

## *Persons and Non-Persons\**

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Is a dolphin a person?

This question came up during the trial of the two people who, in May 1977, set free two bottle-nosed dolphins used for experimental purposes by the University of Hawaii's Institute of Marine Biology. It is an interesting question for a number of reasons, and I want to devote most of this chapter to interpreting it and tracing its connection with several others which may already be of concern to us. I shall not go into the details of the actual case but shall rely on the very clear and thoughtful account which Gavin Daws gives in his paper "'Animal Liberation' as Crime", published in *Ethics and Animals*, edited by Harlan B. Miller and William H. Williams.

Kenneth Le Vasseur, the first of the two men to be tried, attempted through his counsel what is called a 'choice of evils' defence. In principle the law allows this in cases where an act, otherwise objectionable, is necessary to avoid a greater evil. For this defence to succeed, the act has to be (as far as the defendant knows) the only way of avoiding an imminent, and more serious, harm or evil to himself or to 'another'. Le Vasseur, who had been involved in the care of the dolphins, believed that their captivity, with the conditions then prevailing in it, actually endangered their lives.

in his opening statement for the defence, [his counsel] spoke of the exceptional nature of dolphins as animals; bad and rapidly deteriorating physical conditions at the laboratory; a punishing regimen for the dolphins, involving overwork, reductions in their food rations, the total isolation they endured, deprived of the company of other dolphins, even of contact with humans in the tank, deprived of all toys which they had formerly enjoyed playing with – to the point where Puka, having refused to take part consistently in experimental sessions, developed self-destructive behaviours symptomatic of deep disturbance, and finally became lethargic - 'comatose'. Le Vasseur, seeing this, fearing that death would be the outcome, and knowing that there was no law that he could turn to, believed himself authorized, in the interests of the dolphins' well-being, to release them. The release was not a theft in that Le Vasseur did not intend to gain anything for himself. It was intended to highlight conditions in the laboratory.

But was a dolphin 'another'? The judge thought not. He said that 'another' would have to be another person, and he defined dolphins as property, not as persons, as a matter of law. A dolphin could not be 'another person' under the penal code. The defence tried and failed to get the judge disqualified for prejudice. It then asked leave to go to Federal Court in order to claim that Thirteenth Amendment rights in respect of involuntary servitude might be extended to dolphins. This plea the judge rejected:

Judge Doi said, 'We get to dolphins, we get to orang-utans, chimpanzees, dogs, cats. I don't know at what level you say intelligence is insufficient to have that animal or thing, or whatever you want to call it, a human being under the penal code. I'm saying that they're not under the penal code and that's my answer.'

At this point - which determined the whole outcome of the trial - something seemed perfectly obvious to the judge about the meaning of the words 'other' and 'person'. What was it? And how obvious is it to everybody else? In the answer just given, he raises the possibility that it might be a matter of intelligence, but he rejects it. That consideration, he says, is not needed. The

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\* In PETER SINGER (ed), *In Defense of Animals*, New York: Basil Blackwell, 1985, pp. 52-62.

question is quite a simple one; no tests are called for. The word 'person' means a human being. I think that this is a very natural view but not actually a true one, and the complications which we find when we look into the use of this very interesting word are instructive. In the first place, there are several well-established and venerable precedents for calling non-human beings 'persons'. One concerns the persons of the Trinity and, indeed, the personhood of God. Another is the case of 'legal persons' - corporate bodies such as cities or colleges, which count as persons for various purposes, such as suing and being sued. As Blackstone says, these 'corporations or bodies politic . . . are formed and created by human laws for the purposes of society and government', unlike 'natural persons', who can be created only by God.

The law then can, if it chooses, create persons; it is not merely a passive recorder of their presence (as, indeed, Judge Doi implied in making his ruling a matter of law and not of fact). Thirdly, an instance that seems closer to the case of the dolphins, the word is used by zoologists to describe the individual members of a compound or colonial organism, such as a jellyfish or coral, each having (as the dictionary reasonably puts it) a 'more or less independent life'. (It is also interesting that 'personal identity' is commonly held to belong to continuity of consciousness rather than of bodily form in stories where the two diverge. Science fiction strongly supports this view, which was first mooted by John Locke in his *Essay Concerning Human Understanding*.)

There is nothing stretched or paradoxical about these uses, for the word does not in origin mean 'human being' or anything like it at all. It means 'a mask', and its basic general sense comes from the drama. The 'masks' in a play are the characters who appear in it. Thus, to quote the Oxford Dictionary again, after 'a mask', it means 'a character or personage acted, one who plays or performs any part, a character, relation or capacity in which one acts, a being having legal rights, a juridical person'. The last two meanings throw a clear light on the difference between this notion and that of being human. Not all human beings need be persons. The word *persona* in Latin does not apply to slaves, though it does apply to the state as a corporate person. Slaves have, so to speak, no speaking part in the drama; they do not figure in it; they are extras. There are some similar, and entertaining, examples about women. The following is taken from Susan Moller Okin's book *Women in Western Political Thought*:

One case, brought before the US Supreme Court in the 1890s, concerned Virginia's exclusion of a woman from the practice of the law, although the pertinent statute was worded in terms of 'persons'. The Court argued that it was indeed up to the State's Supreme Court 'to *determine whether the word "person" as used (in the Statute) is confined to males*, and whether women are admitted to practise law in that Commonwealth'. The issue of whether women must be understood as included by the word 'persons' continued even into the twentieth century. . . . In a Massachusetts case in 1931 . . . women were denied eligibility for jury service, although the statute stated that every 'person qualified to vote' was so eligible. The Massachusetts Supreme Court asserted; 'No intention to include women can be deduced from the omission of the word male.' (Emphasis added)

What is going on here? We shall not understand it, I think, unless we grasp how deeply drama is interwoven with our thinking, how intimately its categories shape our ideas. People who talk like this have a clear notion of the drama which they think is going on around them. They know who is supposed to count in it and who is not. Attempts to introduce fresh characters irritate them. They are inclined to dismiss these attempts sharply as obviously absurd and paradoxical. The question of who is and who is not a person seems at this point a quite simple and clear-cut one. Bertie Wooster simply is not a character in Macbeth and that is the end of the matter. It is my main business here to point out that this attitude is too crude. The question is actually a very complex one, much more like 'Who is important?' than 'Who has got two legs?' If we asked 'Who is important?', we would know that we needed to ask further questions, beginning with 'Important for what?' Life does not contain just one purpose or one drama but many interwoven

ones. Different characters matter in different ways. Beings figure in some dramas who are absent from others, and we all play different parts in different scripts. Even in ordinary human life it is fatal to ignore this. To insist on reducing all relationships to those prescribed by a single drama — for instance, the social contract — is disastrous. Intellectuals are prone to such errors and need to watch out for them. But when we come to harder cases, where the variation is greater — cases such as abortion, euthanasia or the treatment of other species — this sort of mistake is still more paralyzing. That is why these cases are so helpful in illuminating the more central ones.

It is clear that, over women, those who limited the use of the concept 'person' felt this difficulty. They did not want to deny altogether that women were persons, since in the dramas of private life women figured prominently. Public life, however, was a different stage, whose rules and conventions excluded them (queens apart) as completely as elephants or angels. The fact that private life often impinges on public was an informal matter and could not affect this ruling. Similarly in Rome, it is clear that slaves actually played a considerable part in life. In Greek and Roman comedy ingenious slaves, both male and female, often figure as central characters, organizing the intrigue and supplying the brains which the hero and heroine themselves unfortunately lack. This, however, did not confer legal rights on them. The boundaries of particular situations and institutions served to compartmentalize thought and to stop people from raising questions about the rights and status of those who were, for central purposes, currently disregarded.

I think it will be helpful here to follow a little further the accepted lines of usage for the word 'person'. How complete is its link with the human bodily form? What about intelligent alien beings, for instance? Could we call them persons? If not, then contact with them — which is certainly conceivable — would surely require us to coin a new word to do the quite subtle moral job which is done at present by 'person'. The idea of a person in the almost technical sense required by morality today is the one worked out by Kant in his *Foundations of the Metaphysics of Morals*. It is the idea of a rational being, capable of choice and therefore endowed with dignity, worthy of respect, having rights; one that must be regarded always as an end in itself, not only as a means to the ends of others. Because this definition deals solely with rational qualities, it makes no mention of human form or human descent, and the spirit behind it would certainly not license us to exclude intelligent aliens any more than disembodied spirits. The moral implications of the word 'person' would therefore, on our current Kantian principles, surely still have to attach to whatever word we might coin to include aliens. (C. S. Lewis, describing a planet where there are three distinct rational species, has them use the word *hnau* for the condition which they all share, and this term is naturally central to the morality of all of them.)

Now, if intelligence is really so important to the issue, a certain vertigo descends when we ask, 'Where do we draw the line?' because intelligence is a matter of degree. Some inhabitants of our own planet, including whales and dolphins, have turned out to be a lot brighter than was once supposed. Quite how bright they are is not yet really clear. Indeed, it may never become so to us because of the difference in the kind of intelligence appropriate to beings with very different sorts of life. How can we deal with such a situation?

The first thing that is needed is undoubtedly to get away from the single, simple, black-and-white antithesis with which Kant started, that between persons and things. Most of Kant's argument is occupied with this, and while it remains the focus of his concern he does not need to make finer distinctions. *Things* can properly be used as means to human ends in a way in which *people* cannot. Things have no aims of their own; they are not subjects but objects. Thing-treatment given to people is exploitation and oppression. It is an outrage, because, as Kant exclaims, 'A man is not a thing.' Masters sell slaves; rulers deceive and manipulate their subjects; employers treat their secretaries as part of the wallpaper. By dwelling on the simple, stark contrast involved here, Kant was able to make some splendid moral points, which are still

vital to us today, about the thorough-going respect which is due to every free and rational human being. But the harsh, bright light which he turned on these situations entirely obscured the intermediate cases. A mouse is not a thing either, before we even start to think about a dolphin.

I find it interesting that, just as the American courts could not quite bring themselves to say that women were not persons, so Kant cannot quite get around to saying what his theory certainly implies - that animals are things. He does say in his lecture on 'Duties Towards Animals and Spirits' that they 'are not self-conscious and are there merely as a means to an end', that end being ours. But he does not actually call them things, nor does he write off their interests. In fact, he emphatically condemns cruel and mean treatment of them. But, like many other humane people who have got stuck with an inadequate moral theory, he gives ingenious but unconvincing reasons for this. He says - and this has gone on being said ever since - that it is only because cruelty to animals may lead to cruelty to humans, or degrade us, or be a sign of a bad moral character, that we have to avoid it. This means that if we can show, for instance, that venting our ill-temper on the dog will prevent our doing it on our families and can produce certificates declaring that we are, in general, people of high moral character, not easily degraded, we can go ahead with a clear conscience. Dog-bashing, properly managed, could count as a legitimate form of therapy, along with gardening, pottery and raffiawork. In no case would the physical materials involved be directly considered because all equally would be only objects, not subjects. And there is nothing degrading about hitting an object.

In spite of the appalling cruelty which human beings show towards animals the world over, it does not seem likely that anyone regards them consistently in this light. Spasms of regard, tenderness, comradeship and even veneration, alternating with unthinking callousness, seem to make up the typical human attitude. Towards fellow human beings too a rather similar alternation is often found. So this cannot really be an attitude confined to things. Even cruelty itself, when it is deliberate, seems to require that its objects should not be mere physical objects but should be capable of responding as separate characters in the drama. More widely, the appeal of hunting, and also of sports such as bull-fighting, seems to depend on the sense of outwitting and defeating a conscious quarry or opponent, 'another' able to be one's opposite in the game or drama. The script distinctly requires non-human characters who can play their parts well or badly. Moby Dick is not an extra. And the degradingness of deliberate cruelty itself surely requires this other-regarding element. 'Another' is not always another human being.

The degradingness of cruelty is, of course, widely admitted, and Le Vasseur's counsel used this admission as the ground of an alternative defence. He drew attention to his client's 'status as a state employee, which conferred authority on him to act as he did in coming to the defense of "another", in this case the United States, whose social values were injured by what was being done to the dolphins'. This argument was rejected on the ground that, in the eyes of the law, cruelty to animals is merely a misdemeanour, whereas theft is a felony. Accordingly, the choice of evils could not properly be resolved in favour of theft, the more serious offence. It is interesting that this argument makes no objection to treating the United States as 'another' or 'another person' - it does not insist that a person simply means a human being - but rests instead on contending that this 'other' finds its values more seriously attacked by theft than by cruelty to dolphins.

This sort of argument is not easy to come to grips with even in the case of an ordinary individual person, still less in that of a nation. How serious an evil is cruelty? Once it is conceded that the victim's point of view does not count, that the injury is done only to the offender or some body of which he is part, we seem to be cut off from the key considerations of the argument and forced to conduct it in a strained manner, on grounds which are not really central. Is cruelty necessarily depraving? On this approach, that seems partly to be a factual question about how easily people are depraved and partly, perhaps, an aesthetic one about

how far cruel acts are necessarily disgusting and repellent. These acts seem now to be assimilated to others which are repellent without being clearly immoral, such as eating the bodies of people whom one has not killed or watching atrocities over which one has no control. The topic becomes a neighbour of pornography rather than of abortion and euthanasia. (In the disputes about permissiveness in the 1960s, an overlap actually developed here at times, as when a London art gallery organized a happening in which some fish were to be electrocuted as part of the show, and efforts to ban this were attacked as censorious manifestations of aesthetic narrow-mindedness.)

Something seems to have gone wrong with the thinking here. The distinctive feature of acts censured on purely aesthetic grounds should surely be that their effects are confined to those who actually perform them. No other sentient being is harmed by them. That is why they pose problems for libertarians when bystanders object to them. But cruelty does not pose this kind of problem, since the presence of 'another' who is harmed is essential to it. In our case it is the dolphin, who does seem to be 'another'. Can we avoid thinking of it in this way? Can the central objection to cruelty really be something rather indirect, such as its being in bad taste?

The law seems to rule so here. And in doing this the law shows itself to be in a not uncommon difficulty, one that arises when public opinion is changing. Legal standards are not altogether independent of moral standards. They flow from them and crystallize in ways designed to express certain selected moral insights. When those insights change radically enough, the law changes. But there are often jolts and discrepancies here because the pace of change is different. New moral perceptions require the crystals to be broken up and reformed, and this process takes time. Changes of this kind have repeatedly altered the rules surrounding the central crux which concerns us here: the stark division of the world into persons and property. Changing attitudes to slavery are a central case, to which we will return. But it is worth noticing first that plain, factual discoveries too can make a difference. When our civilization formed the views on the species barrier which it still largely holds, all the most highly developed non-human animals were simply unknown. Legend apart, it was assumed that whales and dolphins were much like fish. The great apes were not even discovered until the eighteenth century, and real knowledge of their way of living has been acquired only within the last few decades. About better-known creatures too there was a very general ignorance and unthinking dismissal of available evidence; their sociality was not noticed or believed in. The central, official intellectual tradition of our culture never expected to be forced to refine its crude, extreme, unshaded dichotomy between man and beast. In spite of the efforts of many concerned thinkers, from Plutarch to Montaigne and from Blake to John Stuart Mill, it did not develop other categories. If alien beings landed tomorrow, lawyers, philosophers and social scientists would certainly have to do some very quick thinking. (I don't expect the aliens myself, but they are part of the imaginative furniture of our age, and it is legitimate to use them to rouse us from our dogmatic slumbers.) Science fiction, though sometimes helpful, has far too often sidetracked the problem by making its aliens just scientists with green antennae, beings whose 'intelligence' is of a kind to be accepted instantly at the Massachusetts Institute of Technology -only, of course, a little greater. Since neither dolphins nor gorillas write doctoral theses, this would still let us out as far as terrestrial non-human creatures were concerned. 'Persons' and their appropriate rights could still go on being denned in terms of this sort of intelligence, and we could quietly continue to poison the pigeons in the park any time that we felt like it.

The question is, why should this kind of intelligence be so important, and why should it determine the limits of our moral concern? It is often assumed that we can owe duties only to beings capable of speech. Why this should be assumed is not altogether clear. At a simple level Bentham surely got it right in his *Introduction to the Principles of Morals and Legislation*: 'The question is not . . . Can they *talk*? but, *Can they suffer?*' With chimps, gorillas and dolphins, however, there is now a further problem because people have been trying, apparently with some degree of success, to teach them certain kinds of speech. This project might have taught

us a great deal about just what new categories we need in our attempt to classify beings more subtly. But unluckily it is now becoming obscured by furious opposition from people who still have just the two categories and who see the whole proceedings as an illicit attempt to smuggle contraband from one to the other. This reaction is extremely interesting. What is the threat? Articulate apes and cetaceans are scarcely likely to take over the Government. What might happen, however, is that it would become much harder to exclude them from moral consideration. In particular, their use as experimental subjects might begin to look very different. Can the frontier be defended by a resolute and unbreakable refusal to admit that these animals can talk?

It is understandable that people should have thought so, but this surely cannot really be the issue. What makes creatures our fellow beings, entitled to basic consideration, is surely not intellectual capacity but emotional fellowship. And if we ask what powers can justify a higher claim, bringing some creatures nearer to the degree of consideration which is due to humans, those that seem to be most relevant are sensibility, social and emotional complexity of the kind which is expressed by the formation of deep, subtle and lasting relationships. The gift of imitating certain intellectual skills which are important to humans is no doubt an indicator of this, but it cannot be central. We already know that both apes and dolphins have this kind of social and emotional complexity. If we ask what elements in 'persons' are central in entitling them to moral consideration, we can, I think, cast some light on the point by contrasting the claim of these sensitive social creatures with that of a computer, of the present generation, programmed in a manner which entitles it, according to current controversial usage, to be called 'intelligent'. That computer does not trouble our sleep with any moral claims, and would not do so however much more 'intelligent' it became, unless it eventually seemed to be conscious, sensitive and endowed with emotions. If it did, we should be facing the Frankenstein problem in a very acute form. (The extraordinary eagerness with which Frankenstein drove his researches to this disastrous point is something which contemporary monster-makers might like to ponder.) But those who at present emphasize the intelligence of computers do not see any reason to call them persons or to allow for them as members of the moral community. Speech alone, then, would scarcely do this job for the apes. What is at issue is the already glaring fact, which speech would make it finally impossible to deny, that they are highly sensitive social beings.

These considerations are not, I think, ones confined to cranks or extremists. They seem fairly widespread today and probably occur at times to all of us, however uncertain we may be about what to do with them. If so, and if the law really allows them no possible weight, then we seem to have reached the point at which the law will have to be changed because it shocks morality. There is an obvious precedent, to which the dolphin liberators tried to appeal:

When the dolphins were taken from the tanks, a message was left behind identifying the releasers as the 'Undersea Railroad', a reference to the Underground Railroad, the Abolitionists' slave-freeing network of pre-Civil War days. Along the Underground Railroad in the 1850s, it sometimes happened that juries refused to convict people charged with smuggling slaves to freedom. That was the kind of vindication Le Vasseur and Sipman were looking for ... They did not consider themselves to be criminals. In fact they took the view that, if there was a crime, it was the crime of keeping dolphins - intelligent, highly aware creatures with no criminal record of their own - in solitary confinement, in small, concrete tanks, made to do repetitious experiments, for life.

If we go back to the alien beings for a moment and consider whether even the most intelligent of them would have the right to keep visiting human beings, however stupid, in these conditions, even those of us least partial to astronauts may begin to see the point which Le Vasseur and Sipman were making. It surely cannot be dismissed merely by entrenching the law around the definition of the word 'person'. We need new thinking, new concepts and new words, and we are not less capable of providing these than people were in the 1850s.