to choose between the two alternatives: Either being a person is a decisive consideration for determining those to whom natural duties are owed (or those to whom natural duties "seem" to be owed) or it is not. It cannot be both. Reasons have been advanced in the above which support Rawls' selection of the latter alternative, since it is only by selecting it and then going on to abandon both his strong and his weak positions regarding justice and animals that his views about how we are to determine those to whom we owe the natural duty of justice can be reconciled with his views about how we are to determine those to whom we owe the natural duty not to be cruel. Were Rawls to recognize the merits of selecting the latter alternative, the way would then be cleared for him to explore a theory of justice that did not "include only our relations with those humans who are persons in the actual world but also took into account our natural duty of justice as this relates to "how we are to conduct ourselves toward animals." What shape that theory would take cannot be determined in advance. All that is certain is that it would be a quite different theory, all considered, than the one Rawls has set forth to date."

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NOTES


3Though Rawls appears to soften his position in A Theory of Justice, it is not clear that he really does so, since he continues to maintain that the "only contingency which is decisive (regarding who is owed the duty of justice) is that of having or not having the capacity for a sense of justice" (A Theory of Justice, op. cit.) pp. 509, 512.


5The logical destination of this line of thought is to argue that the persons in the original position might turn out to be animals, when they are "incarnated" in the actual world, and thus, operating behind the veil of ignorance, would and should include animals within the scope of the duty of justice. This point is argued with considerable force by Donald VanDeVeer in "Of Beasts, Persons, and the Original Position," The Monist 62 (1979) pp. 368-377.

6I explore these matters at length in my The Case for Animal Rights, in preparation.


8I want to thank my colleague W. R. Carter for his critical comments on an earlier draft of this essay.