

Why Not Noah's Ark?

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If for a moment we take Hume's theory of the circumstances of justice not as a theory of justice but as a theory of the conditions under which moral constraints will in fact be effective, we will, I think, conclude that it has impressive explanatory power. It will account for the traditional killing, raping, enslaving, and pillaging of the vanquished by the victors in battle. It will account for the virtual extermination of native peoples by European settlers in, for example, North America and Australia. And it will account for the record that the human race has set in its relations with the other animals with which it shares the planet.

As unflattering as the facts are, what is if anything even more discreditable to human nature is the seemingly inexhaustible capacity human beings have for inventing justifications for cruelty to one another and to nonhuman animals. From the doctrines of Genesis and Exodus to those of "scientific" racism and the survival of the fittest, intellectual history parallels the history of events as a record of the crimes and follies of mankind.

No doubt against a background that includes the notion that it doesn't matter what you do to animals because they are unconscious mechanisms, or because they do not have souls, theories of morality as mutual advantage may appear to be scarcely worth picking on. But it is worth observing, I think, that no theory that makes morality out to be a practice of mutually advantageous forbearances can have any implication that human beings have direct moral obligations not to cause suffering to animals. (I shall explain what I mean by "direct" below.) For although it is of course possible to train some animals to observe constraints, and human beings undoubtedly can benefit from this, it would, I take it, be an indulgence in anthropomorphism to regard this as amounting to reciprocal engagement in a shared moral practice that has as its *quid pro quo* good treatment of animals by human beings.

Here, as elsewhere, we ought to make a sharp distinction between a rational contract for mutual advantage and what can withstand impartial appraisal. As Peter Singer puts it in *Animal Liberation*, the point "is not that animals are capable of acting morally, but that the moral principle of equal consideration of interests applies to them as it applies to humans. That it is often right to include within the sphere of equal consideration beings that are not themselves capable of making moral choices is implied by our treatment of young children and other humans who, for one reason or another, do not have the mental capacity to understand the nature of moral choice."¹

There is no reason in principle why we could not derive protection for the interests of nonhuman animals by using the machinery of the original position. All we have to do is to extend its scope to include representatives of all sentient beings. It may seem a little bizarre to imagine the negotiations taking place aboard Noah's Ark, with the species of the participants concealed from them, but is it really much more farfetched than imagining that the parties are (as [David] Richards proposes) all people who have ever lived or ever will live or (as others have suggested) all people who might live?

It is true that it is hard to think about the question: what rules would you draw up for the treatment of other animals by human beings on the assumption that you might turn out to be either a human being or some other animal? I think, however, that the difficulty of thinking about the question posed in those terms reflects the perfectly genuine difficulty that is faced by those who wish to claim that human and nonhuman interests should be weighed in the same

¹ *Theories of Justice*, Berkeley: University of California Press, 1989, section 25, pp. 203-212.

¹ Peter Singer, *Animal Liberation: Towards an End to Man's Inhumanity to Animals* (London: Granada Books, 1977), p. 230.

scales—in other words, that species as such should not enter into the determination.

It is allowed by those who say this that, whatever the relevant scales may be, the interests of different species will not come out as being of equal weight. Whatever we say is relevant (unless we simply say existence, which would not distinguish sensitive, or even living, things from everything else), some species will have more of it than others. Even the capacity for suffering, which is the nearest thing to a common feature across species, we presume to differ from one to another.²

Nothing whatever is gained by saying things like "If I were turned into an animal, I should stop having any desire for political liberty, and therefore the lack of it would be no hardship to me," or "If we were bears we should suffer horribly if [baited]; therefore we cannot accept any maxim which permits bears to be treated thus; therefore we cannot say that it is all right to treat bears thus."³ In fact, the conclusion seems to me firmer than the supporting reasoning. Once we concede that bears suffer from bear-baiting we have the basis for condemning the practice. To say that if I were a bear I would suffer is to say *no more* than that bears suffer, but it weakens the force of that assertion about bears by obtruding puzzles about cross-species identity. To see that the hypothesis about what we would think or feel if we were to change species is doing no work in the argument, it is only necessary to ask what one's reaction would be to someone who said, "I admit that actual [nonhuman] animals have no desire for political liberty but if I were turned into one I'm pretty sure I still would." The obvious retort is that if you were turned into an animal you would have exactly the same desires as an animal. But it might also be said that what matters here is the- desires of actual animals, and it is quite irrelevant what your desires would be if you were turned into one.⁴

I doubt, too, that it is helpful, in asking about the comparative "value" of the lives of different species, to ask, "given the choice of life as a horse or a human being" which would I choose, if I had had both experiences and could "remember exactly what it was like to be a horse and exactly what it was like to be a human being."⁵ So, in rather the same way, I suspect that not much is gained by asking "What moral constraints would I choose to have placed on human beings if I didn't know if I were a human being, a cat, or a flea?"

I believe, however, that Singer is right in saying that our inability to make precise comparisons between the sufferings of different species is not a crippling blow, because we do not have to do any fine balancing of interest to arrive at far-reaching conclusions.

Even if we were to prevent the infliction of suffering on animals only when it is quite certain that the interests of humans will not be affected to anything like the extent that animals are affected, we would be forced to make radical changes in our treatment of animals that would involve our diet, the farming methods we use, experimental procedures in many fields of science, our approach to wildlife and to hunting, trapping and the wearing of furs, and areas of entertainment like circuses,

² See *ibid.*, p. 35, and also Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979), p. 53.

³ R. M. Hare, *Freedom and Reason* (Oxford: Clarendon Press, 1963), p. 223.

⁴ This kind of reasoning is liable to bring on a throbbing of the temples akin to that produced in Bertie Wooster by Gussie Fmk-Nottle's wish that he were a male newt:

"Do you know how a male newt proposes, Bertie? He just stands in front of the female newt vibrating his tail and bending his body in a semicircle. I could do that on my head. No, you wouldn't find me grousing if I were a male newt."

"But if you were a male newt, Madeline Bassett wouldn't look at you. Not with the eye of love, I mean."

"She would, if she were a female newt."

"But she isn't a female newt."

"No, but suppose she was."

"Well, if she was, you wouldn't be in love with her."

"Yes, I would, if I were a male newt."

A slight throbbing about the temples told me that this discussion had reached saturation point. (P. G. Wodehouse, *Right Ho, Jeeves* [Harmondsworth: Penguin, 1953], p. 22.)

⁵ Singer, *Practical Ethics*, p. 89.

rodeos, and zoos. As a result, a vast amount of suffering would be avoided.⁶

This introduces a methodological principle that is quite often useful, namely, to start from the conclusions and work back to the premises rather than the other way round. Instead of asking, "What conclusions follow from these premises?" we can ask, "What are the weakest premises from which we can derive these conclusions?" Singer's *Animal Liberation* is a particularly good illustration because it would be hard to read it without being convinced of the evil of many of the practices described in the use of animals for experimental purposes and in raising them for food. The effect is in this respect quite like that of reading a dispassionate account of everyday life on a slave plantation or in a Nazi concentration camp. Moreover, Singer's book is one of the very few that have led people to change their lives in a fundamental way, by becoming vegetarians. (I know several philosophers of whom this is true.)

But Singer's apparatus of equal consideration of interests is so strong in the form in which he espouses it, amounting as it does to a universal obligation to pursue the maximum aggregate utility, that it is (to say the least) highly controversial when its scope is taken to be the human race, let alone the whole of sentient creation. Yet, nothing like this sort of commitment to our being our brothers' keepers—whether our brothers are all human beings or all animals—is required in order to agree with Singer that a lot of cruelty to animals is going on and ought to be stopped. As Singer himself says, it is enough to give virtually any weight to the interests of nonhuman animals against those of human beings to arrive at that conclusion.

We may naturally wonder how Rawls and Richards will deal with the question. Richards is in practice much less sensitive than Rawls to the constraints of mutual advantage, as we have seen. We might therefore expect him to incorporate animals into his scheme, as he did future generations, by including them among his rational contractors. To the objection that animals cannot actually negotiate it could be replied that nor can people who are defined as not being contemporaries. If it is said, "Well, they could negotiate if they were contemporaries," then it should be noted that Richards allows imbeciles and insane people to be among those in his original position, and they are presumably in no position to negotiate.⁷ And if we say, "They could negotiate if they were intelligent or grown up, and anyway someone could represent their interests," then the same could be said of nonhuman animals.

The objection surely smacks of the fallacy of misplaced concreteness. There never was and never will be any original position. Talking about what would go on in it is supposed to be a way of doing moral philosophy, not a branch of imaginative literature. If we start with the presupposition that the whole of morality is going to be yielded by the derivation of principles from an original position (as Richards does, though Rawls, as we shall see, does not), and if we assume (as Rawls and Richards both do) that the rational contractors are to pursue their own ends from within the original position, then it must follow that the only way of guaranteeing that the interests of animals will be protected is to include them among the parties whose assent is required.

Richards accepts that this is so but nevertheless confines his *dramatis personae* to human beings. Where, then, does this leave animals? The answer is: in exactly the same position as future generations are put in by Rawls. That is to say, Richards makes a motivational assumption akin to Rawls's: his rational contractors are to know "that persons generally have certain basic sympathies with animals and animal life," and they "will understand cruelty to animals as an extension of a personality orientation which is prone to cruelty to persons."⁸

However, the rational contractors should not be supposed to "know" what is not in fact the case. They should therefore be aware that sympathy for animals varies a great deal from one

⁶ Singer, *Animal Liberation*, p. 35.

⁷ David J. Richards, *A Theory of Reasons for Action* (Oxford: Clarendon Press, 1971), p. 182.

⁸ *Ibid.*

time and place to another and is at best concentrated mainly on pets and petlike animals rather than on those defined as food, game, or pests. They should also recognize that the vast mass of suffering inflicted on animals in modern societies is not gratuitous but is incidental to the pursuit of profit or publication. If a guard at Auschwitz could regard his job as a distasteful but necessary one of dealing with subhuman species, it is much more likely that a broiler house attendant or a technician in a biology laboratory can avoid being an across-the-board sadist. I do not therefore think that much regard for the interests of nonhuman animals would emerge from the protection of strictly human interests and, to be fair to Richards, he does not do much to suggest so.

For our present purpose, however, Richards's conclusions matter less than the way in which he gets to them. Why does Richards rule out the idea that the interests of animals should be protected directly (rather than as a by-product of the pursuit of human interests) by including them among the parties in the original position? His answer is at first sight strange, but it gets us to the heart of a central problem in the interpretation of the hypothetical contractarian method.

Richards in fact says two things and, though he treats them as one, they come out of opposite schools of contractarian thinking. The first is that animals "lack the capacities of choice and control" that would "entitle" them to be members of the original position.⁹ This clearly harks back to the notion of justice as mutual forbearance: justice is owed only to those who are capable of being just in return. However, this is a view that Richards does not really hold, in spite of the lip service he pays to the doctrine of the circumstances of justice.

We need not, indeed, refer back to the discussion of future generations to see this, because Richards immediately qualifies what he has said by adding that "the original position includes mental deficient and the insane because it is quite possible that a contractor may be so embodied."¹⁰ Animals, it seems, "lack the causal possibility of having the capacities of choice and control of members of the original position,"¹¹ but the mentally defective and insane do not.

Now a natural response to this might be that since Richards is making up the rules around here we had better take his word for it that one thing is possible and another not. But this would be to miss the point that a crucial shift in ground has taken place with the second move. For if we say that there are direct moral duties (not via an appropriate motivational assumption) to those who are incapable of adhering on the basis of their own judgment and decision to the usual run of moral constraints, we are thinking of membership of the original position as a way of protecting interests. But then why not include animals, since they seem to be in this respect in much the same position?

This brings us to Richards's second argument, which directs attention to one way of thinking about the foundations of the theory of justice as impartiality. He says, in support of the distinction between the proposed treatment of animals and that of the mentally deficient or insane, that "the notion of moral fortuitousness. . . can be pressed only so far and no further: that a person is American or British, Negro or Caucasian, atheist or Anglican, etc., is fortuitous from the point of view of the original position, but that a creature is an animal or a human is not fortuitous in the same way."¹²

To say that something is fortuitous is to say that it comes about by chance (Latin *fors*); the idea of good or ill fortune (*fortuna*) comes from the same root. Now, there may be some very deep (or perhaps it is very shallow) sense in which it is an accident, lucky or unlucky, that I am

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

who I am and not, say, A slave girl in the court of Rameses II. But to the extent that that is an intelligible remark, it seems to me no less so to suggest that it is an accident, lucky or unlucky, that I am not a corgi in the court of Elizabeth II. Construed as serious hypotheses, they are equally subject to Leibniz's reply to a man who said he wished he were king of China: that what his wish amounted to was, first, that he should not exist and, second, that there should be a king in China.

What, then, is the meaning of fortuitousness in the context of the basic facts about people that constitute their personal identities? We can gain some understanding of this by looking at Richards's more extended discussion of the notion of fortuitousness, which occurs in his specification and defense of the original position. The list of things that the contractors do not know about themselves (on which I drew for my example) includes "sex, age, native talents, particular degree of his capacity for self-control, race, religion, social or economic class and position, the age in which he lives, or the particular form of his desires (e.g. whether he likes asparagus or spinach; or is homosexual or heterosexual in his sexual aims)."¹³

Now it is plain that, if we start from the idea that moral principles are self-interested choices in a suitably specified original position, we are going to have to deny knowledge to the contractors of these things if we are to get impartiality. As Richards puts it, "the choice of *moral* principles by definition implies that the choice is made without favouritism to one's class or race, clan or caste, talent or nationality. Such favouritism is here made impossible by the ignorance of the contractors."¹⁴

However, it is important to recognize that nothing we have said so far sets any limits on the kinds of principles the contractors will draw up. We know, for example, that they will legislate for relations between the sexes along lines that they would regard *ex ante* as protecting their interests—whether they turn out to be men or women. But that obviously does not entail that they will choose not to differentiate the rights and duties of men and women or the expectations about their characters and concerns. They might decide that an ideal society would be one in which a person's sex had no more significance as such than the color of his or her eyes. But there is absolutely nothing in the construction of the original position so far that inevitably drives the parties toward such a decision.

Similarly, the people in Richards's original position might decide on perfect cosmopolitanism, decreeing that, morally speaking, membership in a particular society should make no difference to anybody's obligations. But there is nothing in the construction to prevent them from declaring that each person should have stronger and more extensive obligations to fellow-citizens than to people in the rest of the world. This is not favoritism in the choice of moral principles. The hypothesis is that everyone, without knowing his own country or how he personally will be affected by the alternative possible arrangements, would on balance prefer a world with moral communities to a world without them. This would be a choice, made in the circumstances of impartiality, of principles that allow, in real life, for partiality. (I shall return to this in Volume II.)

Richards, however, having given the defense of his veil of ignorance that I just quoted, goes on to offer a gloss on it that introduces a very different notion of the significance of the ignorance of the contractors from this:

Put differently, the idea may be expressed thus: from the point of view of morality, it is utterly and at bottom fortuitous that a person is born in one social class rather than another, or in one racial or ethnic group rather than another, or in one body (with associated endowments of physical beauty, intelligence, perception, talent, etc.) rather than another, and the like. Since these differences between persons are

¹³ *Ibid.*, p. 82.

¹⁴ *Ibid.*, p. 83 (italics in original).

fortuitous, they cannot be of fundamental weight in deciding what count as moral principles. The ignorance requirement gives expression to this idea by depriving the contractors, who are deciding on moral principles, of the knowledge of their fortuitous position in the natural and cultural lottery.¹⁵

The point is driven home even more sharply a few pages later, where Richards writes that, on the ideal contract view, "various particular facts about oneself are irrelevant, by definition, to the moral point of View, a conception which, I think, gives expression to the intuitive view that morality involves treating persons as persons, apart from the 'irrelevancies of class or colour, clan or caste, talent or nationality.'¹⁶

Fortuitousness here, then, appears as an overtly moral notion: what is fortuitous is everything about people that should not play any role in determining the way in which they should be treated. And if all the features of people that they do not know about in the original position are "irrelevancies," it is pretty obvious that only one thing is left, namely the bare fact of belonging to the human race. This is "treating persons as persons" with a vengeance! Small wonder that Hegel's complaint about the excessive "abstraction" from the complexities of real relationships that he found in Kant has been echoed by contemporary Hegelians or fellow-travelers in criticism of contemporary neo-Kantians!

We can now see that Richards is obliged to exclude nonhuman animals from the original position because of the significance he attaches to being included. Moral principles, on his view, apply to all human beings without differentiation. They cannot prescribe differently for the intelligent or unintelligent, for fellow citizens and noncitizens, and so on. It is hard enough to give credence to this. But if we had to go further and say that moral principles must apply to all sentient creatures without differentiation, we would plainly be deep into absurdity.

Let us now turn to Rawls. Clearly, in his Humean persona, Rawls should be able to deal briskly with nonhuman animals. Since the circumstances of justice do not obtain between human beings and animals, they are automatically outside the scope of justice. That he does not dispatch them this fast illustrates once again his less than total commitment to justice as mutual advantage.

The discussion of duties to animals comes at the end of a section on "The Basis of Equality."¹⁷ In this, Rawls enunciates the principle that "those who can give justice are owed justice."¹⁸ But this has to be interpreted with caution: "the capacity for moral personality is a sufficient condition for being entitled to equal justice."¹⁹ This leaves it open whether or not it is also a necessary condition. When he does discuss animals, Rawls notes that he has "not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice."²⁰ However, he continues by saying that "it does seem that we are not required to give strict justice anyway to creatures lacking this capacity."²¹

The greater hesitation about the second step can, I think, be explained by Rawls's including within the scope of justice human beings who are lacking in moral personality either because they have not yet developed it or because they have temporarily lost it. Capacity rather than actuality is what counts.²² Rawls says that this "seems necessary to match our considered judgments" about the rights of infants and children, and also that "regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 88.

¹⁷ John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Harvard University Press, 1971), section 77, pp. 504-12.

¹⁸ *Ibid.*, p. 510.

¹⁹ *Ibid.*, p. 505.

²⁰ *Ibid.*, p. 512

²¹ *Ibid.*

²² *Ibid.*, p. 509-10.

as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice."²³ This, however, marks a slide from the position that playing one's part in common institutions is what entitles one to justice. Rather, we are getting (as with Richards) parties included in order to avoid their "fortuitous" disadvantages from being built into the original position. But if a day-old infant can be represented in the original position, why not a monkey or a dog?

Be that as it may, Rawls's discussion of animals is interesting for the questions it raises. Having said that we are not required to give strict justice to animals, he goes on:

But it does not follow that there are no requirements at all in regard to them, nor in our relations with the natural order. Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way.²⁴

This is perhaps not an unreasonable place to come out, and it seems to me clearly preferable to Rawls's proposal to make duties to future generations parasitic on justice among contemporaries. It is curious to notice that the effect of combining the two positions is that the interests of nonhuman animals are better secured than those of future human beings. If the current generation is quite indifferent to the fate of its remote successors, it would seem that the only reason for not polluting the planet in a way that will cause them suffering is that it would be hard to do this in a way that would not also cause suffering to future nonhuman animals.

²³ *Ibid.*, p. 509.

²⁴ *Ibid.*, p. 512.