Animals, Rights, and Legal "Bifurcation" In Kant

Author : W.A. Edmundson

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Christine Korsgaard, *Kantian Ethics, Animals, and the Law*, 33 **O.J.L.S.** 629 (2013).

The moral arc of the universe is long. But how long is it? If we measure from the civilizations of ancient Greece and Rome, it is long enough to bring into the fully human fold whole categories that had once been denied equal moral status: notably slaves, women, and people of color, who had sometimes been regarded as hardly more significant, morally and legally, than (non-human) animals. It may be an exaggeration to say that Roman law adhered to a rigid, exhaustive and mutually exclusive bifurcation between rights-holding persons and non-rights-holding things, but the eminent Kant scholar Christine Korsgaard does not deny that Kant was "consciously *following*" precisely that view (P. 630, emphasis original). In this superb paper, she takes up the task of showing that Kant's thought contains elements that undermine what she calls "the legal bifurcation" (P. 629) of the world into persons, on one hand, and things, on the other. That task is instrumental to her aim of showing that Kant might consistently have adopted a more respectful view of the moral status of animals, and that the framework of Kant's thought indicates an attractive way of understanding what that third status—of neither person nor mere thing—might be.

Working within Kant's general account of rationality, agency, and personhood, Korsgaard proposes that we recognize a third category of morally significant being: that of creatures who are not mere things, and yet are not persons either. The tantalizing suggestion is that at least some animals populate this third category, and that they are not apt objects of ownership, at least not in the usual sense. This of course is contrary to Kant's statement in *Anthropology from a Pragmatic Point of View*:

> The fact that man can have the idea 'I' raises him infinitely above all the other beings living on earth. By this he is a *person*; and by virtue of the unity of his consciousness, through all the changes he may undergo, he is one and the same person–that is, a being altogether different in rank and dignity from *things*, such as irrational animals, which we can dispose of as we please.

Kant's official view is not so crabbed as to deny—as Descartes did—that animals can feel; but it is not so generous as to hold—as Bentham did—that feeling, rather than thinking, is all that morally matters. Korsgaard wants to show how Kant could get over onto the right side of history (without surrendering to Benthamite sentimentalism).

Even so, taking animal feeling into account is Korsgaard's key move. Reason does not—and cannot—give us direct access to a noumenal world of absolute value. As rational agents, the goods we choose to pursue are ones that are in a sense relative to us, and to our animal nature as feeling creatures. But our rationality requires that we claim absolute value for our ends, in the sense that what we deliberately value gives *everyone* a reason to promote what we, by our choosing, necessarily *claim* to be valuable. Our rationality thus is an expression not only of our membership in the Kingdom of Ends, it is also an affirmation of our "animal spirits," as it were.

This understanding of the involvement of feeling and reason in our makeup furnishes grounds for respecting feeling beings who, nonetheless, lack a "transcendental unity of apperception,"and who,

therefore, are not capable of personhood in the proper sense of the word. For Korsgaard, the capacity for feeling is evidently tied to the possibility of there being a "good *for*" a feeling being; and the good-for "buck" passes into reasons for action on the part of members of the Kingdom of Ends.

Korsgaard acknowledges that much more needs saying to develop a complete account of the moral status of animals. She also acknowledges that her reading does nothing to elevate the moral status of non-feeling objects. The link between having feelings and having a "good" is not explained, and an Aristotelian teleological account of having a good is not available to Kant. (Kant's metaphysical scruples govern here too, as she points out.) But can't plants and lower invertebrates be said to have a good, despite lacking feeling? Plausibly, their good makes no (or much lesser) claims. Feeling, then, seems to have an implicit role beyond that of merely specifying an aspect of a creature's good. If that thought is combined with the burgeoning evidence that at least some animals *do* possess some rudimentary conception of self, it may begin to appear that what ought to go is not only bifurcation, but trifurcation and—in fact—the very idea that "bridge claims" (P. 635) connecting categories of entity with an internally homogeneous moral status are what we really need. Compare the moral status of children. These undoubted members of our species are allotted greater or lesser rights and duties based upon relatively fine-grained (though arbitrary) presumptions about degrees of moral fitness—and in application even these yield to finer-grained, multi-dimensional judgments about the individual. Why not regard the whole matter of moral status as one not of category but of degree?

Korsgaard elsewhere argues for a surprisingly stronger "pro-animal" position. In the chapter, "Interacting with Animals: a Kantian Account," in the *Oxford Handbook of Animal Ethics*, she concludes:

> We may interact with the other animals in ways to which we think it is plausible to think they would consent if they could—that is, in ways that are mutually beneficial and fair, and allow them to live something reasonably like their own sort of life. If we provide them with proper living conditions, I believe, their use…perhaps even as providers of wool, dairy products, or eggs, might possibly be made consistent with that standard. But it is not plausible to suppose a nonhuman animal would consent to being killed before the term of her natural life is over in order to be eaten or because someone else wants the use of her pelt, and it is not plausible to think she would consent to be tortured for scientific information. (P. 110)

A surprising thing about this is that it follows in the train of an argument that non-human animals are incapable of claiming standing as ends in themselves, and are incapable of genuinely consenting to laws of interaction, for they are incapable of choosing whether or not to interact with us. It is unclear how much of this incapacity is assignable to the vulnerable situation of non-human animals, and how much to the rudimentary nature of their intellects. Other entities that are incapable of consenting presumably are *not* entitled to the benefit of this sort of counterfactual contractualism even if they are creatures that can be said to have a "natural" good. Plants, for example, can't easily be imagined to consent to being burnt or cut to pieces for human purposes, although they might imaginably consent to giving up their fruit.

Why are some creatures who are incapable of consent, but are of such nature that their lives can go better or worse, entitled to the benefit of the counterfactual test, and others not? The answer has to be that plants and other unfeeling things (some of them animals) lack what is minimally required for moral status: the capacity to feel. When we humans make the claims that establish us as members of the Kingdom of Ends we do so not only on behalf of our rationality but our sensibility, and in doing so—on Korsgaard's account—we legislate that there is reason to respect the feeling-bound good of all feeling creatures. Korsgaard does not explain why, in staking claims for ourselves, we do not simultaneously stake a claim for ourselves simply as natural organisms. Again, sensibility—as contrasted both to bare

organism and to bare unfeeling sentience—seems to do a lot more work in Korsgaard's account than Kant ever expected or wanted of it. We have to hope that Korsgaard will further pursue, on her own behalf, the questions she has taken up here, on Kant's—though it is unclear whether the result will be a view that can truly be called Kantian.

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