The Rights of Animals and Future Generations[*]

JOEL FEINBERG

To have a right is to have a claim[1] *to* something and *against* someone the recognition of which is called for by legal (or other institutional) rules, or in the case of moral rights, by the principles of an enlightened conscience. In the familiar cases of rights, the claimant is a competent adult human being, and the claimee is an office-holder in an institution or else a private individual, in either case, another competent adult human being. Normal adult human beings, then, are obviously the sorts of beings of whom rights can meaningfully be predicated. Everyone would agree to that, even extreme misanthropes who deny that anyone in fact has rights. On the other hand, it is absurd to say that rocks can have rights, not because rocks are morally inferior things unworthy of rights (that statement makes no sense either), but because rocks belong to a category of entities of whom rights cannot be meaningfully predicated. That is not to say that there are no circumstances in which we ought to treat rocks carefully, but only that the rocks themselves cannot claim good treatment from us. In between the clear cases of rocks and normal human beings, however, is a spectrum of less obvious cases, including some bewildering borderline ones. Is it meaningful or conceptually possible to ascribe rights to our dead ancestors? to individual animals? to whole species of animals? to plants? to idiots and madmen? to fetuses? to generations yet unborn? Until we know how to settle these puzzling cases, we cannot claim fully to grasp the concept of a right, or to know the shape of its logical boundaries.

One way to approach these riddles is to turn one's attention first to the most familiar and unproblematic instances of rights, note their most salient characteristics, and then compare the borderline cases with them, measuring as closely as possible the points of similarity and difference. In the end, the way we classify the borderline cases may depend on whether we are more impressed with the similarities or the differences between them and the cases in which we have the most confidence.

It will be useful to consider the problem of individual animals first, because their case is the one that has already been debated with the most thoroughness by philosophers so that the dialectic of claim and rejoinder has now unfolded to the point where disputants can get to the end game quickly and isolate the crucial point at issue. When we understand precisely what z's at issue in the debate over animal rights, I think we will have the key to the solution of all the other riddles about rights.

Almost all modern writers agree that we ought to be kind to animals, but that is quite another thing from holding that animals can claim kind treatment from us as their due. Statutes making cruelty to animals a crime are now very common, and these, of course, impose legal duties on people not to mistreat animals; but that still leaves open the question whether the animals as beneficiaries of those duties, possess rights correlative to them. We may very well have duties *regarding* animals that are not at the same time duties *to* animals, just as we may have duties regarding rocks, or buildings, or lawns, that are not duties *to* the rocks, buildings, or lawns. Some legal writers have taken the still more extreme position that animals themselves are not even the intended direct beneficiaries of statutes prohibiting cruelty to animals. During the Nineteenth Century, for example, it was commonly said that such statutes were designed to protect human beings by preventing the growth of cruel habits that could later threaten human beings with harm too. Professor Louis B. Schwartz finds the rationale of the cruelty-to-animals prohibition in its protection of animal lovers from affronts to their sensibilities. "It is not the

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[*] Expanded version of the paper of the same title that appears in *Philosophy and Environmental Crisis,* ed. William Blackstone (Athens, Georgia: University of Georgia Press, 1974).

[1] I shall leave the concept of a claim unanalysed here, but for a detailed discussion, see my "The Nature and Value of Rights," *Journal of Value Inquiry,* Winter 1971.

mistreated dog who is the ultimate object of concern, . . ." he writes. "Our concern is for the feelings of other human beings, a large proportion of whom, although accustomed to the slaughter of animals for food, readily identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings."[2] This seems to me to be factitious. How much more natural it is to say with John Chipman Gray that the true purpose of cruelty-to-animals statutes is "to preserve the dumb brutes from suffering."[3] The very people whose sensibilities are invoked in the alternative explanation, a group that no doubt now includes most of us, are precisely those who would insist that the protection belongs primarily to the animals themselves, not merely to their own tender feelings. Indeed, it would be difficult even to account for the existence of such feelings in the absence of a belief that the animals deserve the protection in their own right and for their own sakes.

Even if we allow, as I think we must, that animals are the directly intended beneficiaries of legislation forbidding cruelty to animals, it does not follow directly that animals have legal rights; and Gray himself, for one,[4] refused to draw this further inference. Animals cannot have rights, he thought, for the same reason they cannot have duties, namely, that they are not genuine "moral agents." Now, it is relatively easy to see why animals cannot have duties, and this matter is largely beyond controversy. Animals cannot be "reasoned with" or instructed in their responsibilities; they are inflexible and unadaptable to future contingencies; they are incapable of controlling instinctive impulses. Hence, they cannot enter into contractual agreements, or make promises; they cannot be trusted; and they cannot (except within very narrow limits and for purposes of conditioning) be blamed for what would be called "moral failures" in a human being. They are therefore incapable of being moral subjects, of acting rightly or wrongly in the moral senses, of having, discharging, or breaching duties and obligations.

But what is there about the intellectual incompetence of animals (which admittedly disqualifies them for duties) that makes them logically unsuitable for rights? The most common reply to this question is that animals are incapable of *claiming* rights on their own. They cannot make motion, on their own, to courts to have their claims recognized or enforced; they cannot initiate, on their own, any kind of legal proceedings; nor are they capable of even understanding when their rights are being violated, or distinguishing harm from wrongful injury, and responding with indignation and an outraged sense of justice instead of mere anger or fear.

No one can deny any of these allegations; but to the claim that they are the ground of animal disqualification for rights, philosophers on the other side of this controversy have made convincing rejoinders. It is simply not true, says W. D. Lamont,[5] that the ability to understand what a right is and the ability to set legal machinery in motion by one's own initiative are necessary for the possession of legal rights. If that were the case, then neither human idiots nor wee babies would have any legal rights at all. Yet it is manifest that both of these classes of intellectual incompetents have legal rights recognized and easily enforced by the courts. Children and idiots start legal proceedings, not on their own direct initiative, but rather through the actions of proxies or attorneys who are empowered to speak in their names. If there is no conceptual absurdity in this situation, why should there be in the case where a proxy makes a claim on behalf of an animal? People commonly enough make wills leaving money to trustees for the care of animals. Is it not natural to speak of the animal's right to his inheritance in cases of this kind? If a trustee embezzles money from the animal's account,[6] and a proxy speaking in the dumb brute's behalf presses the animal's claim, can he not be described as asserting the animal's *rights*? More exactly, the animal itself claims its rights through the

[2] Louis B. Schwartz, "Morals, Offenses and the Model Penal Code," *Columbia law Review,* Vol. 63 (1963), p. 673.
[3] John Chipman Gray, *The Nature and Sources of the Law,* 2nd ed. (Boston-Beacon Press, 1963), p. 43.
[4] And W. D. Ross for another. See *The Right and the Good* (Oxford: Clarendon Press, 1930), Appendix I, pp. 48-56.
[5] W. D. Lamont, *Principles of Moral Judgment* (Oxford: Clarendon Press, 1946J/ pp. 83-85.
[6] Cf. H. J. McCloskey, "Rights," *Philosophical Quarterly,* Vol. 15 (1965), pp. 12l, 124.

vicarious actions of a human proxy speaking in its name and in its behalf. There appears to be no reason why we should require the animal to understand what is going on (so the argument concludes) as a condition for regarding it as a possessor of rights.

Some writers protest at this point that the legal relation between a principal and an agent cannot hold between animals and human beings. Between humans, the relation of agency can take two very different forms, depending upon the degree of discretion granted to the agent, and there is a continuum of combinations between the extremes. On the one hand, there is the agent who is the mere "mouthpiece" of his principal. He is a "tool" in much the same sense as is a typewriter or telephone; he simply transmits the instructions of his principal. Human beings could hardly be the agents or representatives of animals in this sense, since the dumb brutes could no more use human "tools" than mechanical ones. On the other hand, an agent may be some sort of expert hired to exercise his professional judgment on behalf of, and in the name of, the principal. He may be given, within some limited area of expertise, complete independence to act as he deems best, binding his principal to all the beneficial or detrimental consequences. This is the role played by trustees, lawyers, and ghost-writers. This type of representation requires that the agent have great skill, but makes little or no demand upon the Principal, who may leave everything to the judgment of his agent. Hence, there appears, at first, to be no reason why an animal cannot be a totally Passive principal in this second kind of agency relationship.

There are, however, still some important disanalogies. In the typical instance of agency-representation, even of the second, highly discretionary, kind, the agent is *hired by* a principal who enters into an *agreement* or *contract* with him; the principal tells his agent that within certain carefully specified boundaries "You may speak for me," subject always to the principal's *approval,* his right to give new directions, or to *cancel* the whole arrangement. No dog or cat could possibly do any of those things. Moreover, if it is the assigned task of the agent to defend the principal's rights, the principal may often decide to *release* his claimee, or to *waive* his own rights, and *instruct* his agent accordingly. Again, no mute cow or horse can do that. But although the possibility of hiring, agreeing, contracting, approving, directing, canceling, releasing, waiving, and instructing is present in the typical (all human) case of agency representation, there appears to be no reason of a logical or conceptual kind why that *must* be so, and indeed there are some special examples involving human principals where it is not in fact so. I have in mind, for example, legal rules that require that a defendant be represented at his trial by an attorney, and impose a state-appointed attorney upon reluctant defendants, or upon those tried *in absentia,* whether they like it or not. Moreover, small children and mentally deficient and deranged adults are commonly represented by trustees and attorneys even though they are incapable of granting their own consent to the representation, or of entering into contracts, of giving directions, or waiving their rights. It may be that it is unwise to permit agents to represent principals without the latters' knowledge or consent. If so, then no one should ever be permitted to speak for an animal, at least in a legally binding way. But that is quite another thing than saying that such representation is logically incoherent or conceptually incongruous—the contention that is at issue.

H. J. McCloskey,[7] I believe, accepts the argument up to this point; but he presents a new and different reason for denying that animals can have legal rights. The ability to make claims, whether directly or through a representative, he implies, is essential to the possession of rights. Animals obviously cannot press their claims on their own; so if they have rights, these rights must be assertable by agents. Animals, however, cannot be represented, McCloskey contends, and not for any of the reasons already discussed, but rather because representation, in the requisite sense, is always of interests; and *animals* (he says) *are incapable of having interests.*

Now, there is a very important insight expressed in the requirement that a being have interests

[7] *Ibid.*

if he is to be a logically proper subject of rights. This can be appreciated if we consider just why it is that mere things cannot have rights. Consider a very precious "mere thing"—a beautiful natural wilderness, or a complex and ornamental artifact, like the Taj Mahal. Such things ought to be cared for, because they would sink into decay if neglected, depriving some human beings or perhaps even *all* human beings, of something of great value. Certain persons may even have as their own special job the care and protection of these valuable objects. But we are not tempted in these cases to speak of "thing-rights" correlative to custodial duties, because, try as we might, we cannot think of mere things as possessing *interests* of their own. Some people may have a duty to preserve, maintain, or improve the Taj Mahal; but they can hardly have a duty to help or hurt it, benefit or aid it, succor or relieve it. Custodians may protect it for the sake of a nation's pride and art lovers' fancy; but they don't keep it in good repair for "its own sake," or for "its own true welfare," or "well-being." A mere thing, however valuable to others, has no good of its own. The explanation of that fact, I suspect, is that mere things have no conative life; neither conscious wishes, desires, and hopes; nor urges and impulses; nor unconscious drives, aims, goals; nor latent tendencies, directions of growth, and natural fulfillments. Interests must be compounded somehow out of conations; hence mere things have no interests. *A fortiori,* they have no interests to be protected by legal or moral rules. And without interests a creature can have no "good" of its own, the achievement of which can be its due.

So far McCloskey (as I have reconstructed his argument) is on solid ground; but one can quarrel with his denial that any animals but humans have interests. I should think that the trustee of funds willed to a dog or cat is more than a mere custodian of the animal he protects. Rather his job is to look out for the interests of the animal and make sure no one denies it its due. The animal itself is the beneficiary of his dutiful services. Many of the higher animals at least have appetites, conative urges, and rudimentary purposes, the integrated satisfaction of which constitutes their welfare or good. We can, of course, with consistency treat animals as mere pests and deny that they have any rights; and for most animals, especially those of the lower orders, we have little choice but to do so. But it seems clear to me, nevertheless, that in general, animals *are* among the sorts of beings of whom rights can meaningfully be predicated and denied.

Now, if a person agrees with the conclusion of the argument thus far, that animals are the sorts of beings that *can* have rights, and further, if he accepts the moral judgment that we ought to be kind to animals, only one further premise is needed to yield the conclusion that some animals do in fact have rights. We must now ask ourselves for whose sake ought we to treat (some) animals with consideration and humaneness? If we conceive our duty to be one of obedience to authority, or to one's own conscience merely, or one of consideration for tender human sensibilities only, then we might still deny that animals have rights, even though we admit that they are the kinds of beings that *can* have rights. But if we hold not only that we ought to treat animals humanely but also that we should do so for the animal's *own sake,* that such treatment is something we *owe* animals as their *due,* something that can be *claimed* for them, something the withholding of which would be an *injustice* and a *wrong,* and not merely a cause of damage, then it follows that we do ascribe rights to animals. I suspect that the moral judgments most of us make about animals do pass these phenomenological tests, so that most of us do believe that animals have rights, but are reluctant to say so because of the conceptual confusions about the notion of a right that I have attempted to dispel above.