

Original Article

Justice and Non-Human Animals

Robin Attfield¹ and Rebekah Humphreys²

1. Emeritus Professor of Philosophy, Cardiff University, Email: attfieldr@cardiff.ac.uk

2. Lecturer in Philosophy, Trinity St. David's University, Email:

r.humphreys@tsd.uwtsd.ac.uk

Part 2

Abstract: It is widely held that moral obligations to non-human beings do not involve considerations of justice. For such a view, nonhuman interests are always prone to be trumped by human interests. Rawlsian contractarianism comprises an example of such a view. Through analysis of such theories, this essay highlights the problem of reconciling the claim that humans have obligations to non-humans with the claim that our treatment of the latter is not a matter of justice. We argue that if it is granted that the basic interests of non-human beings sometimes count for more than the peripheral interests of humans, then our understandings of obligation and of justice must be aligned, so that what we say about obligation is not countered by assumptions about the invariable priority of humans in matters of justice. We further consider whether such a conclusion can be endorsed by those who adopt certain alternative theories to contractarianism. We conclude that adherents of a range of theories including sentientism and biocentrism must accept that human interests can sometimes be superseded by animal interests, and that this applies not least in matters of justice.

Keywords: justice, contractarianism, animal interests, moral theory, Rawls, moral agency

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Animals and Moral Agency: As we have remarked, it might be thought possible to respond to the objection (regarding the incoherence of Rawls's exclusion of animals) with the claim that it is far from clear that no animals have the capacity for moral agency^{23 24}. Indeed, work by ethologists shows that some mammals demonstrate behaviours that strongly suggest that they have cognitive and emotional capabilities which form part of the bedrock of human morality including, for example, the capacity to sympathise and empathise, as well as the capacity for reciprocal altruism^{25 26}. Recent work by Frans de Waal and colleagues indicates that a sense of fairness is not uniquely human^{27 28} and has a 'long evolutionary history'²⁹. Further, some philosophers too have presented arguments that, at first glance, seem to go against the traditional, widely held view that animals are not moral agents. For example, Stephen Clark has claimed that 'Beasts, let us say, are *ethical*: that is, they respond to aspects of a situation and to features of their kindred, that a good man also respects'³⁰, and David DeGrazia argues that animals are capable of moral agency and of a sense of fairness, albeit a

limited sense³¹. That said, few ethologists or philosophers would readily claim that animals are moral agents in a strict sense. Thus DeGrazia says:

There is a sense of moral agency according to which perhaps no, or at any rate very few, nonhumans are moral agents. In this sense, one is a moral agent only if one is capable of (1) deliberating on the basis of what one takes to be moral reasons, (2) acting on the basis of such deliberation, and (3) justifying one's decisions with an explicit argument appealing to moral reasons (*Taking Animal Seriously*, p. 203).

It is clear that there are few non-human animals that could be characterised as moral agents on the above sense of moral agency. And whether or not we agree with DeGrazia's definition of agency here, there is a sense of moral agency that requires much more than displaying appropriate behaviours; for example, it requires deliberating about possible courses of action and about what makes actions right or wrong, in a way that is capable of being independent of our desires and feelings, and that requires a process of justification.

As Clark notes '[animals] are not *moral*: for they do not, as far as we can see, construct intellectual systems to accommodate their immediate responses' (*The Nature of the Beast*, p. 107). And whilst the ethologist de Waal recognises that there are many animals which possess cognitive capacities and emotional abilities found in our own species, at the same time he stresses his reluctance to claim that animals are full moral agents: 'To communicate intentions and feelings is one thing: to clarify what is right, and why, and what is wrong, and why is quite something else... I hesitate to call the members of any other species than our own 'moral beings' (*Good Natured* , pp. 209-10). Moreover, in relation to their research involving studying the response of certain non-human beings to the inequitable distribution of rewards, Sarah Brosnan and de Waal claim that 'it is the evolution of this response that allowed the development of a complete sense of fairness in humans, which aims not at equality for its own sake but for the sake of continued cooperation', where a full sense of fairness involves distributing benefits even when such distribution results in a negative pay-off for oneself. While there is some evidence of such a sense of fairness in chimpanzees, they state that '[t]here is less evidence that nonhuman species seek to equalize outcomes to their own detriment'³².

But there is another reason for being wary about calling animals moral agents. Moral agency, of course, is intimately tied to issues concerning responsibility and to the concept of culpability; agents are commonly held accountable for their choices, their acts, and their omissions. But few would accept that animals are fully fledged moral agents in the sense of being accountable for what they do, and with good reason. It is one thing to say that some animals have cognitive capacities that enable them to have what we might call 'moral sentiments', and that they are capable of behaviours that could be interpreted as moral, but quite another to jump from such claims to saying that animals are moral agents in a strict sense; a sense which depends upon being able to reflect upon one's thoughts and actions in a way that can make one culpable for what one does. As Mark Rowlands argues:

If animals are moral agents, they are responsible for what they do and so can be praised or blamed for this. At one time, courts of law... set up to try... animals for perceived crimes were not uncommon (see, e.g., Evans, 1906; Dinzelbacher, 2002). I assume that few would wish for a return to this practice. At the core of this unwillingness is the thought that animals are not responsible—and so cannot be blamed—for what they do. If this is correct, then their characterization in terms of moral agency should be resisted' (Rowlands, 'Animals and Moral Motivation', p. 18)^{33 34 35}.

We should then be sceptical of the claim that animals are moral agents, at least in a sense relevant to the capacity to make deliberations in matters of justice. As Martha Nussbaum relatedly claims, 'insofar as there is reciprocity between humans and some nonhuman animals, it is not the type of reciprocity described in Rawls's theory, based on the possession of reflexive rational and moral capacities'³⁶.

Nussbaum, while strongly influenced by Rawls, does not accept the Kantian commitment to rationality as a necessary condition for being a recipient of justice:

That animals suffer pain and indignity at the hands of humans has often been conceded to be an ethical issue; it has more rarely been acknowledged to be an issue of social justice. If we do so acknowledge it... this new problem will require theoretical change. Images of social cooperation and reciprocity that require rationality in all parties... will need to be reexamined (*Frontiers of Justice*, p. 2).

Nussbaum then rejects those aspects of Rawls's theory that exclude animals from being capable of being recipients of justice on the ground that they lack rationality, a necessary characteristic for the possession of moral agency. For Nussbaum, such claims depreciate the intelligence of many animals (p. 327), and fail to recognise that animals have a range of capabilities and species-specific 'entitlements based upon justice' (p. 392), which latter include 'opportunities for nutrition and physical activity; freedom from pain, squalor, and cruelty; freedom to act in ways that are characteristic of the species... freedom from fear and opportunities for rewarding interactions with other creatures... and to enjoy the light and air in tranquility' (p. 326). Denying animals such freedoms is a matter of justice, for such freedoms are essential to animals' flourishing, and enable them to fulfill their capabilities, thus constituting needs.

That said, even if we accept (for argument's sake) that some animals are indeed capable of moral agency, or of the rationality required for being (or becoming) a moral agent, recognition of the cognitive and emotional capacities or abilities of animals, such as the capacity for altruistic reciprocity, and the ability to sympathise and / or empathise, does not provide a sufficient reason for including animals in contract theories as recipients of justice. Indeed, Nussbaum argues that 'It seems doubtful... that we can include animals sufficiently in a Rawlsian theory simply by acknowledging these facts... [T]he capacity for reciprocity is present only in some animals; and yet issues of unfair and cruel treatment extend very

broadly. If there is reciprocity between humans and dogs or apes, it is not clear that there is reciprocity between humans and birds and lions. And yet, our treatment of all these animals appears to raise questions of justice' (p. 333). Accordingly, the theory that obligations of justice are restricted to those obligations which focus on parties able to enter into contracts and capable of a sense of justice is implausible in any case, not least because there are many human beings which are neither able to enter into contracts nor currently capable of a sense of justice, but which are nevertheless capable of being harmed and benefited by our moral deliberations and thus capable of being recipients of distributive justice. Here we should add that many sentient non-human animals have needs comparable to these and to other human beings, and are thus capable of being recipients of distributive justice as well.

Rawls persisted in arguing to the contrary in his later writings, claiming that 'the status of the natural world and our proper relation to it is not a constitutional essential or basic question of justice' (*Political Liberalism*, p. 246); but such claims serve to underline why we should hesitate to give unqualified assent to Rawlsian theories of justice. And this general conclusion also has a bearing on theories of justice of this general kind, which, because of being based on contracts, whether real or hypothetical, will foreseeably be unduly restrictive and narrow, excluding not just non-human beings, but also many humans who are unable to enter into contracts (or to experience a sense of justice) for various reasons.

Contractarianism Revised: In relation to contractarianism, there have of course been attempts to extend or modify the contract doctrine so as to include animals as recipients of justice, most notably on the part of Mark Rowlands, who notes that the rational beings in the contract choose rules by imagining what they would want those rules to be if they did not have certain properties³⁷. Being in the original position is about being able to restrict one's reasoning about oneself and morality:

This process of reasoning looks something like this: 'As a matter of fact, I have property p. But what if I did not have property p? What principles of morality would I want adopted if I didn't have p?'... [B]eing in the original position is... simply a matter of allowing one's reasoning about morality to be guided by the above sorts of restrictions (*Animal Rights*, p. 136).

When Rowlands talks of a 'property' here, we take him to mean not only particular characteristics (like colour of eyes or hair), but also more general ones, including sex, race, and class. The rational beings in the contract choose rules by imagining what they would want those rules to be if they did not have certain properties. In this way those in the original position are not only debarred from knowledge of their individual characteristics, but also (or so Rowlands suggests) from any knowledge of their species. Rowlands applies his view of contractarianism to the ethics of factory farming and animal experimentation. The consequences humans would have to endure if they were to become vegetarians and animal research were phased out can be compared with the consequences animals have to endure from the practices of intensive rearing and animal research. In comparison to the suffering animals endure in these practices, humans would suffer very little by becoming vegetarians

and by a phasing out of animal experiments. Given that the individuals in the contract make choices behind a veil of ignorance, they would not know which species they were a member of. (It may be that they are non-human, rather than human.) And given that animals suffer enormously in these practices compared to what humans would suffer if they were abolished, the most rational choice would be a world where widespread vegetarianism was put into practice and animal experiments were phased out (*Animal Rights*, pp. 149-50).

However, Rowlands's would-be rescue of contractarianism and attempt to include animals in the contract as deserving recipients of justice is creditable but unconvincing, as the notion of rational choosers of indeterminate species is barely coherent. For, given that the choosers do not know to which species they belong, or as what they are choosing, the very concept of choosing is eroded to such an extent that it cannot be relied upon to operate as it normally does. Besides, choosers who have no idea what their own good consists in can hardly be understood as capable of rational choice at all. (For further problems, see Garner, *Theory of Justice for Animals*, pp.34-36.). Can other contractualist theories which present a concept of justice as impartiality protect the interests of animals in a more convincing manner? More recently, Robert Garner has provided a revealing and an informative analysis of Brian Barry's contractarian stance in relation to animals and justice (*Theory of Justice for Animals*, pp. 36-42). Barry's approach originates in Scanlon's contractualist theory according to which judgments about morality are 'judgments about what would be permitted by principles that could not reasonably be rejected, by people who were moved to find principles for the general regulation of behaviour that others, similarly motivated, could not reasonably reject' (*What We Owe to Each Other*, p. 4). Relatedly, principles of justice then, as Garner notes, 'come about as a result of bargaining and negotiation within the original position... Only those principles that cannot be reasonably rejected by others pass the test and can be included as principles of justice' (*Theory of Justice for Animals*, p. 37: here Garner cites works of Brian Barry)^{38 39}. In the light of Barry's stance, 'the inclusion of animal protection principles within justice as impartiality would require that they be principles that cannot be reasonably rejected' (*Theory of Justice for Animals*, p. 37).

That said, Garner plausibly argues that it is unlikely such a requirement would afford genuine or sufficient protection for animals. Justice is still owed *directly* to moral agents only, and since animals lack moral agency their interests are excluded from being given direct consideration. In other words, it is not the interests of the animals themselves that are to be considered in matters of justice; rather 'the interests of animals can only be considered indirectly by those humans who regard it as a good they wish to promote' (*Theory of Justice for Animals*, p. 38). Relatedly and importantly, 'In Barry's Scanlonian version of the contract, the participants know they are humans and know what their particular, narrow, self-interests are' (*Theory of Justice for Animals*, p. 38). As such, while those deliberating about justice might find it reasonable to accept a principle that outlaws, say, using animals for entertainment in ways that cause them to experience pain and distress, nevertheless in the light of the fact that many people have a vested interest in maintaining the status quo with regards to our use of animals (including a vested interest in ensuring the continuance of practices that exploit animals and cause them considerable suffering), many would *not* find it

reasonable to accept a principle that ‘impacts negatively upon their conception of the good’ such as one involving fundamental economic interest. This conclusion is heightened by the fact that all that is required for a proposed principle of justice to be rejected is an individual veto’ (*Theory of Justice for Animals*, p. 38). Thus we arrive at the problem highlighted earlier in this essay; contractualist theories appear susceptible to the claim that they cannot sufficiently protect the interests of animals, even vital ones. (While they may condemn much factory-farming on social and environmental grounds, it remains a problem that they would not protect the animal interests at stake in the absence of these grounds.) Indeed, they do not appear to be able to take sufficiently into account what animals are owed, according to philosophers such as Nussbaum and Garner, as a matter of justice.

With regards to Barry’s attempt to include animals, then, we have seen that the tension between protecting animals and liberalism’s emphasis on rejecting principles that conflict with one’s conception of the good raises its head again. In relation to Rowlands’s attempt, given that those in the original position do not know to which species they belong, the concept of choice becomes so eroded that it is difficult to fathom how those in the original position, making ‘choices’ behind a veil of ignorance, are to make rational choices at all. This is a problem integral to the Rawlsian framework itself as the matrix for principles of justice—the framework on which decisions of justice are made. As such, the problems arising from Rawlsian contractarianism (particularly problems related to the charge of inconsistency in respect of its exclusion of animals and to the claim that it cannot sufficiently protect animals’ weighty interests from being unjustifiably overridden by less weighty human ones) cannot be resolved by merely trying to modify or revise the contract so as to include animals.

Relatedly, the framework is based on a conception of justice which itself is rooted in a certain conception of rationality: rationality requires somehow abstracting one’s self from the particulars in order to obtain a disinterested and an impartial viewpoint. In Seyla Benhabib’s words, such a self is ‘disembodied and disembedded’ from concrete reality⁴⁰. Indeed, it is far removed from having any knowledge of the differences between individuals, and yet differences would need to be taken into account should the rational choosers be able to make choices which attempt to make those disadvantaged in society better off: such differences would, for Benhabib, include gender differences, but to these one should add species differences. Thus it is difficult to imagine how the Rawlsian goal of equality could be attained by disembodied choosers, ignorant of the particulars (and, in relation to considering animals’ interests as a matter of justice, ignorant of species-specific differences).

Non-anthropocentrism, Justice and Animals: In the light of the above concerns regarding anthropocentric conceptions of justice and regarding contractarianism, it is now time to consider what can be said about justice towards non-human animals by people who reject anthropocentrism (even if they are not adherents of animals rights) and who accept an alternative moral framework. For even alternative moral theories that adopt a non-anthropocentric stance tend to exclude animals from the sphere of justice, and yet, as we have seen, doing so means that animals’ interests are likely to be unfairly overridden by stricter obligations of justice with regards to human interests. But if advocates of such theories wish

to provide a framework which can genuinely take the interests of animals into account, then their theory of obligation with regards to animals needs to be brought into line with their claims about whether animals are entitled to justice. However, if such theories encounter problems with including non-human animals as recipients of justice (as contractarianism does) then they may be seen to undermine themselves as non-anthropocentric moral theories.

The kind of anthropocentrism that is relevant here is not metaphysical or teleological anthropocentrism, the claim that everything exists for the sake of humanity, but the normative or ethical kind, which claims that human interests are the only interests that matter in morality, and that human beings alone have moral standing. Most ethicists these days reject this kind of anthropocentrism, partly because they can do so without adopting any stance in metaphysics, but for a range of good reasons besides.

However, it should be said at the outset that rejecting normative anthropocentrism need not involve acceptance of obligations to animals, as it is compatible with holding that non-human animals warrant moral consideration but have relatively slight moral significance. (For the distinction between moral considerability and moral significance, see Goodpaster, 'On Being Morally Considerable' (note 20). Nevertheless, the usual grounds for rejecting normative anthropocentrism take us much further. The usual grounds include the wrongness of inflicting pain and suffering on non-human animals without a good justification, and these grounds imply that animal suffering is morally significant enough to be weighed against human interests, and to be found more serious than trivial ones, but perhaps less serious than vital interests. But this in turn suggests that, besides non-human animals having moral standing, their well-being has quite considerable moral significance, and enough to support obligations in their regard, and obligations of justice at that.

Certainly there are other grounds that can be advanced for rejecting anthropocentrism, and so the reasoning just rehearsed does not apply of itself to all those who share in this rejection. Yet for many of the grounds for rejecting it, there will be arguments that are counterparts of the one just advanced, capable of sustaining the same conclusion. For example, biocentrists standardly hold not only that all living creatures have moral standing, but also that their good or flourishing has intrinsic value. This view is compatible with the relevant degree of intrinsic value being slight. But when living creatures in their millions are at risk, as when a forest is threatened, this very approach implies that a very high degree of intrinsic value is in question, and therefore that agents who can prevent the forest being destroyed have an obligation to prevent it happening and to preserve the forest.

Besides, the argument just presented has an interesting spin-off, for many would agree that intrinsic value is what we have obligations to promote. Let us adopt this assumption for present purposes. On this basis, both sentientists (who recognise negative intrinsic value in animal suffering) and biocentrists (who recognise positive intrinsic value in the well-being of non-human living creatures in general) have to accept that whenever the well-being of the creatures whose moral standing they recognise is at stake, obligations are incurred, other things being equal. Moral agents, in other words, have obligations with regard to (at least)

sentient animals, and possibly with regard to non-human creatures in general, where there are no other moral considerations, or where other considerations exist but cancel each other out. But this conclusion has a bearing on our theory of justice; for a theory of justice which purports to set aside recognised obligations as insignificant cannot be accepted. If so, and even if we still hesitate to affirm animal rights, our theory of justice must sometimes prioritise non-human interests over some human interests^{41 42}.

So far in this section, it has been suggested that traditional theories of justice are likely to need to be modified by those who accept either sentientism or biocentrism. But what of other normative stances? The view that animals can be the focus of obligations can be supported by virtue ethicists, for some of the virtues can be construed as upholding kindness, mercy and loyalty towards non-humans, despite costs to the human agent concerned, and thus as supporting not only acts of supererogation but also sometimes obligatory ones. There can undoubtedly be obligations of loyalty, and plausibly there can sometimes be obligations to be kind or to be merciful too. Virtue ethicists are not obliged to accept this, but their virtue-ethical stance permits and enables them to accept it. Further, once obligations are recognised, then once again our understanding of justice needs to be modified accordingly. Virtue ethics, then, is compatible with obligations of justice being owed to animals.

This can all likewise be accepted by non-anthropocentric consequentialists, who relate our obligations to promoting states of value, and include among these states valuable states of non-human animals; for this was implicit in the earlier reasoning. (Many sentientists, after all, are also consequentialists, as are some biocentrists.) It could also be accepted by those deontologists who hold that one of our duties is not to harm existing creatures. For this duty could well be interpreted as a requirement of justice, and as sometimes taking priority over some duties to human beings. While neither consequentialists nor deontologists are required as such to accept that justice is owed to animals, their generic normative stances certainly allow of this conclusion (just as virtue ethics does). Rawlsian and other contractarians, however, can hardly accept this view about animals and justice, since non-human animals cannot enter into contracts, and almost certainly lack the capacity for a sense of justice. Certainly, for Rawls, only humans can be recipients of justice, humans being the only species capable of a sense of justice and of moral agency.

Conclusions: If we hold that animal ethics is just a matter of moral obligations not grounded in justice, plus compassion, then it is understandable that it is often side-lined before issues such as the relief of human poverty and the upholding of human rights, for the latter are certainly regarded as matters of justice. However, since the vital interests of animals turn out to be more significant than the trivial or peripheral interests of humans, or, in other words, the treatment of animals is a matter of justice, then there are obligations to prevent avoidable and unnecessary animal suffering, and good grounds to regard this as a matter not just of compassion but also one of justice and of fairness, just as there are also good grounds to relieve human poverty and to uphold human rights.

It has been found that Rawls's contractarianism and related revisionist positions encounter problems with regards to this conclusion: particularly problems related to the charge of inconsistency, but also to the claim that contractarianism cannot sufficiently protect animals' weighty interests from being overridden by less weighty human ones. In relation to the latter claim, there appears to be a tension in liberal attempts to provide sufficient protection for animals; a tension that arises from liberalism's emphasis on the freedom of individuals to pursue their own conception of the good as long as doing so does not interfere with the good of others.

In relation to the former charge, one could try to overcome the inconsistency of excluding animals from the contract by, for example, either including those animals which are at least as cognitively developed as babies and infants, or by excluding marginal humans along with animals. But such an attempt raises a number of further issues. One issue is that comparison of the mental capacities of different beings would not be an easy task, not least because different capacities will manifest themselves in different ways, and will be possessed by beings (whether of the same or of different species) in varying degrees. But such a comparison would be necessary in order to determine which beings should be included in the contract and which excluded. As such, it would become incredibly difficult to determine which beings should be recipients of justice.

Besides, a theory that restricts obligations to those who are capable to entering into contracts and / or to those who possess certain rational capacities is implausible, not least because there are many beings (humans and non-human animals included) which are unable to enter into contracts and which would not meet the conditions deemed necessary for the possession of rationality, but which are nevertheless capable of being harmed and benefited by our moral deliberations and thus capable of being recipients of distributive justice.

Another issue concerns Rowlands's revised contractarian position more specifically; we have seen that the notion of choice in Rowlands's theory becomes so eroded as to make it impossible to see how choosers could make decisions concerning justice. In any case, it has been found that the issues arising from Rawlsian contractarianism cannot be resolved by merely trying to modify the contract, for there is a problem regarding the very framework from which obligations are derived. Yet unless Rawlsian contractarianism and its framework can be drastically revised so as to overcome the various problems mentioned above, it is to be concluded that it must be rejected because of its failure to include animals in the sphere of justice.

Overall, contractarianism's exclusion of animals from the sphere of justice has serious implications, for it follows that animals' basic needs and interests could easily be overridden by less weighty human interests. To overcome this, animals need to be included in the sphere of justice, and this would involve overcoming the disparity between our understanding of our obligations to animals and our understanding of what is owed to animals as a matter of justice; in other words, what we say about obligations and about justice with regards to animals need to be aligned, so that animals' interests are not unjustifiably countered and

disregarded by traditionalist assumptions about the priority of humans in matters of justice. While even some non-anthropocentric theories (such as sentientism and biocentrism) have (like contractarianism) excluded animals from considerations of justice, it has been found that they (unlike contractarianism) have the resources to overcome this disparity, and include animals as recipients of justice. While it may not always be easy to motivate acceptance of such non-anthropocentric theories, as opposed to, for example, contractualism, our capacities for sympathy and for respect for non-human lives as well as for human beings mean that this is far from an insuperable obstacle to the acceptance of one or another of these theoretical stances.

It should be re-affirmed that no appeal to animal rights is required of those who endorse these conclusions; these obligations hold good even for those who reject such considerations, and the same holds for inter-species issues of justice. It is possible to have obligations (for example, to relieve poverty, or to reduce the suffering of animals used in the practices of animal experimentation and factory-farming) without the individuals of the class towards which the obligations are targeted having rights to that treatment. Correspondingly an acceptance of obligations towards non-human animals need not imply a matching recognition that those animals have matching rights, although taking seriously such obligations plausibly requires that we grant animals some appropriate *legal* rights, if only so that their interests can be properly protected and promoted (whether or not we recognise them as having moral rights)⁴³. The inclusion of non-human animals within the scope of justice makes the language of animal rights less inappropriate than it might appear from traditionalist perspectives, but does not mandate those who recognise this inclusion to endorse animal rights as well. Whether or not we are happy with language of this kind, we can and should recognise that there are obligations of justice towards animals; such, at any rate, is the central conclusion of this essay.

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