

Animals, Exclusion and Justice

1. Introduction

Assuming that both animals and humans have interests, and that these interests can sometimes conflict, how should trade-offs be resolved?¹ By way of introduction, consider the following cases. A teenager wonders whether they should eat animals. On the one hand they enjoy the texture of cooked animal flesh and adolescent veganism would create additional stress in familial and social situations, but on the other hand they struggle to deny the livestock industry's cruelty to animals.²

A revered chef adores the taste of steak. All her life she has prized this ingredient as the cornerstone of her best dishes. However, she also knows that steak production requires exploitation and slaughter. If she stops using meat in her cooking, her professional success will suffer. She doesn't just have a slight preference for meat consumption; it's deeply important to her.

The government considers a ban on blood sports, including foxhunting. They know that a ban will significantly upset a group of avid hunters who prize foxhunting as an historic tradition. On the other hand, they realise that foxhunting involves the painful deaths of sentient wild animals.

A district council has commissioned the construction of a small park to serve the local community. Of all the potential architectural designs, only two remain. One is a pet park, filled with tunnels, towers and toys to provide pets with ample space for exercise and socialisation. The other is an Astroturf, perfect for local sports teams to play on. The council has to decide whether to dedicate public funds to pets or sports clubs.

A cancer research laboratory is nearing a breakthrough. In order to test the final iterations of their cure, they must kidnap chimpanzees from their natural habitats, to inject them with painful, lethal drugs.

What should be done in such scenarios? As for many people, I first considered this sort of question when I wondered if meat-eating was defensible. However the variety of examples show that diet is just a small personal manifestation of a wider social phenomenon. Inter-species interest trade-offs don't just occur on the dinner plate; they are manifest in various public institutions, cultural traditions and court cases. Alasdair Cochrane, Robert Garner and Siobhan O'Sullivan recognise the recent 'political turn' in animal scholarship as a response to this fact, and frame animal rights as an issue of social justice (Cochrane, Garner & O'Sullivan 2016, 10).

¹ Although useful in conversation, 'nonhuman animals' is cumbersome in prose so I use 'animals' instead. 'Creatures' is my catch-all for humans and animals.

² I don't mean to say that plant-based diets are unsatisfying.

Philosophers have long-debated interest trade-offs, but traditional answers don't address inter-species trade-offs, or address them inadequately. This prompted me to sketch new principles to resolve interest trade-offs. The traditional answers I have in mind are the social contract, and utilitarianism about justice. Very crudely, social contract theorists state that an interest trade-off is just if it adheres to a set of rules that would be agreed to by mutually consenting parties (properly construed) from prior conditions of justice (properly construed). Utilitarians about justice state that an interest trade-off is just if it maximises utility (properly construed). I will argue that the social contract theory with John Rawls as its strongest proponent *excludes* inter-species trade-offs from its scope (Rawls 1999, pp.448-449), and that utilitarian approaches address animals but are implausible anyway, since utilitarianism disrespects the separateness of persons (Rawls *ibid.* pp.19-24). The puzzle of inter-species trade-offs has not been adequately addressed by the traditional debate.

Utilitarianism has severe flaws, but some elements can be revived to address inter-species trade-offs. The 'impartial spectator' view of justice derived from Adam Smith's *The Theory of Moral Sentiments* (1976) provides convincing principles for inter-species trade-offs. This view is plausible only if it is distinguished from utilitarianism; I draw this distinction.

Justice demands that trade-offs are to be resolved in ways that an impartial spectator wouldn't resent. The impartial spectator resents two sorts of action. First, if an interest trade-off *can* be resolved without stripping *any* creature of their 'basic interests' (those interests that ensure a realistic chance at a good life), the impartial spectator resents all trade-offs that violate a creature's basic interests. Second, if an interest trade-off *can't* be resolved without violating at least some creatures' basic interests (these are the hard cases), then the impartial spectator resents all trade-offs except for those which minimise basic interest-violations.

Finally I propose a legitimacy principle based on the impartial spectator. The state may legitimately coerce its citizens if an impartial spectator wills such coercion. This principle is attractive because it shows that the UK's 2006 Animal Welfare Act, and my own policy proposal outlined in §8 could be legitimate. This is an accolade of the impartial spectator view and I defend the principle against worries that it leads to tyranny.

The issue of animal-human interest trade-offs extends beyond mealtime. Animals' role and relationship to humans is one the most pressing and unsolved moral, political, and economic issues of the 21st century. The impartial spectator view of justice brings us closer to the answer.

2. Animal well-being and animal justice

In this section I outline my assumptions about animal well-being from which I argue that animals are owed duties, including duties of justice. I assume along with Tom Regan that animals have welfare-interests, where A has a welfare-interest in ϕ if it would be good for A, that ϕ (Regan 1983, p.87). In general, animals with central nervous systems have a welfare-interest in being happy and not suffering. 'Happiness' denotes positive experiential states including enjoyment, play and love. 'Suffering' denotes negative experiential states including stress, anxiety and

loneliness. I presuppose that these animals are sentient, that is, capable of experiencing pleasure and pain.³

It's wrong to needlessly kick a dog. The act is wrong because of the harm inflicted on the dog, and not just because of the harm indirectly caused to humans, including the dog-owner's misery and the fact one negates one's interest in acting compassionately. This contradicts Thomas Aquinas and Immanuel Kant, both of whom aspired to reduce all wrongs inflicted on animals, to wrongs inflicted on humans (Aquinas' *Summa Contra Gentiles* III.112.12-13; Kant's *Lectures on Ethics* 27:413). It is wrong to kick a dog because it harms the dog, not just because it harms humans. In other words, our duties to animals can be 'direct' rather than 'indirect'. A has a duty to θ if they must θ according to the moral rules. A's duty to refrain from harming B is *direct* if it obtains because of the harm inflicted on B rather than the second-hand harm inflicted on C, and *indirect* if it only obtains because of the harm inflicted on C. If A is owed direct moral duties, A is a 'moral patient'. This is not to say that A is a 'moral agent', which requires the additional capacity to hold moral duties.

The fact that humans are moral patients, and that there is no principled way to distinguish humans and animals that excludes only the latter from the sphere of direct duties, entails that animals are moral patients. Can anything distinguish animals and humans such that only humans are moral patients? Perhaps we say that only *rational* creatures are moral patients and define 'rationality' in such a demanding way that it excludes animals. But rationality so-defined would also exclude some humans; infants and the comatose have 'inferior' rational capacities to some animals, but are moral patients.⁴ Perhaps we say instead that only *humans* are moral patients. But this is circular (it argues that only humans are moral patients from that supposition itself) and it contradicts the intuitive idea that if we were to encounter an advanced, sentient alien race, we would have direct moral duties towards them. Indirect duty views are 'speciesist', a term popularised by Peter Singer (1975, p.6), and the mistake of speciesism lies in its circularity and failure to accommodate the alien case.⁵ Since humans are moral patients, and that there is no plausible way to distinguish humans from animals such that only the former are moral patients, animals are also moral patients.

Animals can be owed duties. It makes sense to ask what types of duty they are owed. Are animals are owed duties of *justice*, along with other duties such as those of compassion? John Rawls' *A Theory of Justice* excluded animals from the scope of justice. He admitted that 'it is wrong to be cruel to animals' but 'we are not required to give strict justice anyway to creatures' (ibid. p.448). Martha Nussbaum argues against Rawls that animals are owed justice as well as mere compassion because some animals are owed 'basic entitlements', and such entitlements occupy 'the sphere of justice' (2006, p.337). There are two additional *prima facie* reasons to think that animals are owed duties of justice. First, assuming that justice is owed to any creature subjected to systems of

³ René Descartes allegedly denied mental states to animals. For a discussion of Descartes' animal ethics and philosophy of mind see John Cottingham (1978) 551-559 and Tom Regan (1983) pp.3-5.

⁴ This argument is unfortunately termed the argument from 'marginal cases', for which I substitute 'non-rational humans'.

⁵ A mere accusation of speciesism without specifying the *mistake* of speciesism is not a criticism.

artificial coercion, animals are thereby owed duties of justice, since they are often exposed to artificial coercion. This echoes Joseph Carens' remark that migrants are owed justice because they are subject to coercive border controls (2013, p.258). Second, Garner remarks that we should hope that animals are owed duties of justice rather than mere duties of compassion, since only duties of justice can be legitimately enforced (2013, p.48). The state cannot legitimately coerce its citizens to be compassionate, but it can legitimately coerce them to fulfil the demands of justice. It would be better for animals if they were owed duties of justice, so on pragmatic grounds we should posit such duties.⁶ So it makes sense to ask what duties *of justice* are owed to animals, in the hope that this will shed light on inter-species trade-offs.

I don't use 'justice' to characterise fair principles for allocating benefits and burdens arising from societal cooperation. This was a central project of liberalism in the 20th Century. Instead I ask what justice demands of human behaviour towards animals. However by focussing on Smith, Rawls, Nussbaum, Sue Donaldson and Will Kymlicka I am rooted in the liberal tradition.⁷ Given that animals can be owed duties of justice, which traditional theories of justice are helpful for thinking about these duties? I critique utilitarianism and the social contract in the next section before proposing my preferred impartial spectator approach.

3. The social contract and utilitarianism

I follow Nussbaum, Garner and Regan in rejecting two historically-dominant theories of justice that resolve interest trade-offs. Utilitarianism considers animals' interests but doesn't respect the separateness of persons, whereas the social contract theory exemplified by Rawls doesn't account for animals.

Utilitarianism about justice refers to a family of theories that share three commitments. They are *act-consequentialist* (only consequences of actions have value); *welfarist* (consequences are better only to the extent that they include greater welfare), and *aggregative* (these good consequences are commensurable and can be added up to a sum total; justice demands that the maximal sum is pursued).⁸ 'Welfare' is understood variously as pleasurable experience, interest-satisfaction or another configuration depending on the utilitarian scholar. Given an expansive account of welfare, utilitarianism takes animals' interests into account, so has promise as a theory of animal justice.⁹ Historically utilitarians including Jeremy Bentham (2007, XVII.IV, note 122) and Singer in *Animal Liberation* (1975) led the intellectual charge for animal justice.

⁶ Garner doesn't propose a legitimacy principle but he is on to an important thought. Animal protection laws are coercive, so demand legitimation. See §8.

⁷ I am grateful to Rachel Elizabeth Fraser and Karamvir Chadha for convening a reading group during Easter Term, Cambridge (2017), which explored Marxist, feminist, and postcolonial approaches to animal rights as juxtapositions to liberalism.

⁸ This characterisation owes to Tom Dougherty's unpublished lecture series on utilitarianism in Cambridge, Michaelmas 2015.

⁹ Rich conceptual issues surround inter-species aggregative welfare calculations. Some argue that animal and human welfare is commensurable. Others argue that humans are capable of more 'sophisticated' welfare than animals, so have greater 'weight' in comparisons. See Garner (*ibid.* pp.129-132).

However utilitarianism is implausible as a theory of justice because aggregative welfarism doesn't respect the separateness of persons (Rawls *ibid.* pp.19-24). Utilitarianism commands that sum welfare across society is to be maximised, so doesn't care about the distribution of welfare as long as the total is boosted. If the sum is higher then it doesn't matter to utilitarians whether a particular person has exceptionally high or low welfare. This is problematic in cases where one person's extreme suffering increases overall welfare. If a single person could be enslaved to the rest of society such that their loss in welfare would be outweighed by the benefits provided to everyone else, utilitarianism requires that we enslave that person, as a matter of justice. But (presumably) justice demands that slavery is always wrong, so utilitarianism is wrong (Rawls *ibid.* p.23). You can frame a similar argument in terms of animals. Suppose an innocent lonesome dog is captured by ten meat lovers, such that aggregate welfare is highest in the possible scenario where the dog is killed to satiate the meat lovers' palate. According to utilitarianism, justice demands that the dog be slaughtered. But justice cannot demand that the dog be slaughtered. Utilitarianism is wrong about justice.

'But perhaps', we ask, 'it's not so bad that the dog is slaughtered to satisfy those hungry humans?'. Perhaps Rawls' separateness of *persons* criticism works when applied to humans, but not when applied to animals, who are *not* persons. However we now face the same trouble of non-rational humans and speciesism outlined in §2. Justice demands that *some* human interests (e.g. in not being enslaved) cannot be violated in the name of aggregate welfare, so either (i) the same is true for animals, or (ii) something normatively distinguishes animals and humans such *all animal interests* could, in principle, be justly violated for the sake of aggregate welfare. But (ii) isn't plausible because - to echo an argument in §2 - neither 'is rational' nor 'is human' serve as a defensible distinguishing feature of that special set of creatures, who have some interests that cannot be justly violated in the name of higher aggregate welfare. There is nothing special about animals that makes them suitable for utilitarian trade-offs. Given that humans have interests that can't be justly violated in the name of higher aggregate welfare, animals' corresponding interests oughtn't be violated either. Utilitarianism is unfit as a theory of animal justice.

On the other hand Rawls' theory respects the separateness of persons (*ibid.* pp.134-135). According to Rawls, justice demands that interest trade-offs between members of a 'fair scheme of cooperation' are to be resolved in a way that adheres to rules of a 'social contract', such that mutually consenting parties (properly construed) in an initial position of fairness (properly construed) would agree to be governed by those rules. He stipulates that the consenting parties are to be 'mutually disinterested' and risk-averse, and that the initial position of fairness, the 'original position', includes a 'veil of ignorance' that precludes each contractor from knowing their class, social status, natural assets or conception of the good in society. These conditions are supposed to be fair, and just, because they fulfil the liberal ideals of freedom and equality. His theory respects the separateness of persons because the risk-averse contractors would never agree to rules that enable an extreme unjust distribution of welfare, such as those in which one person is enslaved for the benefit of all, just in case that contractor ended up as the enslaved person.

However I agree with Nussbaum's argument that Rawls' theory cannot be used to generate duties of justice to animals, because animals do not obviously contribute to a scheme of cooperation, so are excluded from his theory's scope (Nussbaum *ibid.* pp.33-34). Rawls himself admits this, saying 'it does not seem possible to extend the contract doctrine so as to include [animals] in a natural way' (*ibid.* p.448). Rawls' social contract generates principles to govern interest trade-offs in a fair scheme of cooperation between productive parties, and it is hard to see how animals are productive members of this cooperative scheme. Rawls' theory doesn't propose duties of justice towards animals; they are excluded from his theory.

Rawls' influence generates a temptation to adjust his theory to accommodate animal interests. Mark Coeckelbergh argues that animals contribute to a scheme of cooperation, so should be included in the scope of justice (2009, 74-75).¹⁰ Regan (*ibid.* p.171), and later Ruth Abbey (2007, 4) consider whether the original position should be adapted such that species-membership is hidden behind the veil of ignorance. Even if we can't hide species-membership behind the veil of ignorance, we can stipulate the rationality of contractors in the original position such that they deliberate on behalf of animals as their representatives (Nussbaum *ibid.* p.335). However none of these qualifications resuscitate Rawls' theory. Furthermore, the fact that there is an attractive alternative (the impartial spectator approach) to Rawls' social contract undermines the motivation to retain a Rawlsian approach to animal justice.

As stated, the central problem with adapting Rawls to accommodate animals is that animals don't contribute to a productive scheme of cooperation, and that this scheme sets the limit of Rawls' theory. Coeckelbergh's hypothesis that animals, in general, provide sufficient productive input to be included in the scope of Rawlsian justice is contentious at best. While Donaldson and Kymlicka claim that dogs are capable of following basic social rules and can enter into primitive forms of productive cooperation (*ibid.* p.119), they admit that 'there is enormous uncharted territory here' (p.121) and that the empirical data only applies to dogs. Rachel Elizabeth Fraser argues that pets contribute 'emotional labour'; on these grounds we might argue that animals count as members of the cooperative scheme (2017, 39). But again this only applies to some cats, dogs and other pets, rather than animals generally. There are plenty of animals that don't obviously contribute to the scheme of societal cooperation (e.g. urban foxes, pigeons) but a theory of animal justice should consider these animals (Garner *ibid.* p.31).

Other attempts to generate so-called 'Rawlsian resources' for animal justice don't vindicate this central shortcoming of Rawls' theory.¹¹ Regan and Abbey's suggestion that the veil of ignorance should preclude knowledge of species-membership only makes sense if made in isolation from the rest of Rawls' theory, which essentially places animals outside the scope of justice. An adapted veil of ignorance may be a useful heuristic that clarifies our duties of justice to animals in any concrete situation, but it can and should be isolated from the broader theory. The same criticism applies to the idea that contractors in the original position can deliberate on behalf of animals' interests. The fundamental idea in

¹⁰ Donaldson and Kymlicka consider a similar approach (2011, p.119).

¹¹ The phrase is from Abbey's 'Rawlsian Resources for Animal Ethics' (2007).

Rawls' theory (the fair scheme of cooperation) applies only to productive humans, and even if his other ideas (the veil of ignorance, the original position) are useful in isolation for thinking about our duties to animals, they can be separated from the theory itself.

In summary, while utilitarianism is promising as a theory of animal justice (it at least takes animals' interests into account), it falls prey to Rawls' separateness of persons criticism. Rawls' own account respects the separateness of persons but excludes animals from the sphere of justice. Given that Rawls offers such a strong version of social contract theory, I am pessimistic about the prospects of an alternative social contract doctrine that protects animals' interests. My preferred conception of animal justice, based on the impartial spectator, includes the advantages of both utilitarianism and Rawls' social contract, without their respective shortcomings.

4. A defence of the impartial spectator

Adam Smith uses the metaphor of an impartial spectator to articulate the demands of justice (1976, p.330). Rawls believes that his separateness of persons critique also undermines the impartial spectator metaphor. I argue, following Stephen Darwall, that Smith's impartial spectator metaphor resists Rawls' critique. My preferred version varies slightly from Smith's view. On Darwall's interpretation, Smith asserts that an act is unjust if it is properly resented (Darwall 2006, pp.178-9). One way to understand resentment is as interest-frustration; to resent an act is for that act to inhibit you from fulfilling your interests. But not all interest-frustration is unjust; an act is only unjust if it is 'properly' resented. Resentment of an act is 'proper' if the impartial spectator would also resent that act. Whether an act is unjust depends on whether it frustrates the impartial spectator's interests.

What are the impartial spectator's interests? The impartial spectator is the viewpoint of someone who fully sympathises with every person, including the subject and perpetrator of potential injustice and is to that extent 'impartial'. While the impartial spectator's interests are a *function* of the interests of those it sympathises with, the impartial spectator's interests can't *simply* be the result of listing everyone's interests. If the impartial spectator's interests were simply a list of everyone's interests, then *any* outcome to *any* genuine conflict of interests would be resented, and therefore unjust. But not all conflict-resolutions are unjust. I articulate my own account of the impartial spectator's interests and how they are constructed from individual creatures' interests, in §5 and §6.

Rawls critiques one conception of the impartial spectator, portraying the spectator as someone who sympathises with everyone in society such that each individual's ends is conceived as analogous to an individual person's ends. Since an individual person would sacrifice some personal projects in favour of highest aggregate personal welfare, the impartial spectator would also sacrifice some individuals' interests in favour of highest aggregate societal welfare. This includes violation of some individuals' rights, such as enslavement for the sake of aggregate welfare. This conception of the impartial spectator leads Rawls to reject the metaphor as untenable since it disrespects the separateness of persons (Rawls *ibid.* p.24).

But Rawls' criticism only applies to one version of the impartial spectator, one in which the impartial spectator's sense of rationality adheres to aggregative welfarism. We can conceive of an impartial spectator who doesn't think in aggregative terms. To resist Rawls' critique the spectator must resent slavery even when it leads to higher aggregate welfare. On Darwall's interpretation, Smith's conception resists Rawls' critique since full sympathy with the interests of each (including each individuals' very powerful interest to not be enslaved) gives the impartial spectator an 'individual-patient-regarding' perspective.

This individual-patient-regarding character of justice leads Smith to oppose utilitarian tradeoffs and to hold that resistance to injustice is warranted not by considerations of overall utility but by concern for the "very individual" who would be injured. (Darwall ibid. p.179).

Smith states that theft of another's property is unjust even when it leads to higher aggregate 'benefit', so we cannot interpret his impartial spectator principle as an aggregative welfare principle (ibid. p.138). Individuals hold some interests very strongly, such as an interest in not being enslaved. Since the impartial spectator fully sympathises with each individual they recognise the overwhelming strength of these 'very strong' interests. The impartial spectator resents trade-offs that violate those interests in the name of higher aggregate welfare. The impartial spectator would likely agree with social contract theorists that these 'very strong' interests, or what I term 'basic interests' ought to be protected within a state's constitution. While the impartial spectator is historically associated with utilitarianism Smith's version is not vulnerable to the same critique. In the next section I give an account of basic interests; for now just note that they are required for the impartial spectator to overcome Rawls' critique.

We can adapt Smith's version to include animals. An act is unjust iff the impartial spectator would resent that act, and the impartial spectator sympathises with every *creature* (not just humans) subjected to that act as well as the perpetrator. Can we ever really sympathise with animals? Thomas Nagel famously argued that we cannot know what 'it is like' to be a bat (Nagel 1974, 438), which suggests that we cannot know whether an animal-directed act is unjust. But evidently we *can* sympathise with animals' interests (pet owners can tell which foods their dog prefers); this doesn't require grasping their 'inner consciousness'. We should be wary of anthropomorphising animals by projecting human traits but this is a constraint on sympathy, not an objection to it (Nussbaum 2001, 1508).

Smith's impartial spectator view, adapted for animals, takes *actions* rather than consequences (such as distributions of benefits and burdens), as the subject-matter of justice. Even if animals suffer, this suffering is unjust only if caused by active human interference. To summarise, if A θ 's B (if A acts upon B), and θ is properly resented, θ is unjust. Anyone resents θ if θ frustrates their interests, but θ is *properly* resented only if it frustrates the impartial spectator's interests. On my account, the impartial spectator has two sorts of interests, both pertaining to the violation of other creatures' basic interests, one for the resolution of easy cases and another for the resolution of hard cases. A trade-off is *easy* when there is at least one possible outcome where basic interests are not frustrated. A trade-off is *hard* when basic interests are frustrated in every outcome.

(*Easy Cases*) If θ violates B's basic interests, and there is a possible outcome to the interest trade-off in which *no* basic interests are violated, then the impartial spectator has an interest in not- θ ; θ is properly resented, so unjust.

(*Hard Cases*) If θ violates B's basic interests, and *all* possible outcomes to the interest trade-off include violation of at least some creature's basic interests, then the impartial spectator has an interest in the outcome where fewest basic interests are violated; θ is properly resented, so unjust if an alternative course of action violates fewer basic interests.

At the moment the notion of a 'basic interest' is unclear and I haven't argued for either principle. In §5 I elucidate basic interests and argue for the *Easy Cases* principle; in §6 I argue for the *Hard Cases* principle. The point in this section has been to show that the impartial spectator resists violation of basic interests and so wouldn't approve of those utilitarian trade-offs that Rawls critiqued. It transcends both utilitarianism and Rawls' doctrine as a theory of animal justice. The proof, however, is in the pudding.

5. How the impartial spectator resolves trade-offs

Recall the trade-off examples outlined at the start of this essay, including the teenager flirting with veganism, the steak chef, the government's decision to ban foxhunting, the council's choice to build an Astroturf or a pet park, and whether to permit animal experimentation in medical research. The impartial spectator solves each trade-off. The guiding idea is to minimise basic interest-violations.

What is a basic interest, and which interests are basic? We already know that humans have a basic interest in avoiding slavery; we need to say this to overcome Rawls' criticism. Rawls' broader point is not specifically about slavery, it's that humans have some interests that cannot be justly violated in the name of higher aggregate welfare. Basic interests are those interests that cannot be justly sacrificed for higher aggregate welfare. But this is uninformative, because we don't yet have a clear account, or list, of *which* animal interests are unsuitable for aggregate welfare calculations. I *suggest* that A's welfare-interest in ϕ is basic if ϕ must be satisfied in order for A to have *a realistic chance at a good life*. In Regan's words, 'certain conditions are necessary, certain basic requirements must be met, if an individual who *can* live well is to have a realistic chance of doing so' (ibid. p.88). Nussbaum makes a similar point, calling these 'capabilities' those things that are necessary for a life worthy of 'dignity' (2006, p.351).

An animal (or human) has a good life if their welfare-interests are more-or-less satisfied over their lifetime; they may suffer at times but overall they experience happiness, bountiful emotional relationships and success in short-term goals. Even if all of A's basic interests are satisfied, A may still have a bad life. Basic interest-satisfactions only guarantee a 'realistic chance' at a good life, so leave space for bad luck or laziness to get in the way. Whether a chance is 'realistic' is vague, but it still conveys a substantive point since some interests clearly fall into the 'basic' bracket, although the line between realistic and unrealistic is fuzzy. I don't have a basic interest in owning a superyacht, it's unclear to me whether I have a basic interest in higher education, but it's very clear that I have a basic

interest in adequate nutrition. Furthermore, while A might be psychologically attached to a particular goal (such as a successful career as a butcher), A doesn't have a basic interest in pursuing this *particular* goal, given that there are other possible ways in which A could have a good life (as a grocer, perhaps).

For virtually all animals, basic interests include the interest in being alive (including an interest in shelter, nourishment and rest), exposure to stimulating sensory environments, and procreation.¹² Basic interests will vary across species but most mammalian animals have a basic interest in access to social relationships, the opportunity for play, and emotional expression. Without satisfaction of these interests, it is simply impossible, or incredibly unlikely, for an animal's life to go well.¹³

There are easy and hard trade-offs. First I deal with the easy cases such as the teenager. The impartial spectator demands that, as a matter of justice, the teenager adopts veganism over meat-eating. Meat-eating requires animal slaughter, which violates an animal's basic interest in being alive, and thus would be resented by the impartial spectator. But adopting a vegan lifestyle wouldn't violate the teenager's basic interests, since (in most cases) one can still live a good life without eating animal products, so the impartial spectator wouldn't resent the teenager's choice to become a vegan.¹⁴

The steak chef example is slightly more difficult. Recall that she has a deep psychological attachment to life as a steak chef, not a mere culinary preference. However, given that she can have a good life in other ways (as a pioneer of plant-based cuisine, for example), she doesn't have a *basic interest* in her steak chef career. It is possible for a steak chef to have a realistic chance at a good life, without being a steak chef. The impartial spectator doesn't resent the chef's choice to stop cooking meat, because her basic interests are not violated. But the impartial spectator resents animal slaughter as argued above, so resents her choice to cook meat. The impartial spectator demands that the steak chef stop cooking animals, as a matter of justice. The same point applies to foxhunting. Foxhunting is an historic cultural tradition, treasured by its adherents, but it is possible to live a good life without hunting foxes. Even if we have a basic interest in enjoying cultural traditions, that is, if such group activities are a necessary ingredient of a good human life, there are plenty other available cultural traditions that don't violate animals' basic interests. In most cases, foxhunting *does* violate foxes' basic interests, namely their interest in staying alive. Insofar as foxhunting violates foxes' basic interests unnecessarily, the impartial spectator resents foxhunting but not the ban, so foxhunting is rendered unjust.

In all these cases we're dealing with death, but there are other cases in which the basic interests are more emotional in character. Recall that

¹² I don't mean to say that humans can't live well without reproducing, hence 'virtually all'.

¹³ For a list of purported basic interests, see Nussbaum (2006, pp.392-401).

¹⁴ The perspective of the impartial spectator is remarkably similar to Regan and Abbey's preferred version of the veil of ignorance, in which species-membership is hidden. Both the impartial spectator, and contractors from behind the veil of ignorance, consider the interests of all species impartially. To that end, the amended veil of ignorance may be used as a heuristic to consider the judgments of the impartial spectator.

most animals, including pets, have a basic interest in play, access to social relationships and stimulating sensory environments. Imagine Dogchester, a happy town in which all the humans have satisfied their basic interests. Dogchester features a pet park, such that the pets in Dogchester have no other way to satisfy their basic interests in play, socialisation and sensory stimulation, than to use the pet park. Justice demands that the pet park cannot be demolished, because its demolition would violate the pets' basic interests in play, socialisation and sensory stimulation. The important point to note for now is that the set of basic interests is not austere; it includes a rich diversity of emotional goods over and above mere biological necessities.

6. Hard cases

On the whole, these have been easy cases. But now imagine Sadchester. Sadchester is like Dogchester in every conceivable way, except that in Sadchester, while animals enjoy the pet park, humans are completely deprived of any opportunity for play, socialisation or sensory stimulation. Sadchester is an ugly polluted town, completely deprived of any public spaces for recreation (other than the pet park which only animals enjoy) and the human population is systematically depressed. The Sadchester council are deciding whether to demolish the pet park (and so violate the animals' basic interests) in order to build an Astro turf for the humans (which would, suppose, fulfil the humans' currently-frustrated basic interests). Whatever course of action is pursued, the animals' or humans' basic interests are violated. Although a simplified imaginary scenario, the Sadchester dilemma is a hard trade-off.

In the real world, medical research presents hard cases. Presumably, cancer patients have a basic interest in access to life-saving medical research. Suppose that such medical research requires that fatal, painful injections are administered to chimpanzees, violating their basic interests. The impartial spectator sympathises with the chimpanzees' basic interests, but also the cancer patients' basic interests, and in this case it's impossible to protect both. What, if anything, does justice demand in these hard cases?

Either we incorporate a principle of justice that resolves hard cases, or we say that justice doesn't apply to hard trade-offs. Donaldson and Kymlicka pursue the latter strategy, saying that when faced with 'lifeboat cases', the demands of justice no longer apply (ibid. p.41). Borrowing an idea from Rawls (and in turn, Hume) hard cases are said to lie outside of the 'circumstances of justice', those scenarios where justice has more-or-less determinate demands on our behaviour. Hard cases lie outside of the circumstances of justice because in such cases, basic interest-satisfactions are a totally scarce resource, and justice only applies in cases of 'moderate scarcity' (Rawls ibid. p.110).

However, a theory of justice is more informative to the extent that it solves a wide variety of cases. The impartial spectator theory is more ambitious if it includes a supplementary principle of justice to solve the hard cases.¹⁵ To that end, I suggest my *Hard Cases* principle, that if θ violates a creature's basic interests, and *all* possible outcomes to the interest trade-off include violation of at least some creature's basic

¹⁵ I don't mean to say that *Zoopolis* is unambitious; the opposite is true.

interests, then the impartial spectator resents all trade-offs except for that in which fewest basic interests are violated.

If one chimpanzee's basic interests must be violated in order to protect the basic interests of ten cancer patients, that violation is tragic, but not resented by the impartial spectator. Similarly suppose that the Sadchester council's choice to demolish the pet park to make way for an AstroTurf would relieve the far more populous human population of depression. Then it is just to demolish the pet park.

My justification for this principle is the intuition that, in hard cases, and from the perspective of large-scale political decision-making rather than personal ethical decision-making, it is better that more basic interests are protected than fewer. From behind an amended veil of ignorance, this seems like the right thing to do. When (and only when) we cannot avoid violating basic interests, we should violate the fewest basic interests. It's better to deal with hard cases this way than to ignore them altogether.

7. Policing nature

I have taken *actions* as the subject of justice, not *consequences*. This is a strength of the impartial spectator because it avoids a common worry in animal ethics. The problem arises like this. We start to think about animals from a normative perspective, and notice that we ought (not) to behave towards animals in particular ways. One might think that animals are due respect, compassion, or shouldn't be harmed. Then we notice that animals suffer all the time in the wild. Leopards hunt gazelle every day. But it seems like we *don't* want to say that humans have an overwhelming duty to interfere in distant ecosystems to prevent animals from attacking one another. This seems like a mistake. For example, Nussbaum asks whether humans should 'police the animal world, protecting vulnerable animals from predators' and answers that '[i]n one sense, this seems absurd' (2006, p.379). The challenge for theories of animal justice is to suggest plausible duties to animals without also committing to implausible duties to overwhelmingly interfere in ecosystems. We need to show that meat-eating is wrong without committing to continuous interference in nature.

When Singer proposed his doctrine of animal equality, he acknowledged this problem and replied that 'except in a few very limited cases, we cannot and should not try to police all of nature', on the practical grounds that human intervention in sensitive ecosystems will likely cause 'far more harm than good' (ibid. p.226). In Regan's rights-based discussion of animal ethics, Regan responded to the same problem, saying that 'animals are not moral agents' so lack 'the duty to respect the rights of other animals' (ibid. p.357). When proposing her own 'capabilities approach', Nussbaum argued that we have reason to intervene if we are sure that interference would be beneficial, but ultimately stated that 'the question must remain a very difficult one', and that we have more responsibility to care for domesticated dogs and cats than for gazelles, because we are guardians only of the former (ibid. p.379).

I sympathise with all three approaches, but my aim is to show how the impartial spectator responds to the problem. I want to show that some human-animal trade-offs are unjust, but not that we have a duty of justice to extensively interfere in wild ecosystems. The impartial spectator view

meets this challenge by predicating (in)justice of actions, not consequences. There is a permissive sense of ‘action’ of which even animals are capable, but ‘action’ as used in the impartial spectator view is specifically about the active behaviour of rational agents. The only sorts of things that can be judged unjust, by the impartial spectator, are the behaviours of rational agents. This seems to exclude predation in the wild, even if it leads to consequences that include a great deal of suffering. The impartial spectator doesn’t directly judge leopard hunting patterns as unjust, so doesn’t provide an immediate reason to posit a duty of justice to interfere in nature. But human behaviour towards animals (such as abattoir slaughter) is still judged unjust, because these are cases of active interference. The impartial spectator view has an adequate response to a common worry.

However it’s important to note that ‘wild’ ecosystems are not always independent of human action. Presumably for much of history, many biomes were extremely distant from human influence. It’s fair to say that human action did not affect those ecosystems. But given the immense expansion of humanity, and the increased extent of our influence on the environment, it’s a matter of controversy whether most ‘wild’ ecosystems are really free of human action. Some animal behaviours ‘in the wild’ may result indirectly from human behaviours, so the relevant human actions can be judged as unjust by the impartial spectator, *if* the result on wild ecosystems violates animals’ basic interests. For example, if human action has led to the melting ice caps, and the resultant destruction of polar bear habitats, this is reason to think that the impartial spectator would judge such human action as unjust, since it violates polar bears’ basic interests, perhaps unnecessarily. But unlike intervention in leopard’s hunting patterns, this is not an objectionable conclusion.

8. The impartial spectator and legitimate coercion

I now add a principle of legitimacy to the impartial spectator view. I suggest that state enforcement of animal protection laws is legitimate if the impartial spectator wills such coercion. This is important because if A’s act of θ -ing B is unjust, then the state has a *pro tanto* reason to coerce A away from doing θ , assuming that the state’s has a duty to prevent injustice.

Animal protection laws are coercive, including the UK’s 2006 Animal Welfare Act. In this Act, the guiding principle is to prohibit ‘unnecessary suffering’, including for example docking dog’s tails for non-medical reasons (ch. 45, §4-6). The 2006 ban on ‘unnecessary’ suffering imposes higher costs and regulations on livestock farmers and abattoir managers, who are prosecutable if noncompliant.

My own tentative policy proposal for democratic debate, in addition to the 2006 Act, is that meat-eating be made illegal in almost every case. The only exception would be when meat-eating is (i) vital in order to fulfil a human’s basic interest (which as I’ve argued is rarely, if ever, the case) and (ii) those basic interests protected by meat-eating are greater than the animals’ basic interests that meat-eating violates. In general, meat-eating should be made illegal because it is an unjust trade-off and the state has a *pro tanto* reason to make something illegal if it is unjust. Meat-eating is an unjust trade-off because it is resented by the impartial spectator. If the dairy and egg industries also violate animals’ basic interests and are not

necessary to fulfil humans' basic interests, then dairy and egg consumption should be illegal. Dietary veganism would be required by law.

Presumably justice also demands that all state coercion against its citizens is legitimate. A coerces B to θ if A forces B to θ through (for example) physical obstruction or threats. Our challenge is to show that coercive animal protection laws are legitimate. As Garner argues, we should hope that animal protection laws are enforceable because this would be considerably better for animals (2013, p.48). If they are not enforceable, then protection of animals' basic interests becomes a matter of personal charitable choice. But it should not be left to the whims of personal choice whether animals' basic interests are protected, especially since animals have severely limited abilities to represent themselves.¹⁶ However we also don't want any law enforcement to be illegitimate. It would be for the best if animal protection laws could be legitimately enforced; to that end I propose the impartial spectator principle of legitimacy.

Suppose that the actual and proposed animal protection laws couldn't be legitimately enforced. If so, the state couldn't justly enforce the 2006 Act against recalcitrant factory farmers, or my own proposed ban on meat-eating. Animal activist organisations would be subsumed to the status of charities, whereby their only strategy would be to appeal to humans' compassionate sentiments. They would not be able to pursue legal change. This would have a positive effect, but it would be negligible in the face of recalcitrant animal abuse. If faced with an adamant factory farmer, the activist would have no further court of appeal. Not only would this be worse for animals, it also contradicts the actual state of affairs in the UK and elsewhere where animal protections *are* legally enforceable. Presumably the 2006 Act is legitimately enforceable, in which case it is up to us to provide a criterion of legitimacy.

A coercive act is legitimate if it is willed by the impartial spectator. The impartial spectator wills any coercive act that prevents unjust interest trade-offs, where the (in)justice of a trade-off is judged by the *Easy Cases* and *Hard Cases* principles. This implies that teenagers may be legitimately coerced away from meat-eating. Naturally this legitimacy principle leads to worries about tyranny, which are ultimately unfounded. The legitimacy principle leads to worries of tyranny insofar as laws inhibiting 'personal choice' such as diet may be legitimately enforced. The teenager who disagrees with veganism may still be forced to adopt a vegan diet.

The first reason the impartial spectator will never be tyrannical is that they will always strive to protect basic interests where basic interests can be met. The impartial spectator wishes that the teenager has a realistic chance at a good life, and to that end resents trade-offs in which their basic interests are violated (in easy cases). A tyrant lacks this sentiment, and to that extent impartial spectators diverge from tyrants. The only case in which an impartial spectator would ever demand that your basic interests are violated would be in hard trade-offs. But in these cases, by definition at least one creature's basic interests are going to be violated, and the impartial spectator would resent any trade-off in which more

¹⁶ Although see Donaldson and Kymlicka for a discussion of how animals politically self-represent through 'sheer presence' (ibid. pp.112-116).

basic interests are violated than is necessary. It seems strange to call a principle that seeks to minimise basic interest violations ‘tyrannical’.

Second, tyranny plausibly occurs when basic interests are violated unnecessarily. If the factory farmer complains of tyranny, they are compelled (on pain of consistency) to complain about the tyrannical violation of animals’ basic interests too. Third, this legitimacy principle need not lead to actual immediate political change. While policy may aim (in part) to approximate academic principles of justice, policy in a democratic state is tempered by public opinion. My proposal may only be politically feasible once democratic opinion shifts considerably in favour of reform. If the complaint of tyranny is made as a complaint against the incredulity of enforced veganism given contemporary public opinion, this does not undermine the theoretical principles of justice themselves.

The core strength of this legitimacy principle is an explanation of how the 2006 Act, and a meat-eating ban, may be legitimately enforced even though abattoir managers may dislike such laws. Although I cannot fully expound the explanatory virtues of the impartial spectator principle of legitimacy, the principle does explain why, in general (and outside of animal protection), laws can still be legitimate even if those coerced by such laws dislike them. The 2006 Act and my own proposal are legitimately enforceable because they are willed by the impartial spectator. A revised conception of legitimacy is a good example of the way in which considering edge cases (animal protection) to a traditional problem (the problem of legitimacy) forces us to take justice to a higher level of abstraction such that we learn something interesting about justice generally.

9. Conclusion

How are we to resolve interest trade-offs between animals and humans? Where possible, justice demands that basic interests are to be protected, and where basic interests must be violated, justice demands that we minimise basic interest-violations. Anything else is resented by the impartial spectator. Although it is yet to be fully explored, this is a workable theory of animal justice that also provides a criterion of legitimacy. It is attractive even though it is historically associated with utilitarianism, which has fatal flaws. The impartial spectator view does not lead to tyranny; quite the opposite is true. So far as I can see it is a promising path away from animal oppression.

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