BETWEEN THE SPECIES

The Moral Patient,
the Honorable Fudiciary,
and a Faltering Liberalism:
An Exploration of Professor Bryant's
Call to Animal Respect

ABSTRACT

Professor Bryant's article—which seeks to discover whether aspects of an anticruelty statute can be based directly on a call to virtuous conduct—is a provocative piece of scholarship that harbors a much larger question: Can a general principle mandating full respect for animals be developed out of the moral methodology inhering in virtue ethics? Insights garnered in this rejoinder are meant to stand alongside those in Professor Bryant's article to lend deep moral grounding to animal-respect as well as provide intimations of the way virtue ethics as a moral methodology might yield determinate answers to moral questions.

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Professor Bryant's article—which seeks to discover whether aspects of an anticruelty statute can be based directly on a call to virtuous conduct—is a provocative piece of scholarship that harbors a much larger question: Can a general principle mandating full respect for animals be developed out of the moral methodology inhering in virtue ethics? If Professor Bryant's question is circumscribed, her efforts are nonetheless ambitious, as both the issue of the moral grounding for animal-respect and her methodology, virtue ethics, are surrounded by controversy and skepticism. Professor Bryant's article is a thoughtful attempt to bring a controversial and evolving moral methodology to bear on a position the moral necessity of which is itself in dispute.

My remarks in this rejoinder venture a bit further and hazard to peek through the door that Professor Bryant has boldly opened and enticingly left ajar. I ask whether there might be some way in which virtue ethics—as opposed to other moral methodologies—is particularly suited to provide metes and bounds to the normative foundations of animal-respect. Insights garnered here are meant to stand alongside those in Professor Bryant's article to lend deep moral grounding to animal-respect as well as provide intimations of the way virtue ethics as a moral methodology might yield determinate answers to moral questions. Toward this end, this paper has several sections. The first section briefly outlines virtue ethics as a moral methodology with particular attention to its highly situated and somewhat ad hoc aspect. The second section explores efforts over the last several decades to rely first on utilitarianism and then on deontological (or Kantian) approaches in pursuit of moral grounding for animal respect. The third section explores the particular challenges that utilitarianism or deontology must confront in attempting to provide moral grounding for any re-

lationship between human beings and persons or creatures that are incapable of moral agency. Finally, I turn to the concept of fiduciary duty to see if it might be viewed as a type of virtue ethics—or perhaps an instance of virtue ethics in play.

Before we begin, however, we want to note that ethical thinking has commonly recognized an indirect duty to animals, one that (in particular) proscribes the gratuitous infliction of suffering. The rationale for this injunction has been that, where human beings are concerned, cruelty to animals can foster cruelty to other humans. Modern efforts to construct a moral requirement of animal-respect stand in marked contrast to these earlier positions as more recent scholars seek to establish that animals have intrinsic moral value and, accordingly, the duty to treat them with commensurate respect is direct.

I. Virtue ethics

Virtue ethics as an approach to moral life is at least as old as Aristotle. In recent years, however, this moral methodology has seen a revival, albeit in a more contemporary guise. In its most recent formulation, virtue ethics jettisons historic foundations in Greek metaphysics in favor of “ethical naturalism,” a grounding more consonant with contemporary ideas about the nature of things. Modern day virtue ethics would retain from the classical formulation the concepts of *phronesis*—practical wisdom—and *eudaimonia*—the deep happiness of which the fully realized person is capable—without grounding these concepts in aspects of Aristotelianism that are highly teleological and infused with dynamic necessity. Accordingly, ethical naturalism is simply “the enterprise of basing ethics in some way on considerations of human nature, on what is involved in being good *qua* human being” (Hursthouse 1999, 192). Modern virtue ethics is then a type of ethical naturalism that uses practical

wisdom to unearth those core moral precepts that make reference to and are embedded in the lives of humans as rational and social beings, when they are at their best as such (Hursthouse 1999, 29).

Virtue ethics as a moral methodology gives rise to a number of objections, however. One complaint is that any moral method that would place the virtuous agent at the center of an inquiry into virtue boils down to little more than a truism such that, for any given circumstance, “virtue is what the virtuous do,” or “virtue is virtue.” The response to this objection is that, as a method, virtue ethics quickly moves to drill down on situated moral questions, to ask what a virtuous agent would characteristically do under particular circumstances. The focus is on moral life in the trenches and in particular on those character traits that predispose this person to act in moral way. Once the inquiry is situated (so the claim is made), fundamental principles become more determinate and indeed less tautological (Hursthouse 1999, 31). But the claim that this moral methodology is typically highly situated in its application gives rise to a second objection – that, where principles are developed “in the trenches,” they are unlikely to offer much guidance beyond the narrow circumstances out of which they arise. And perhaps even more salient is the observation that, narrow or otherwise, if the resultant prescriptions take their moral force from the value of virtue per se, what about the person who has little truck with virtue? It is hard to see what sort of claim virtue ethics might make upon the conscience of the un-virtuous (Hursthouse 1999, 30). (And this is particularly the case once the teleological dimensions of Aristotelianism are jettisoned.) Finally, whereas ethical theories typically focus on those things that are morally necessary, virtue ethics conflates (or perhaps even supplants) the necessary with the superogatory, the can-

ons of ordinary decency with the heroic. No line can be drawn between what is morally required and those things that are above and beyond (Hursthouse 1999, 40). The conflation of the necessary with the superogatory compounds the problem (inherent in most moral methodologies) of setting priorities among competing obligations.

Such objections notwithstanding, proponents of virtue ethics persevere with the stringent point that, however virtue ethics may fall short in developing universal requirements of morality, it offers something else which other moral methods do not, something which is a *sine qua non* of any moral method. Any method that aims only to produce a determinate and coherent set of moral requirements is unlikely to succeed as a moral method because, to shed light on or to develop moral precepts, a method must engender a particular attitude, not just concerning the moral life, but also concerning the moral method as part of the moral life. What is required for any moral method to come into its own as an avenue into the moral is a concern more with “what kind of person do I want to be?” than “what are the duties or rules with which I must comply?”¹ (Hursthouse 1999, 29). To succeed, a moral method must engender not merely a certain moral behavior, but also (and also more fundamentally) a way of thinking about moral discourse. Absent a cultivated attitude with respect to the “process,” any moral method (in its passive form) reduces to a posture of rule-compliance or (in a more active form) degenerates into casuistry. Either mind-numbing concern with rules or shallow casuistry will thwart the moral method that is the midwife to the moral life. Unlike most schools of ethics, virtue ethics takes the spotlight off the letter of the law and focuses instead on the spirit. Rather than simply training the individual in rule compliance, virtue ethics

1 See Hursthouse’s discussion on the noncodifiability thesis (Hursthouse 1999, 29).

as a moral method develops in the individual an ever increasing capacity for virtuous behavior which (among other things) moves the discourse to the right place (Hursthouse 1999, 27).

Professor Bryant does not overlook that aspect of virtue ethics that recognizes correct moral attitude as an essential prerequisite to moral discourse. But as she attempts to use virtue ethics as a framework within which to address animal cruelty in the egg production industry, she must also concede many of the objections outlined above, whatever the attitude brought to bear upon the process² (Hursthouse 1999, 40-41). Even if virtue ethics makes for more productive moral discourse, this method would still appear to fall short when it comes to developing determinate principles to guide behavior – at least when it comes to relations between the species. Bryant maintains that virtue ethics does not directly yield or justify a general anti-cruelty statute. But even when the method is applied to more situated dilemmas, such as that presented by the egg production industry, she finds it tough going. For example, California law requires depositaries of living animals to treat these animals “kindly” (Cal. Civil Code 2012). While such a requirement can be seen as consonant with and perhaps derivative of virtue ethics, the statute provides no guidance as to the meaning of the word “kind” or particular actions that would accordingly be required (or proscribed) with respect to the animals. To the extent that this statute bespeaks “what is involved in being good qua human being,” it is hard to extract from this principle particular obligations applicable to the egg production industry. Thus, even where virtue ethics is applied as a highly situated meth-

² Virtue ethics maintains that, to interpret rules and indeed to apply them in a particular case, a certain amount of virtue and corresponding practical wisdom (*phronesis*) are required. Over time the virtuous person develops a store of practical wisdom so that he or she can deal virtuously with a host of situations.

odology, any resulting guidance with respect to the moral life seems to hover above the situation, remaining indeterminate.

But further, a need to “be kind” offers nothing in the way of help in juggling competing moral obligations. What if an egg producer knowing the degree to which chickens suffer in this industry has a family that relies upon him for financial support? He then confronts a conflict the needs of his family and the needs of the chickens. Steps taken to minimize the suffering of the chickens potentially cut into his profits as a producer – an outcome with a particular moral force when these profits are instrumental in meeting obligations to a family by making a living.

II. Alternatives

Virtue ethics as a moral methodology was born of an increasing dissatisfaction with the dominant schools of modern ethics, especially utilitarianism and deontology, both types of liberalism (Hursthouse 1999, 2). Nevertheless, given the apparent limitations of virtue ethics, not the least of which becomes evident in trying to generate substantive rules requiring animal respect, this is an occasion to revisit these other moral methods, with particular attention to the various attempts in the last 25 years to use them to lend a more rigorous moral grounding to the relationship between humans and other animals.

Recent attempts to provide a systematic argument for the idea that animals are entitled to respect comparable to that owed human beings have issued both from the utilitarians and from deontological theorists. Both of these approaches attempt to extend the obligation owed by humans to other animals well beyond animal welfare and compassion in its usual form. And, of course, both of these approaches draw upon of schools of

moral philosophy developed for the purpose of working out the ethical requirements of human-to-human existence. In both instances, the goal has been in applying these foundations to the relations between animals and people, to subsume animals into the moral framework so that humans must show them concern and respect on a par with other humans.

As we shall see, each of these two schools confronts a similar problem as it attempts to extend its fundamental premises to animals. While each school has a qualitatively different approach to moral justification, the moral principles emanating from either school remain indeterminate with respect to the bulk of those substantive rules necessary to collective life. The need to “gap-fill” presents a challenge where human-to-human relations are concerned, but for humans the challenge is not insurmountable. It is the stuff of moral and political discourse (framed, as per either school of thought, by fundamental principles). Where other animals enter into the mix, however, the process of gap-filling presents virtually insurmountable hurdles.

II.A Utilitarianism

Of these two schools of thought, it is probably easier to develop a position that animals deserve respect on a par with human beings out of utilitarianism. This is because, at least for the classical utilitarians, the only significant data of moral life are pleasures and pains. The test of whether an act is moral consists in assessing whether it makes for the greatest happiness of the greatest number—whether its consequences, when all the pain and pleasure the act causes has been calculated, produce the greatest aggregate of well-being or happiness for all those who can experience pleasure or pain, as compared to any other course of action (Bentham 1789, ch. 4). A direct

duty to animals is easily developed here because, if the most important data of human life are pleasures and pains and if we acknowledge that animals (like humans) are sentient creatures, then no utilitarian can doubt that indicia of animal sentience merit inclusion in any calculation of aggregate happiness (Bentham 1789, n. 311).

Even if the community of moral relevance can be enlarged so that animal sentience can be readily factored into the utilitarian moral calculus, however, fundamental objections to utilitarianism as a moral philosophy operate to undercut the force and significance of such assimilation. While utilitarianism purports to give us a rule of behavior, a guide to action, it forces us to calculate, calculate calculate (Smart and Williams 1973, 100-107). Second, on a related point, in practice the metrics are impossible. The data relevant to any moral decision is likely to make for ambiguous and indeterminate conclusions (Smart and Williams 1973, 93-100). Third and most importantly, there is nothing in the doctrine about the distribution of burdens. As long as pleasure is increased overall, it is of no moral moment that some people (or animals) suffer or even die as instrumentalities of the benefiting majority. All that need be secured is the optimal balance of pleasure over pain. So, for example, we can easily justify animal-testing on a certain number of animals, however cruel the test, if this type of activity can be shown to be important to advance the treatment of some disease affecting a majority of humans and other animals (Franklin 2005, 8-9; Singer 2009; Regan 2004, 202-205).

II.B Deontology

In the second school of thought, the deontological, we have a group of philosophers (most quintessentially, Kant (1785)) who focus on the concept of the moral itself, developing a rule (the

“categorical imperative” in the case of Kant) and attendant duties that go to the essence of this concept—as a *sine qua non* of moral relations (Pufendorf 1691; Finnis 1980). The challenge for those trying to develop a direct duty to animals from deontological principles is, however, that deontological theories in general take moral duty to be part and parcel of some type of moral agency, aspects of free will and rationality that enable a human being to make right choices or to be responsible. It is the implication of this agency that makes for moral duty and provides at least minimal moral content to that duty (Kant 1785). However, for the foremost modern exponent of deontological ethics, Kant, moral obligations and moral rights run only to moral agents, or those with this essential capacity. Because animals lack this type of autonomy, they are merely moral patients and moral agents have no direct duty to them.

More recently, deontologists pursuing a direct duty to animals have shifted the grounding of the concept of the moral away from moral agency to center on a universal vulnerability, that is, to the quality of being a moral patient. Animals cannot be moral agents because they cannot be held responsible for following rules, but they can instead factor into the moral universe as “moral patients” because they can suffer unjustified harm from moral agents. For example, Tom Regan, perhaps the most prominent contemporary scholar to attempt to develop a direct duty to animals from a deontological foundation, takes as fundamental the capacity for sentience—the basic datum of moral life in utilitarian thinking. But rather than treating sentience as merely a source of morally relevant data, Regan shifts the ground so that sentience entails vulnerability. Such vulnerability (or subjectivity) becomes the rationale for claiming that every sentient being is inherently valuable (Regan 2004, 279-280; Franklin 2005, 16-20). Claiming we have “a direct *prima*

facie duty not to harm individuals,” Regan moves to extend this “harm principle” to include animals, maintaining that all mammals of one year or more in age have “inherent value” (Franklin 2005, 20; Francione 2000, 18). Any life—human being or other animal—is inevitably finite; once it is over it is infinitely gone. In that sense all sentient lives have an inherent value and animals are bearers of equal rights as are people. Thus, in Regan’s hands this universality of sentience—this vulnerability—becomes the basis of a theory of rights that runs to animals and to people alike.

When deontological principles are developed in such a way as they can be applied to the relations not only between humans but also between humans and animals, these rules support a fairly convincing argument against meat-eating and the grosser forms of animal abuse. To the extent animals can suffer harm (including the harm of a shortened life, however painless the death), they cannot be eaten any more than people can. As a tool with which to develop the metes and bounds of a direct duty to animals, however, deontological accounts fall short (as they do where duties to humans are concerned) in yielding substantive rules to govern myriad situations.

III. Deliberation and Negotiation

It is commonly observed that deontological ethics understood as a moral method can be hard pressed to supply rules sufficiently determinate to govern the full panoply of situations that spring up in the course of interaction—whether it be human-to-human or, more recently, human-to-animal. But where human interactions are concerned, the characteristic means of rendering formal principles more substantive—negotiations between parties against the background of fair principles—serves to highlight the essential challenge of using a deontological

method to develop a direct duty to animals. Indeed, aspects of the theory of John Rawls (who resists the idea of a direct duty to animals) are particularly instructive in this regard.

Rawls's work is particularly illustrative because for him moral life at every stage presupposes the capacity for deliberation. Unlike Kant, Rawls does not develop his basic premises governing human-to-human interactions on free will and rationality as such. Nor is he interested in according sentience some constitutive role in a theory of justice. Instead, he begins with the idea of community as the bedrock of the moral. Terms of social cooperation are then those that would emerge from an ideal situation structured to produce reasonable and impartial deliberation about the basic principles that are to govern society as a system of fair cooperation. Those in this "original position" are behind a "veil of ignorance" and know nothing about their circumstances otherwise. They know nothing about their class position or social status, their intelligence, talents or abilities, not even their personal psychology or fundamental values. Operating from the same standpoint, all the parties are able to be similarly rational in their deliberations.

Some suggest that the Rawlsian thought experiment could be expanded to include animals so that the duties that emerge behind the veil of ignorance would be owed also to animals. To do this, species would be suppressed behind the veil of ignorance along with other aspects of deliberators' real circumstances.

The introduction of animal interests into the original position would, however, violate fundamental premises of Rawls's construction. The point of Rawls's thought experiment is to shine the light of reason on various attributes that typically

make for social advantage or disadvantage and (among other things) determine the weight of those attributes in a fair system of cooperation. While it might seem that it would not thwart the experiment to introduce into it the possibility that some members of society will be moral patients (without a capacity for moral agency), Rawls's heuristic artifice is meant to bespeak the capacity for reasoned judgment inherent in members of a well-ordered polity. So, while the participants function in some sense in a representative capacity, the device does not countenance paternalism (Rawls 1993, 48-54 110-115).

Rawls illustrates the pervasiveness of deliberation in moral life when he turns to the need in any well-ordered polity for something like a "just savings principle." A polity needs to impose taxes to develop and maintain various types of infrastructure (human capacities as well as material structures) necessary to secure the future of the polity. Rawls admits that precisely how these burdens are to be shared admits of no definite answer. While elements of Rawls foundational principles impose ethical constraints on the distribution of these burdens, "[t]he principles of justice set up a certain range within which the rate of savings or the emphasis given to self-respect should lie. But they do not say where in this range the choice should fall." Ultimately, Rawls concedes, "[w]e must rely on the actual course of discussion at the legislative stage to select a policy within the allowed bounds" (Rawls 1971, 284-293).

Because all deontological methods must extract from or develop against the background of fundamental duties rules sufficiently substantive to govern myriad social interactions, to cast moral patients in a constitutive role alongside moral agents becomes deeply problematic. The ability to act by understanding rules and making agreements is a *sine qua non* in the realiza-

tion of a just social order. And, as Rawls's theory underscores, where the capacity for deliberation is key, a presumption of reciprocity operates as a bedrock.

As for utilitarianism, even if we can expand the community of moral relevance to include animals and other moral patients, utilitarianism also comes up short when it must generate the myriad substantive rules necessary to a mature polity. At that point utilitarianism also has to allow moral agents to fill gaps by devising consensual arrangements against a background of fundamental principles. Indeed, whether at issue are singular acts of individuals (as with act utilitarianism) or rules meant to govern a polity (as with rule utilitarianism), the injunction to embrace that which will produce the greatest aggregate of happiness entails complex calculations and readily disputed outcomes. And while more substantive rules potentially issue from disciplines that are the progeny of utilitarianism—microeconomics and rational choice theory, both of these disciplines take as indicators of the relevant utility calculus the trade-offs made in the quid-pro-quo of the market. Thus, even if utilitarianism per se can include animals in the community of moral relevance, to the extent that utilitarianism relies upon market behavior as revelatory of aggregate utility, it is difficult to envision how the data of animal sentience are to factor in.

IV. Moral Agent as Fiduciary: Back to Virtue?

It is hardly a new insight that utilitarianism and deontology as species of liberalism have trouble establishing the moral metes and bounds of relationships between parties that are not equal (Gilligan 1993, 173-174). The more fundamental problem in these ethical schools—that of finding philosophic footing for the rightful interests of the moral patient—can also come as no surprise. And, of course, not only do these moral

methods slight the interests of animals, but human beings of diminished capacity are also overlooked. Thus, by the same token that animals are side-lined, so are very young children, the mentally disabled and undeveloped (fetal) humans, among others (Franklin, 2005, 55).

So the challenge to lend deep moral grounding to animal respect persists. In the face of the limitations of utilitarianism and deontology, however, are we certain that the concept of virtue can take us no further? Even if virtue ethics falls short as an effort to extract a modern moral methodology from the concept of virtue, the concept of virtue itself is still alive and well and indeed turns up in various (non-deontological, non-utilitarian) methods and indeed in legal doctrines, all directed at securing the interests of moral patients. No one can claim that concept of virtue flowers in these places and unto itself gives rise to a moral method. It does, however, serve to ground other methods and strategies that for various reasons can be more determinate in their outcomes. Two examples follow.

IV.A Ethical Spheres and Virtue

Christopher Stone as an environmentalist is eager to secure the interests of moral patients, a category he enlarges substantially to include not only animals and humans of diminished capacity, but also future generations, plants and all manner of flora and fauna, trees, rivers, landscapes, vistas, and the list goes on (Stone 1987, 20-21). In his classic *Earth and Other Ethics*, he maintains that these morally marginalized people and things are worthy of concern, but historically they have not made their way into the heart and soul of ethics (Stone 1987, 20). And this is the case, he argues, even in the face of past efforts (of which deontology and utilitarianism could be seen as of a piece) to squeeze moral patients into familiar paradigms by indulging in

legal fictions, effectively ascribing to them moral agency, but then constructing limited exceptions to general rules in recognition of their significant differences (Stone 1987, 22). Notwithstanding these strategies, Stone maintains, any moral status the marginalized have been granted has been purely derivative of the welfare of those with moral agency (Stone 1987, 25).

Along these same lines, Stone also sees as problematic the tendency to characterize any fundamental moral endowment ascribed to the otherwise marginalized as a right that can be trumped only if the holder waives or trades it (Stone 1987, 147). For persons or things incapable of unambiguously articulating volitional intensions, to accord them rights (in any sense that the term is conventionally understood) is almost certain to freeze the ordering of collective priorities (Stone 1987, 51). Once assigned, such an entitlement will not be reallocable to the highest use by ordinary legal and market mechanisms and, accordingly, will be untenable as a freeze on aspects of the status quo (Stone 1987, 53).

Stone maintains that both of these approaches—either relying on legal fictions or ascribing to the morally marginalized rights upon which they cannot act—jeopardize any attempt to develop a disciplined and coherent regime that will treat the historically marginalized with moral seriousness. His goal is to ascribe to these other persons and things what he terms “moral considerateness”—a more comprehensive and flexible alternative based more on the duties of moral agents than the rights on moral patients (Stone 1987, 55).

The content of this “considerateness,” as Stone applies it to various moral patients, is to be undergirded with a pluralist moral methodology. The view that every quandary has to

be defined and attacked according to a single coherent set of rules must be surrendered. Stone resists the idea that the moral fabric that connects moral agents and moral patients is part and parcel of the governance that embroiders relations between and among moral patients themselves (Stone 1987, 147). The essential fact is that moral agents have differential access to information as they cross domains. Expectations appropriately change as agents move from friends to strangers or to animals because knowledge changes (Stone 1987, 142). To secure the moral status of the otherwise marginalized, ethics must be partitioned into several strata, or planes (Stone 1987, 153). A particular plane is an intellectual framework that, among other things, confronts our limited knowledge as to the preferences and, at times, even the needs of those patients that belong to the strata in question (Stone 1987, 133).

Interestingly, however, as Stone insists that pluralism need not degenerate into rank relativism, he quickly reaches for the concept of virtue as a ground for his moral method (Stone 1987, 246). While Stone deflects attention away from patients' rights to emphasize agents' duties, it becomes clear that the edifice he is erecting will be the final analysis predicated upon agents' moral virtue. In fact, Stone concedes that, when monist methods (whatever the stripe) are jettisoned in favor of pluralism, idealism of some sort—a desire to advance some good—commonly comes to inform the moral method. This point is perhaps most easily grasped by thinking about how contemporary moral agents might apply the concept of moral considerateness to future generations of moral agents (the not-yet-existent being in this era the moral patients of the contemporary). There is no way, Stone observes, to arrive at what the progeny will want independent of what the current generation wants them to want. Thus, there is no way for the current generation of moral agents

to treat future generations with moral considerateness except by trying to advance some good (Stone 1987, 88). “There is no way we can carry out a commitment to care for our distant progeny and avoid the question of what things we want them to value and disvalue” (Stone 1987, 89). The insight that idealism and indeed human virtue are inescapably in play when we seek to care for those who cannot speak for themselves enters into Stone’s argument in other places as well (Stone 1987, 184). As he waxes lyrical toward the end of his treatise, Stone says with respect to any ethical plane, “It is by the choices we affirm in this zone, no less than by our yielding to the dictates of a clear moral command, that we have our highest opportunity to exercise our freedom and define our character” (Stone 1987, 254)

IV.B A Punctilio of Honor

Finally, if liberalism (whatever the school) is generally reluctant to pursue ethical rules that would govern relations between unequals, the Western legal tradition, using the concept of fiduciary duty, has long ago developed laws to govern such relationships (Stone 1987, 48). Indeed, drawing upon the concept of fiduciary duty, the law has long given quarter to moral patients. And if fiduciary duty has historically governed relationships between human beings, this rich area of the law nevertheless illustrates the possibility of doing what Stone suggests—generating rules within ethical planes or particular intellectual frameworks and doing so with discipline and intellectual integrity (Stone 1987, 105). The concept of fiduciary duty demonstrates that it is possible to come to terms with relationships between unequals and to develop rules uniquely tailored to a situation where one party is vulnerable relative to the other. Such rules would be calculated not only to discourage exploitation but also to foster the well-being of the party who, relatively speaking, has less aptitude. In this area of the law the

most basic rules—which address things like self-dealing—are clear in their proscriptions and impose draconian remedies. But most importantly, a significant portion of the law of fiduciary duty frames the exercise of discretion so that the fiduciary can respond to changing circumstances in ways that best serve the moral patient. Indeed it is this exercise of discretion with respect to the interests of someone who is not a peer of the fiduciary that is the essence of the fiduciary role; it is what makes it unique in the law.

Perhaps because this exercise of discretion is so central to the fiduciary role, fiduciary law has at its core aspects of idealism and indeed virtue. The concept of virtue provides the touchstone for the exercise of discretion and informs the laws governing it. As with virtue ethics, the spirit of the law necessarily animates the letter. Indeed, for the errant fiduciary seeking to refuge in the letter of the law, there is the famous admonition by Justice Cardozo, “A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior” (Meinhard v. Salmon 1928).

Most moral agents enter into a fiduciary relationship voluntarily, by means of a contract with another moral agent who effectively engages the fiduciary to see to the well-being of a third party. Because the third party will have less aptitude than the fiduciary in some important respect (perhaps in the way of financial acumen), the third party will be, relative to the fiduciary, a moral patient. Recently it has become possible to provide for the care of a pet via this classic trust arrangement (Frasch et al. 2011, 211-213).

But moral agents can also find themselves deemed a fiduciary without entering into such an agreement. It has long been the case that, where parties are not equal in some important respect (in particular where one party possess some esoteric knowledge—financial, medical, etc.) and where the vulnerable party has reason to rely on the one with superior aptitude, the law can impute a fiduciary relationship, with attendant liability imposed on the deemed fiduciary. This second situation suggests the versatility of the concept of the fiduciary as an intellectual framework—indeed a quite venerable intellectual framework—within which to develop rules appropriate to relationships between moral agents and those moral patients of many stripes heretofore ignored by the law and much philosophy (Frasch et al. 2011, 211-213; Sunstein 2004, 251). But further, the imputation of fiduciary duty also suggests that, where there are unequals, moral agents can—under certain circumstances—have inherent responsibilities to moral patients.

V. Conclusion

Professor Bryant's attempt to predicate aspects of an anti-cruelty statute on a call to virtuous conduct encounters difficulties that are at one with the commonplace criticisms of modern virtue ethics as a moral method—that it cannot develop out of the impulse to do virtue the universal requirements of a virtuous life or, where the impulse to virtue is various, set priorities among intentions. Thus, when Professor Bryant tries to use virtue ethics to give shape and form to the moral requisites of the egg production industry, the resulting guidance is indeterminate.

Before the call to virtue is entirely jettisoned as being of little use in developing a direct requirement of animal-respect, however, we must recall that virtue ethics as a moral methodology

has emerged in the face of dissatisfactions with the two dominant schools of modern moral thinking—utilitarianism and deontology. Further, whatever the broader colloquy about these two schools, each of them confronts virtually insurmountable challenges in encompassing within its terms relationships between unequals. Indeed, as a problem that has long beset liberal thinking, this difficulty extends to the goal of developing a direct duty to animals.

Relationships between unequals are particularly problematic for these other methods due to the way they extract from or develop out of their fundamental premises those myriad substantive rules necessary in any era to guide humans through the panoply of situations that arise in the course of social interaction—whether human to human or human to animal. Where interactions are human to human, however, these moral methods allow for various forms of voluntary dealings between or among parties to produce substantive rules. Depending on the school, either market behavior or deliberations against a background of fair principles of political engagement produce the necessary substantive prescriptions. As it works out, however, where one of the parties lacks the capacity to bargain or to deliberate, as the case may be, this essential process of gap-filling cannot proceed. In short, as exponents of these alternative schools attempt to extract from their fundamental premises the substantive necessities entailed by animal respect, the methodology runs aground. (Utilitarianism probably falters at a later point in the unfolding of its method, but both schools ultimately fall short.)

But all is not lost with respect to the moral governance of relationships between unequals—and much is still to be gleaned from the concept of virtue. While Professor Bryant's project

raises serious doubts as to whether virtue ethics can flower into a comprehensive moral methodology that can require or justify animal respect (among other things), the idea of virtue continues to appear in diverse places to significant effect, both in philosophical schemes (albeit in ones less monistic than typical iterations of utilitarianism or deontology) and in the law. And given the fundamental challenges that inhere in utilitarianism and deontology where relationships between unequals are concerned, these appeals to virtue are worth noting. Perhaps most provocative in this regard is the venerable law of fiduciary duty, where dealings between unequals are the primary focus. The call to virtuous conduct occupies center stage as the antidote to a situation otherwise rife with exploitation. The “punctilio of an honor” becomes a necessary and indeed compelling touch point where moral agents do the inevitable—the morally unavoidable—and exercise discretion on behalf of moral patients.

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