to extend the coverage of whatever principles they adopt so as to cover more than the class of moral persons—e.g. the children they might be born as.

⁷ VanDeVeer, p. 375.

⁸ This orientation helps justify Rawls's demand for a thin theory of the good, and a special emphasis on the primary goods which enable a person to pursue her chosen life plans. Elliot correctly notes that controversy rages about whether Rawls is successful in avoiding "want-regarding principles"; however, he does not think that animals pose any insurmountable difficulties in this regard (Elliot, pp. 103-104).

⁹ Regan, *The Case for Animal Rights*, pp. 243-248.

¹⁰ Peter Singer, "Killing Humans and Killing Animals," *Ethics*, vol. 22 (1979), pp. 145-156.

¹¹ It would seem that Regan's analysis of a "subject of a life" is also meant to capture a sense of individuality, but one which requires substantially less intellectual capacity than Rawls's account of a moral person.

¹² Rawls, pp. 505-510, *passim*.

¹³ Elliot, p. 104.

¹⁴ Cf. Rawls, p. 142.

¹⁵ Again, this is predicated on serious doubts about Regan's analysis of a "subject-of-a-life". Cf. fn. 10.

¹⁶ VanDeVeer and Regan both discuss this point, although it does not seem to be the major focus in either case.

¹⁷ This comparison tacitly recognizes an additional complicating factor that is not discussed in this paper: the fact that being a moral person may well be a matter of degree. I do not think this simplification affects the analysis of the arguments under analysis here, since none of them mentions this dimension, but it is dangerous to ignore it entirely.

¹⁸ For more on this topic, see Michael Wreen, "In Defense of Speciesism," *Ethics and Animals*, vol 3 (1982), pp. 47-60, and James Lindemann Nelson, "Animals, Handicapped Children, and the Tragedy of Handicapped Cases," *Journal of Medical Ethics*, vol 14 (1988), pp. 191-193.

Commentary: On the Utility of Contracts

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In many discussions that touch on animal rights, the participants clearly feel they know the truth and proceed to shape arguments to fit that truth. We owe Professor Russow our thanks for a careful, thoughtful discussion which has no axe to grind.

If I understand her argument, it runs something like this.

- A. To understand whether participants in the original position could be incarnated as nonhuman animals, we need to understand what the original position is supposed to accomplish.
- B. The original position was set up in response to Rawls's dissatisfactions with utilitarianism, principally to overcome (what he believes to be) utilitarianism's failure to respect individuality.
- C. Individuality, in the morally significant sense, involves having and caring about a life-plan.
- D. Consequently, the participants in the original position can be assured of being incarnated only as beings capable of having and caring about life-plans, so-called "moral persons," because only such beings are the object of the original position exercise.
- E. Very few, if any, nonhuman animals are capable of having and caring about life-plans.
- F. Consequently, the participants in the original position can be assured that with, at most, very few exceptions, they will be incarnated as human beings.

DISCUSSION

Thus, given the commitment to protecting individuality (as defined in C), a consistent theory of justice which excludes most all nonhuman animals (and a few marginal humans) follows.

The pivotal steps in Professor Russow's analysis are the commitment to respecting individuality and the definition of individuality in terms of having a life-plan. Both of these steps are, according to Professor Russow, the result of Rawls's dissatisfaction with utilitarianism. She tells us that "If one rejects utilitarianism in favor of respect for individuality, one moves inevitably, as Rawls does, toward a system which protects the individual's ability to choose and carry out her own plans, to further her own purposes."

That statement is obviously true, but trivially so, since its being obviously true derives from its employing a definition of "individuality" which refers to having life-plans. If one rejects utilitarianism in favor of respect for those with life-plans, one will inevitably end up with a system that protects those with life-plans. There cannot be significant question about such a truism. The significant issue is not what a rejection of utilitarianism in favor of respecting moral persons would inevitably lead to but whether Rawls's criticisms of utilitarianism would inevitably lead to defining individuality in terms of life-plans and calling for the respecting of such individuality. I do not find that that is where those criticisms inevitably lead.

In section 5 of the first chapter of *A Theory of Justice*, Rawls's criticism of utilitarianism focuses on the lack of a principle of distribution in utilitarian conceptions of justice: "The striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed." (TOJ, 26) "This sum of satisfactions" refers to "the greatest sum of satisfaction of the rational desires of individuals." (TOJ, 25) Lack of a principle of distribution permits the sacrifice of individuals in order to maximize the general welfare and indicates a degree of indifference to individuals. All this is very well-trodden ground and has, as Professor Russow notes, nothing in particular to do with animal ethics issues.

It also has nothing in particular to do with respecting beings having "a rational plan of life," i.e., moral persons. Although Rawls, like classical utilitarians, clearly is only concerned with normal human beings—as evidenced by his reference to "rational desires"—lack of assurance for individuals that they will receive an equitable share of available goods and lack of

protection for individuals against being sacrificed for the general welfare are concerns of justice no matter what kinds of vulnerable beings are involved. The hackneyed example of how a candy bar should be divided among children—whether each should get an equal share and equal pleasure or one should get all the candy and all the pleasure—indicates that "having a rational plan of life" is irrelevant to this criticism of utilitarianism. There is a question of justice here and a failure on the part of utilitarianism, if it cannot account for the injustice of the inequitable distribution, but none of this hinges on respecting rational life-plans, since (with very few exceptions) eating candy has nothing to do with life-plans.

If utilitarianism is indifferent to inequitable distributions, the offense to our intuitive sense of justice concerns some innocent individuals suffering or being deprived while others enjoy most of the goods and pleasures available and perhaps even prosper from the others' loss. Appreciating the injustice of such arrangements in no way leads one to emphasize the ability to choose, carry out plans, or further purposes, because lack of concern for the distribution of goods need not involve frustrating choices, plans, or projects. Even those who cannot choose, plan, and project, such as young children and nonhuman animals, can receive the short end of the stick when it comes to distributing pleasures and pains. What a desire to overcome the distributive shortcomings of utilitarianism inevitably leads to, then, is not a procedure that respects just those who have life-plans; rather, it leads to principles which protect all those who might be sacrificed for the general welfare against such sacrifice and which assure all concerned that they will receive an equitable share of available goods.

Such principles can be formulated without reference to moral persons, except insofar as moral persons are the sorts of beings to whom such principles are directed in order to inhibit their tendencies to injustice. For example, in *Moral Philosophy*, D. D. Raphael contends that the principle of utility, "Do that which will lead to the greatest happiness for the greatest number," already contains a principle of distribution. The imperative to seek happiness *for the greatest number* can be interpreted as directing us to distribute happiness as widely as possible. Alternatively, one could add to the imperative to maximize utility the qualification that the maximum that is compatible with equitable distribution is to be chosen. Other, more complex alternatives

referring explicitly to Rawls's insights concerning when inequalities of distribution are equitable, could also be formulated without referring to moral persons as the exclusive beneficiaries of these qualifications (or clarifications) of the principle of utility. The concern of these principles of distribution would not be "Can they choose?," "Can they plan?," or "Can they project?" Their concern about the individuals to be protected would still be "Can they suffer?"

Consequently, if the limitation of the concern of the original position participants to the fate of moral persons originates with Rawls' dissatisfactions with utilitarianism, that is not because those dissatisfactions depend in any essential way on what distinguishes moral persons from other vulnerable beings. Rather, it derives from the incidental fact that participants in this debate over the adequacy of utilitarianism have, by and large, been concerned only with moral persons. Remarks about obligations to other beings have generally been relegated to footnotes, parentheses, and afterwords, especially in the period during which *A Theory of Justice* was being written, which predates *Animal Liberation* by several years.

Rawls's own, brief discussion of possible obligations to nonhuman animals occurs late in *A Theory of Justice*, beginning on page 504. On page 505, in response to the question of "what sorts of beings are owed the guarantees of justice," Rawls responds that "The natural answer seems to be that it is precisely the moral persons who are entitled to equal justice. [E]qual justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation." Rawls goes on to indicate that moral personhood should be treated as a sufficient but not a necessary condition for the guarantees of justice—presumably out of concern about "marginal" humans—but it is clear that in this contractarian approach to justice, those who are entitled to the protection of principles of justice are those who can and have agreed to abide by the contract containing those principles: "Those who can give justice are owed justice." (TOJ, 510) That contractarian attitude, I submit, rather than criticisms of utilitarianism, is the basis for the elimination of nonhuman animals from the guarantees of Rawlsian justice.

It follows that in addition to the sorts of criticism of that elimination discussed by Professor Russow, questions about that contractarian attitude are also to the point. We can, for example, question whether the question of "what sorts of beings are owed the

guarantees of justice" is not itself prejudicial. Questions about who is *owed* something ordinarily presuppose that the benefit has to be earned or, at least, that it does not follow from one's being able to benefit from something that one should have it. However, matters of moral or social justice and associated basic rights differ from special rights and privileges in being guarantees that one does not have to earn. So, should not the question here be "Under what conditions can a being who could benefit from just treatment be denied the guarantees of justice?" Putting the question that way eliminates the suggestion that one must earn the guarantees of justice by doing something special, such as subscribing to a contract. As William James says:

Take any demand, however slight, which any creature, however weak, may make. Ought it not, for its own sake, to be satisfied? If not, prove why not. (*Essays in Pragmatism*, p. 73)

Again, contracts ordinarily presuppose that all the parties to it both have something to contribute to the others and will benefit from entering into the contract. On the other hand, many instances of moral and social concern with justice involve situations in which one party is at the mercy of the other. Here the principles of justice are supposed to prevent the powerless from being exploited with impunity by the powerful. In such situations, the presumption of reciprocity that underlies contracts—you are owed something because you have given something—is out of place. The powerless pose no threat to the powerful, and the powerful would be better off exploiting the powerless. Nonetheless, the exploitation of the weak by the strong is unjust, is even a paradigm of injustice.

Does it not follow that contractarian constructions of justice must inevitably fall short of providing a complete theory of justice and that this shortfall concerns not only marginal cases but a fundamental moral and social concern with justice? Referring to questions about "how we are to conduct ourselves toward animals and the environment," Rawls acknowledges that "the contract notion" may not offer "a way to approach" all "moral relationships," (TOJ, 17) but the shortcomings of the contractarian approach may be much more important to an adequate theory of justice than has been acknowledged.

Finally, there are many examples of individuals who are not parties to a contract being intended beneficiaries

of that contract. For example, many parents sign contracts with day care centers to watch over and tend to their children. So, is it so "natural" to believe that, with only marginal exceptions, only those who subscribe to a contract containing principles of justice are to benefit from the guarantees of justice? Even though nonhuman animals cannot be parties to a contract, it does not follow that they could not be intended beneficiaries of that contract. Consequently, if the participants in the original position can be incarnated as any of the intended beneficiaries of the contract they devise—a contract designed to overcome the distributive shortcomings of utilitarianism—they could be incarnated as nonhuman animals.

References

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Reply: Rawls: Rejecting Utilitarianism and Animals

Lilly-Marlene Russow

As is his custom, Professor Sapontzis begins his reply with a masterful reconstruction of my basic argument, the better to pinpoint the exact nature of our disagreement. His reconstruction is entirely accurate and fulfills its function admirably. It allows us to focus directly on the key issue: the proper interpretation of and justification for Premise C: "Individuality, in the morally significant sense, involves [for Rawls] having and caring about a life-plan."

In my paper, I argued that this premise could be justified by Rawls's rejection of utilitarianism and that it, in turn, justified excluding most nonhuman animals from the original position. Sapontzis contends, in contrast, that Rawls's rejection of utilitarianism is too weak to support Premise C. He thinks that Rawls rejects utilitarianism primarily because it lacks a fair principle of distribution and argues that a demand for justice and fair distribution does not yield any conclusions about the relevance or importance of life-plans. He concludes that Rawls's exclusion of animals springs from his contractarian bent rather than from his rejection of utilitarianism. If this is correct, Rawls's position is much less interesting and plausible: many arguments (most notably, "marginal case" sorts of arguments) discredit generally contractarian approaches from the outset, while critiques of utilitarianism are more likely to demand serious and sustained attention.

Sapontzis is correct in claiming that Rawls is concerned about utilitarianism's apparent willingness to countenance unjust distributions; however, I think Rawls's objections go beyond that. Another,

DISCUSSION