Feinberg, Joel. "The Rights of Animals and Unborn Generations." In Philosophy & Environmental Crisis, by William T. Blackstone (ed.), 43-68. Athens, GA: The University of Georgia Press, 1974

The Rights of Animals and Unborn Generations

JOEL FEINBERG

EVERY PHILOSOPHICAL PAPER must begin with an unproved assumption. Mine is the assumption that there will still be a world five hundred years from now, and that it will contain human beings who are very much like us. We have it within our power now, clearly, to affect the lives of these creatures for better or worse by contributing to the conservation or corruption of the environment in which they must live. I shall assume furthermore that it is psychologically possible for us to care about our remote descendants, that many of us in fact do care, and indeed that we ought to care. My main concern then will be to show that it makes sense to speak of the rights of unborn generations against us, and that given the moral judgment that we ought to conserve our environmental inheritance for them, and its grounds, we might well say that future generations *do* have rights correlative to our present duties toward them. Protecting our environment now is also a matter of elementary prudence, and insofar as we do it for the next generation already here in the persons of our children, it is a matter of love. But from the perspective of our remote descendants it is basically a matter of justice, of respect for their rights. My main concern here will be to examine the concept of a right to better understand how that can be.

THE PROBLEM

To have a right is to have a claim[1] *to* something and *against* someone, the recognition of which is called for by legal rules or, in the case of moral rights, by the principles of an enlightened

1. I shall leave the concept of a claim unanalyzed here, but for a detailed discussion, see my "The Nature and Value of Rights," *Journal of Value Inquiry* 4 (Winter 1971): 263–277.

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

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

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

INDIVIDUAL ANIMALS

Almost all modern writers agree that we ought to be kind to animals, but that is quite another thing from holding that animals can claim kind treatment from us as their due. Statutes making cruelty to animals a crime are now very common, and these, of course, impose legal duties on people not to mistreat animals; but that still leaves open the question whether the animals, as beneficiaries of those duties, possess rights correlative to them. We may very well have duties *regarding* animals that are not at the same time duties *to* animals, just as we may have duties regarding rocks, or buildings, or lawns, that are not duties *to* the rocks, buildings, or lawns. Some legal writers have taken the still more extreme position that animals themselves are not even the directly intended beneficiaries of statutes prohibiting cruelty to animals. During the nineteenth century, for example, it was commonly said that such statutes were designed to protect human beings by preventing the growth of cruel habits that could later threaten human beings with harm too. Prof. Louis B. Schwartz finds the rationale of the cruelty-to-animals prohibition in its protection of animal lovers from affronts to their sensibilities. "It is not the mistreated dog who is the ultimate object of concern," he writes. "Our concern is for the feelings of other human beings, a large proportion of whom, although accustomed to the slaughter of animals for food, readily identify themselves with a tortured dog or horse and respond with great sensitivity to its sufferings."[2] This seems to me to be factitious. How much more natural it is to say with John Chipman Gray that the true purpose of cruelty-to-animals statutes is "to preserve the dumb brutes from suffering."[3] The very people whose sensibilities are invoked in the alternative explanation, a group that no doubt now includes most of us, are precisely those who would insist that the protection belongs primarily to the animals themselves, not merely to their own tender feelings. Indeed, it would be difficult even to account for the existence of such

2. Louis B. Schwartz, "Morals, Offenses and the Model Penal Code," *Columbia Law Review* 63 (1963): 673.

3. John Chipman Gray, *The Nature and Sources of the Law*, 2d ed. (Boston: Beacon Press, 1963), p. 43.

feelings in the absence of a belief that the animals deserve the protection in their own right and for their own sakes.

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

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

No one can deny any of these allegations, but to the claim that they are the grounds for disqualification of rights of animals, philosophers on the other side of this controversy have made con-

4. And W. D. Ross for another. See *The Right and the Good* (Oxford: Clarendon Press, 1930), app. 1, pp. 48–56.

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

Some writers protest at this point that the legal relation between a principal and an agent cannot hold between animals and human beings. Between humans, the relation of agency can take two very different forms, depending upon the degree of discretion granted to the agent, and there is a continuum of combinations between the extremes. On the one hand, there is the agent who is the mere "mouthpiece" of his principal. He is a "tool" in much the same sense as is a typewriter or telephone; he simply transmits the instructions of his principal. Human beings could hardly be the agents or representatives of animals in this sense, since the dumb brutes could no more use human "tools" than mechanical ones.

5. W. D. Lamont, *Principles of Moral Judgment* (Oxford: Clarendon Press, 1946), pp. 83–85.

6. Cf. H. J. McCloskey, "Rights," *Philosophical Quarterly* 15 (1965): 121, 124.

On the other hand, an agent may be some sort of expert hired to exercise his professional judgment on behalf of, and in the name of, the principal. He may be given, within some limited area of expertise, complete independence to act as he deems best, binding his principal to all the beneficial or detrimental consequences. This is the role played by trustees, lawyers, and ghost-writers. This type of representation requires that the agent have great skill, but makes little or no demand upon the principal, who may leave everything to the judgment of his agent. Hence, there appears, at first, to be no reason why an animal cannot be a totally passive principal in this second kind of agency relationship.

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

in a legally binding way. But that is quite another thing than saying that such representation is logically incoherent or conceptually incongruous—the contention that is at issue.

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

Now, there is a very important insight expressed in the requirement that a being have interests if he is to be a logically proper subject of rights. This can be appreciated if we consider just why it is that mere things cannot have rights. Consider a very precious "mere thing"—a beautiful natural wilderness, or a complex and ornamental artifact, like the Taj Mahal. Such things ought to be cared for, because they would sink into decay if neglected, depriving some human beings, or perhaps even all human beings, of something of great value. Certain persons may even have as their own special job the care and protection of these valuable objects But we are not tempted in these cases to speak of "thing-rights" correlative to custodial duties, because, try as we might, we cannot think of mere things as possessing interests of their own. Some people may have a duty to preserve, maintain, or improve the Taj Mahal, but they can hardly have a duty to help or hurt it, benefit or aid it, succor or relieve it. Custodians may protect it for the sake of a nation's pride and art lovers' fancy; but they don't keep it in good repair for "its own sake," or for "its own true welfare," or "well-being." A mere thing, however valuable to others, has no good of its own. The explanation of that fact, I suspect, consists in the fact that mere things have no conative life: no conscious wishes, desires, and hopes; or urges and impulses; or unconscious drives, aims, and goals; or latent tendencies, direction of growth, and natural fulfillments. Interests must be compounded somehow

7. Ibid.

out of conations; hence mere things have no interests. *A fortiori*, they have no interests to be protected by legal or moral rules. Without interests a creature can have no "good" of its own, the achievement of which can be its due. Mere things are not loci of value in their own right, but rather their value consists entirely in their being objects of other beings' interests.

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

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

that animals have rights, but are reluctant to say so because of the conceptual confusions about the notion of a right that I have attempted to dispel above.

Now we can extract from our discussion of animal rights a crucial principle for tentative use in the resolution of the other riddles about the applicability of the concept of a right, namely, that the sorts of beings who *can* have rights are precisely those who have (or can have) interests. I have come to this tentative conclusion for two reasons: (1) because a right holder must be capable of being represented and it is impossible to represent a being that has no interests, and (2) because a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefitted, having no good or "sake" of its own. Thus, a being without interests has no "behalf" to act in, and no "sake" to act for. My strategy now will be to apply the "interest principle," as we can call it, to the other puzzles about rights, while being prepared to modify it where necessary (but as little as possible), in the hope of separating in a consistent and intuitively satisfactory fashion the beings who can have rights from those which cannot.

VEGETABLES

It is clear that we ought not to mistreat certain plants, and indeed there are rules and regulations imposing duties on persons not to misbehave in respect to certain members of the vegetable kingdom. It is forbidden, for example, to pick wildflowers in the mountainous tundra areas of national parks, or to endanger trees by starting fires in dry forest areas. Members of Congress introduce bills designed, as they say, to "protect" rare redwood trees from commercial pillage. Given this background, it is surprising that no one[8] speaks of plants as having rights. Plants, after all, are not "mere things"; they are vital objects with inherited biological propensities determining their natural growth. Moreover, we do say that certain conditions are "good" or "bad" for plants, thereby suggesting that plants, unlike rocks, are capable of having a "good." (This is a case, however, where "what we say" should not be taken seriously: we also say that certain kinds of paint are good

8. Outside of Samuel Butler's *Erewhon*.

or bad for the internal walls of a house, and this does not commit us to a conception of walls as beings possessed of a good or welfare of their own.) Finally, we are capable of feeling a kind of affection for particular plants, though we rarely personalize them, as we do in the case of animals, by giving them proper names.

Still, all are agreed that plants are not the kinds of beings that can have rights. Plants are never plausibly understood to be the direct intended beneficiaries of rules designed to "protect" them. We wish to keep redwood groves in existence for the sake of human beings who can enjoy their serene beauty, and for the sake of generations of human beings yet unborn. Trees are not the sorts of beings who have their "own sakes," despite the fact that they have biological propensities. Having no conscious wants or goals of their own, trees cannot know satisfaction or frustration, pleasure or pain. Hence, there is no possibility of kind or cruel treatment of trees. In these morally crucial respects, trees differ from the higher species of animals.

Yet trees are not mere things like rocks. They grow and develop according to the laws of their own nature. Aristotle and Aquinas both took trees to have their own "natural ends." Why then do I deny them the status of beings with interests of their own? The reason is that an interest, however the concept is finally to be analyzed, presupposes at least rudimentary cognitive equipment. Interests are compounded out of *desires* and *aims*, both of which presuppose something like *belief*, or cognitive awareness. A desiring creature may want X because he seeks anything that is $\emptyset$, and X appears to be $\emptyset$ to him; or he may be seeking Y, and he believes, or expects, or hopes that X will be a means to Y. If he desires X in order to get Y, this implies that he believes that X will bring Y about, or at least that he has some sort of brute expectation that is a primitive correlate of belief. But what of the desire for $\emptyset$ (or for Y) itself? Perhaps a creature has such a "desire" as an ultimate set, as if he had come into existence all "wound up" to pursue $\emptyset$-ness or Y-ness, and his not to reason why. Such a propensity, I think, would not qualify as a desire. Mere brute longings unmediated by beliefs—longings for one knows not what—might perhaps be a primitive form of consciousness (I don't want to beg that question) but they are altogether different

from the sort of thing we mean by "desire," especially when we speak of human beings.

If some such account as the above is correct, we can never have any grounds for attributing a desire or a want to a creature known to be incapable even of rudimentary beliefs; and if desires or wants are the materials interests are made of, mindless creatures have no interests of their own. The law, therefore, cannot have as its intention the protection of their interests, so that "protective legislation" has to be understood as legislation protecting the interests human beings may have in them.

Plant life might nevertheless be thought at first to constitute a hard case for the interest principle for two reasons. In the first place, plants no less than animals are said to have needs of their own. To be sure, we can speak even of mere things as having needs too, but such talk misleads no one into thinking of the need as belonging, in the final analysis, to the "mere thing" itself. If we were so deceived we would not be thinking of the mere thing as a "mere thing" after all. We say, for example, that John Doe's walls need painting, or that Richard Roe's car needs a washing, but we direct our attitudes of sympathy or reproach (as the case may be) to John and Richard, not to their possessions. It would be otherwise, if we observed that some child is in need of a good meal. Our sympathy and concern in that case would be directed at the child himself as the true possessor of the need in question.

The needs of plants might well seem closer to the needs of animals than to the pseudoneeds of mere things. An owner may need a plant (say, for its commercial value or as a potential meal), but the plant itself, it might appear, needs nutrition or cultivation. Our confusion about this matter may stem from language. It is a commonplace that the word *need* is ambiguous. To say that A needs X may be to say either: (1) X is necessary to the achievement of one of A's goals, or to the performance of one of its functions, or (2) X is good for A; its lack would harm A or be injurious or detrimental to him (or it). The first sort of need-statement is value-neutral, implying no comment on the value of the goal or function in question; whereas the second kind of statement about needs commits its maker to a value judgment about what is good or bad for A in the long run, that is, about what is in A's interests.

A being must have interests, therefore, to have needs in the second sense, but any kind of thing, vegetable or mineral, could have needs in the first sense. An automobile needs gas and oil to function, but it is no tragedy for it if it runs out—an empty tank does not hinder or retard its interests. Similarly, to say that a tree needs sunshine and water is to say that without them it cannot grow and survive; but unless the growth and survival of trees are matters of human concern, affecting human interests, practical or aesthetic, the needs of trees alone will not be the basis of any claim of what is "due" them in their own right. Plants may need things in order to discharge their functions, but their functions are assigned by human interests, not their own.

The second source of confusion derives from the fact that we commonly speak of plants as thriving and flourishing, or withering and languishing. One might be tempted to think of these states either as themselves consequences of the possession of interests so that even creatures without wants or beliefs can be said to have interests, or else as grounds independent of the possession of interests for the making of intelligible claims of rights. In either case, plants would be thought of as conceivable possessors of rights after all.

Consider what it means to speak of something as "flourishing." The verb *to flourish* apparently was applied originally and literally to plants only, and in its original sense it meant simply "to bear flowers: BLOSSOM"; but then by analogical extension of sense it came also to mean "to grow luxuriantly: increase, and enlarge," and then to "THRIVE" (generally), and finally, when extended to human beings, "to be prosperous," or to "increase in wealth, honor, comfort, happiness, or whatever is desirable."[9] Applied to human beings the term is, of course, a fixed metaphor. When a person flourishes, something happens to his interests analogous to what happens to a plant when it flowers, grows, and spreads. A person flourishes when his interests (whatever they may be) are progressing severally and collectively toward their harmonious fulfillment and spawning new interests along the way whose prospects are also good. To flourish is to glory in the advancement of one's interests, in short, to be happy.

Nothing is gained by twisting the botanical metaphor back

9. *Webster's Third New International Dictionary.*

from humans to plants. To speak of thriving human interests as if they were flowers is to speak naturally and well, and to mislead no one. But then to think of the flowers or plants as if they were interests (or the signs of interests) is to bring the metaphor back full circle for no good reason and in the teeth of our actual beliefs. Some of our talk about flourishing plants reveals quite clearly that the interests that thrive when plants flourish are human not "plant interests." For example, we sometimes make a flowering bush flourish by "frustrating" its own primary propensities. We pinch off dead flowers before seeds have formed, thus "encouraging" the plant to make new flowers in an effort to produce more seeds. It is not the plant's own natural propensity (to produce seeds) that is advanced, but rather the gardener's interest in the production of new flowers and the spectator's pleasure in aesthetic form, color, or scent. What we mean in such cases by saying that the plant flourishes is that our interest in the plant, not its own, is thriving. It is not always so clear that that is what we mean, for on other occasions there is a correspondence between our interests and the plant's natural propensities, a coinciding of what we want from nature and nature's own "intention." But the exceptions to this correspondence provide the clue to our real sense in speaking of a plant's good or welfare.[10] And even when there exists such a correspondence, it is often because we have actually remade the plant's nature so that our interests in it will flourish more "naturally" and effectively.

WHOLE SPECIES

The topic of whole species, whether of plants or animals, can be treated in much the same way as that of individual plants. A whole collection, as such, cannot have beliefs, expectations, wants, or desires, and can flourish or languish only in the human interest-

10. Sometimes, of course, the correspondence fails because what accords with the plant's natural propensities is not in our interests, rather than the other way round. I must concede that in cases of this kind we speak even of weeds flourishing, but I doubt that we mean to imply that a weed is a thing with a good of its own. Rather, this way of talking is a plain piece of irony, or else an animistic metaphor (thinking of the weeds in the way we think of prospering businessmen). In any case, when weeds thrive, usually no interests, human or otherwise, flourish.

related sense in which individual plants thrive and decay. Individual elephants can have interests, but the species elephant cannot. Even where individual elephants are not granted rights, human beings may have an interest—economic, scientific, or sentimental—in keeping the species from dying out, and *that* interest may be protected in various ways by law. But that is quite another matter from recognizing a right to survival belonging to the species itself. Still, the preservation of a whole species may quite properly seem to be a morally more important matter than the preservation of an individual animal. Individual animals can have rights but it is implausible to ascribe to them a right to life on the human model. Nor do we normally have duties to keep individual animals alive or even to abstain from killing them provided we do it humanely and nonwantonly in the promotion of legitimate human interests. On the other hand, we do have duties to protect threatened species, not duties to the species themselves as such, but rather duties to future human beings, duties derived from our housekeeping role as temporary inhabitants of this planet.

We commonly and very naturally speak of corporate entities, such as institutions, churches, and national states as having rights and duties, and an adequate analysis of the conditions for ownership of rights should account for that fact. A corporate entity, of course, is more than a mere collection of things that have some important traits in common. Unlike a biological species, an institution has a charter, or constitution, or bylaws, with rules defining offices and procedures, and it has human beings whose function it is to administer the rules and apply the procedures. When the institution has a duty to an outsider, there is always some determinant human being whose duty it is to do something for the outsider, and when the state, for example, has a right to collect taxes, there are always certain definite flesh and blood persons who have rights to demand tax money from other citizens. We have no reluctance to use the language of corporate rights and duties because we know that in the last analysis these are rights or duties of individual persons, acting in their "official capacities." And when individuals act in their official roles in accordance with valid empowering rules, their acts are imputable to the organization itself and become "acts of state." Thus, there is no need to posit any

individual superperson named by the expression "the State" (or for that matter, "the company," "the club," or "the church.") Nor is there any reason to take the rights of corporate entities to be exceptions to the interest principle. The United States is not a superperson with wants and beliefs of its own, but it is a corporate entity with corporate interests that are, in turn, analyzable into the interests of its numerous flesh and blood members.

DEAD PERSONS

So far we have refined the interest principle but we have not had occasion to modify it. Applied to dead persons, however, it will have to be stretched to near the breaking point if it is to explain how our duty to honor commitments to the dead can be thought to be linked to the rights of the dead against us. The case against ascribing rights to dead men can be made very simply: a dead man is a mere corpse, a piece of decaying organic matter. Mere inanimate things can have no interests, and what is incapable of having interests is incapable of having rights. If, nevertheless, we grant dead men rights against us, we would seem to be treating the interests they had while alive as somehow surviving their deaths. There is the sound of paradox in this way of talking, but it may be the least paradoxical way of describing our moral relations to our predecessors. And if the idea of an interest's surviving its possessor's death is a kind of fiction, it is a fiction that most living men have a real interest in preserving.

Most persons while still alive have certain desires about what is to happen to their bodies, their property, or their reputations after they are dead. For that reason, our legal system has developed procedures to enable persons while still alive to determine whether their bodies will be used for purposes of medical research or organic transplantation, and to whom their wealth (after taxes) is to be transferred. Living men also take out life insurance policies guaranteeing that the accumulated benefits be conferred upon beneficiaries of their own choice. They also make private agreements, both contractual and informal, in which they receive promises that certain things will be done after their deaths in exchange for some present service or consideration. In all these cases promises are made to living persons that their wishes will be

honored after they are dead. Like all other valid promises, they impose duties on the promisor and confer correlative rights on the promisee.

How does the situation change after the promisee has died? Surely the duties of the promisor do not suddenly become null and void. If that were the case, and known to be the case, there could be no confidence in promises regarding posthumous arrangements; no one would bother with wills or life insurance companies to pay benefits to survivors, which are, in a sense, only conditional duties before a man dies. They come into existence as categorical demands for immediate action only upon the promisee's death. So the view that death renders them null and void has the truth exactly upside down.

The survival of the promisor's duty after the promisee's death does not prove that the promisee retains a right even after death, for we might prefer to conclude that there is one class of cases where duties to keep promises are not logically correlated with a promisee's right, namely, cases where the promisee has died. Still, a morally sensitive promisor is likely to think of his promised performance not only as a duty (i.e., a morally required action) but also as something owed to the deceased promisee as his due. Honoring such promises is a way of keeping faith with the dead. To be sure, the promisor will not think of his duty as something to be done for the promisee's "good," since the promisee, being dead, has no "good" of his own. We can think of certain of the deceased's interests, however, (including especially those enshrined in wills and protected by contracts and promises) as surviving their owner's death, and constituting claims against us that persist beyond the life of the claimant. Such claims can be represented by proxies just like the claims of animals. This way of speaking, I believe, reflects more accurately than any other an important fact about the human condition: we have an interest while alive that other interests of ours will continue to be recognized and served after we are dead. The whole practice of honoring wills and testaments, and the like, is thus for the sake of the living, just as a particular instance of it may be thought to be for the sake of one who is dead.

Conceptual sense, then, can be made of talk about dead men's rights; but it is still a wide open moral question whether dead men in fact have rights, and if so, what those rights are. In particular, commentators have disagreed over whether a man's interest in his reputation deserves to be protected from defamation even after his death. With only a few prominent exceptions, legal systems punish a libel on a dead man "only when its publication is in truth an attack upon the interests of living persons."[11] A widow or a son may be wounded, or embarrassed, or even injured economically, by a defamatory attack on the memory of their dead husband or father. In Utah defamation of the dead is a misdemeanor, and in Sweden a cause of action in tort. The law rarely presumes, however, that a dead man himself has any interests, representable by proxy, that can be injured by defamation, apparently because of the maxim that what a dead man doesn't know can't hurt him.

This presupposes, however, that the whole point of guarding the reputations even of living men, is to protect them from hurt feelings, or to protect some other interests, for example, economic ones, that do not survive death. A moment's thought, I think, will show that our interests are more complicated than that. If someone spreads a libelous description of me, without my knowledge, among hundreds of persons in a remote part of the country, so that I am, still without my knowledge, an object of general scorn and mockery in that group, I have been injured, even though I never learn what has happened. That is because I have an interest, so I believe, in having a good reputation *simpliciter*, in addition to my interest in avoiding hurt feelings, embarrassment, and economic injury. In the example, I do not know what is being said and believed about me, so my feelings are not hurt; but clearly if I did know, I would be enormously distressed. The distress would be the natural consequence of my belief that an interest other than my interest in avoiding distress had been damaged. How else can I account for the distress? If I had no interest in a good reputation as such, I would respond to news of harm to my reputation with indifference.

While it is true that a dead man cannot have his feelings hurt, it does not follow, therefore, that his claim to be thought of no worse than he deserves cannot survive his death. Almost every living person, I should think, would wish to have this interest

11. William Salmond, *Jurisprudence,* 12th ed., ed. P. J. Fitzgerald (London: Sweet and Maxwell, 1966), p. 304.

protected after his death, at least during the lifetimes of those persons who were his contemporaries. We can hardly expect the law to protect Julius Caesar from defamation in the history books. This might hamper historical research and restrict socially valuable forms of expression. Even interests that survive their owner's death are not immortal. Anyone should be permitted to say anything he wishes about George Washington or Abraham Lincoln, though perhaps not everything is morally permissible. Everyone ought to refrain from malicious lies even about Nero or King Tut, though not so much for those ancients' own sakes as for the sake of those who would now know the truth about the past. We owe it to the brothers Kennedy, however, as their due, not to tell damaging lies about them to those who were once their contemporaries. If the reader would deny that judgment, I can only urge him to ask himself whether he now wishes his own interest in reputation to be respected, along with his interest in determining the distribution of his wealth, after his death.

HUMAN VEGETABLES

Mentally deficient and deranged human beings are hardly ever so handicapped intellectually that they do not compare favorably with even the highest of the lower animals, though they are commonly so incompetent that they cannot be assigned duties or be held responsible for what they do. Since animals can have rights, then, it follows that human idiots and madmen can too. It would make good sense, for example, to ascribe to them a right to be cured whenever effective therapy is available at reasonable cost, and even those incurables who have been consigned to a sanatorium for permanent "warehousing" can claim (through a proxy) their right to decent treatment.

Human beings suffering extreme cases of mental illness, however, may be so utterly disoriented or insensitive as to compare quite unfavorably with the brightest cats and dogs. Those suffering from catatonic schizophrenia may be barely distinguishable in respect to those traits presupposed by the possession of interests from the lowliest vegetables. So long as we regard these patients as potentially curable, we may think of them as human beings with interests in their own restoration and treat them as possessors

of rights. We may think of the patient as a genuine human person inside the vegetable casing struggling to get out, just as in the old fairy tales a pumpkin could be thought of as a beautiful maiden under a magic spell waiting only the proper words to be restored to her true self. Perhaps it is reasonable never to lose hope that a patient can be cured, and therefore to regard him always as a person "under a spell" with a permanent interest in his own recovery that is entitled to recognition and protection.

What if, nevertheless, we think of the catatonic schizophrenic and the vegetating patient with irreversible brain damage as absolutely incurable? Can we think of them at the same time as possessed of interests and rights too, or is this combination of traits a conceptual impossibility? Shocking as it may at first seem, I am driven unavoidably to the latter view. If redwood trees and rosebushes cannot have rights, neither can incorrigible human vegetables.[12] The trustees who are designated to administer funds for the care of these unfortunates are better understood as mere custodians than as representatives of their interests since these patients no longer have interests. It does not follow that they should not be kept alive as long as possible: that is an open moral question not foreclosed by conceptual analysis. Even if we have duties to keep human vegetables alive, however, they cannot be duties *to* them. We may be obliged to keep them alive to protect the sensibilities of others, or to foster humanitarian tendencies in ourselves, but we cannot keep them alive for their own good, for they are no longer capable of having a "good" of their own. Without awareness, expectation, belief, desire, aim, and purpose, a being can have no interests; without interests, he cannot be benefited; without the capacity to be a beneficiary, he can have no rights. But there may nevertheless be a dozen other reasons to treat him as if he did.

12. Unless, of course, the person in question, before he became a "vegetable," left testamentary directions about what was to be done with his body just in case he should ever become an incurable vegetable. He may have directed either that he be preserved alive as long as possible, or else that he be destroyed, whichever he preferred. There may, of course, be sound reasons of public policy why we should not honor such directions, but if we did promise to give legal effect to such wishes, we would have an example of a man's earlier interest in what is to happen to his body surviving his very competence as a person, in quite the same manner as that in which the express interest of a man now dead may continue to exert a claim on us.

FETUSES

If the interest principle is to permit us to ascribe rights to infants, fetuses, and generations yet unborn, it can only be on the grounds that interests can exert a claim upon us even before their possessors actually come into being, just the reverse of the situation respecting dead men where interests are respected even after their possessors have ceased to be. Newly born infants are surely noisier than mere vegetables, but they are just barely brighter. They come into existence, as Aristotle said, with the capacity to acquire concepts and dispositions, but in the beginning we suppose that their consciousness of the world is a "blooming, buzzing confusion." They do have a capacity, no doubt from the very beginning, to feel pain, and this alone may be sufficient ground for ascribing both an interest and a right to them. Apart from that, however, during the first few hours of their lives, at least, they may well lack even the rudimentary intellectual equipment necessary to the possession of interests. Of course, this induces no moral reservations whatever in adults. Children grow and mature almost visibly in the first few months so that those future interests that are so rapidly emerging from the unformed chaos of their earliest days seem unquestionably to be the basis of their present rights. Thus, we say of a newborn infant that he has a right now to live and grow into his adulthood, even though he lacks the conceptual equipment at this very moment to have this or any other desire. A new infant, in short, lacks the traits necessary for the possession of interests, but he has the capacity to acquire those traits, and his inherited potentialities are moving quickly toward actualization even as we watch him. Those proxies who make claims in behalf of infants, then, are more than mere custodians: they are (or can be) genuine representatives of the child's emerging interests, which may need protection even now if they are to be allowed to come into existence at all.

The same principle may be extended to "unborn persons." After all, the situation of fetuses one day before birth is not strikingly different from that a few hours after birth. The rights our law confers on the unborn child, both proprietary and personal, are for the most part, placeholders or reservations for the rights he shall inherit when he becomes a full-fledged interested being. The

law protects a potential interest in these cases before it has even grown into actuality, as a garden fence protects newly seeded flower beds long before blooming flowers have emerged from them. The unborn child's present right to property, for example, is a legal protection offered now to his future interest, contingent upon his birth, and instantly voidable if he dies before birth. As Coke put it: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth";[13] but this is quite another thing than recognizing a right actually to be born. Assuming that the child will be born, the law seems to say, various interests that he will come to have after birth must be protected from damage that they can incur even before birth. Thus prenatal injuries of a negligently inflicted kind can give the newly born child a right to sue for damages which he can exercise through a proxy-attorney and in his own name any time *after* he is born.

There are numerous other places, however, where our law seems to imply an unconditional right to be born, and surprisingly no one seems ever to have found that idea conceptually absurd. One interesting example comes from an article given the following headline by the *New York Times:* "Unborn Child's Right Upheld Over Religion."[14] A hospital patient in her eighth month of pregnancy refused to take a blood transfusion even though warned by her physician that "she might die at any minute and take the life of her child as well." The ground of her refusal was that blood transfusions are repugnant to the principles of her religion (Jehovah's Witnesses). The Supreme Court of New Jersey expressed uncertainty over the constitutional question of whether a nonpregnant adult might refuse on religious grounds a blood transfusion pronounced necessary to her own survival, but the court

13. As quoted by Salmond, *Jurisprudence*, p. 303. Simply as a matter of policy the potentiality of some future interests may be so remote as to make them seem unworthy of present support. A testator may leave property to his unborn child, for example, but not to his unborn grandchildren. To say of the potential person presently in his mother's womb that he owns property now is to say that certain property must be held for him until he is "real" or "mature" enough to possess it. "Yet the law is careful lest property should be too long withdrawn in this way from the uses of living men in favor of generations yet to come; and various restrictive rules have been established to this end. No testator could now direct his fortune to be accumulated for a hundred years and then distributed among his descendants"—Salmond, ibid.

14. *New York Times*, 17 June 1966, p. 1.

nevertheless ordered the patient in the present case to receive the transfusion on the grounds that "the unborn child is entitled to the law's protection."

It is important to reemphasize here that the questions of whether fetuses do or ought to have rights are substantive questions of law and morals open to argument and decision. The prior question of whether fetuses are the kind of beings that can have rights, however, is a conceptual, not a moral, question, amenable only to what is called "logical analysis," and irrelevant to moral judgment. The correct answer to the conceptual question, I believe, is that unborn children are among the sorts of beings of whom possession of rights can meaningfully be predicated, even though they are (temporarily) incapable of having interests, because their future interests can be protected now, and it does make sense to protect a potential interest even before it has grown into actuality. The interest principle, however, makes perplexing, at best, talk of a noncontingent fetal right to be born; for fetuses, lacking actual wants and beliefs, have no actual interest in being born, and it is difficult to think of any other reason for ascribing any rights to them other than on the assumption that they will in fact be born.[15]

FUTURE GENERATIONS

We have it in our power now to make the world a much less pleasant place for our descendants than the world we inherited from our ancestors. We can continue to proliferate in ever greater numbers, using up fertile soil at an even greater rate, dumping our wastes into rivers, lakes, and oceans, cutting down our forests, and polluting the atmosphere with noxious gases. All thoughtful people agree that we ought not to do these things. Most would say that we have a duty not to do these things, meaning not merely that conservation is morally required (as opposed to merely desirable) but also that it is something due our descendants, something to be done for their sakes. Surely we owe it to future generations to pass on a world that is not a used up garbage heap. Our remote descendants are not yet present to claim a livable world as their right, but there are plenty of proxies to speak now in their behalf. These spokesmen, far from being mere custodians, are genuine representatives of future interests.

15. In an essay entitled "Is There a Right to be Born?" I defend a negative answer to the question posed, but I allow that under certain very special conditions, there can be a "right *not* to be born." See *Abortion*, ed. J. Feinberg (Belmont, Calif.: Wadsworth, 1973).

Why then deny that the human beings of the future have rights which can be claimed against us now in their behalf? Some are inclined to deny them present rights out of a fear of falling into obscure metaphysics, by granting rights to remote and unidentifiable beings who are not yet even in existence. Our unborn great-great-grandchildren are in some sense "potential" persons, but they are far more remotely potential, it may seem, than fetuses. This, however, is not the real difficulty. Unborn generations are more remotely potential than fetuses in one sense, but not in another. A much greater period of time with a far greater number of causally necessary and important events must pass before their potentiality can be actualized, it is true; but our collective posterity is just as certain to come into existence "in the normal course of events" as is any given fetus now in its mother's womb. In that sense the existence of the distant human future is no more remotely potential than that of a particular child already on its way.

The real difficulty is not that we doubt whether our descendants will ever be actual, but rather that we don't know who they will be. It is not their temporal remoteness that troubles us so much as their indeterminacy—their present facelessness and namelessness. Five centuries from now men and women will be living where we live now. Any given one of them will have an interest in living space, fertile soil, fresh air, and the like, but that arbitrarily selected one has no other qualities we can presently envision very clearly. We don't even know who his parents, grandparents, or great-grandparents are, or even whether he is related to us. Still, whoever these human beings may turn out to be, and whatever they might reasonably be expected to be like, they will have interests that we can affect, for better or worse, right now. That much we can and do know about them. The identity of the owners of these interests is now necessarily obscure, but the fact of their interest-ownership is crystal clear, and that is all that is necessary to certify the coherence of present talk about their rights. We can tell, sometimes, that shadowy forms in the spatial distance belong

to human beings, though we know not who or how many they are; and this imposes a duty on us not to throw bombs, for example, in their direction. In like manner, the vagueness of the human future does not weaken its claim on us in light of the nearly certain knowledge that it will, after all, be human.

Doubts about the existence of a right to be born transfer neatly to the question of a similar right to come into existence ascribed to future generations. The rights that future generations certainly have against us are contingent rights: the interests they are sure to have when they come into being (assuming of course that they will come into being) cry out for protection from invasions that can take place now. Yet there are no actual interests, presently existent, that future generations, presently nonexistent, have now. Hence, there is no actual interest that they have in simply coming into being, and I am at a loss to think of any other reason for claiming that they have a right to come into existence (though there may well be such a reason). Suppose then that all human beings at a given time voluntarily form a compact never again to produce children, thus leading within a few decades to the end of our species. This of course is a wildly improbable hypothetical example but a rather crucial one for the position I have been tentatively considering. And we can imagine, say, that the whole world is converted to a strange ascetic religion which absolutely requires sexual abstinence for everyone. Would this arrangement violate the rights of anyone? No one can complain on behalf of presently nonexistent future generations that their future interests which give them a contingent right of protection have been violated since they will never come into existence to be wronged. My inclination then is to conclude that the suicide of our species would be deplorable, lamentable, and a deeply moving tragedy, but that it would violate no one's rights. Indeed if, contrary to fact, all human beings could ever agree to such a thing, that very agreement would be a symptom of our species' biological unsuitability for survival anyway.

CONCLUSION

For several centuries now human beings have run roughshod over the lands of our planet, just as if the animals who do live

there and the generations of humans who will live there had no claims on them whatever. Philosophers have not helped matters by arguing that animals and future generations are not the kinds of beings who can have rights now, that they don't presently qualify for membership, even "auxiliary membership," in our moral community. I have tried in this essay to dispel the conceptual confusions that make such conclusions possible. To acknowledge their rights is the very least we can do for members of endangered species (including our own). But that is something.

APPENDIX

The Paradoxes of Potentiality

Having conceded that rights can belong to beings in virtue of their merely potential interests, we find ourselves on a slippery slope; for it may seem at first sight that anything at all can have potential interests, or much more generally, that anything at all can be potentially almost anything else at all! Dehydrated orange powder is potentially orange juice, since if we add water to it, it will be orange juice. More remotely, however, it is also potentially lemonade, since it will become lemonade if we add a large quantity of lemon juice, sugar, and water. It is also a potentially poisonous brew (add water and arsenic), a potential orange cake (add flour, etc., and bake), a potential orange-colored building block (add cement and harden), and so on, *ad infinitum*. Similarly a two-celled embryo, too small to be seen by the unaided eye, is a potential human being; and so is an unfertilized ovum; and so is even an "uncapacitated" spermatozoan. Add the proper nutrition to an implanted embryo (under certain other necessary conditions) and it becomes a fetus and then a child. Looked at another way, however, the implanted embryo has been combined (under the same conditions) with the nutritive elements, which themselves are converted into a growing fetus and child. Is it then just as proper to say that food is a "potential child" as that an embryo is a potential child? If so, then what isn't a "potential child?" (Organic elements in the air and soil are "potentially food," and hence potentially people!)

Clearly, some sort of line will have to be drawn between direct or proximate potentialities and indirect or remote ones; and however we draw this line, there will be borderline cases whose classification will seem uncertain or even arbitrary. Even though any X can become a Y provided only that it is combined with the necessary additional elements, a, b, c, d, and so forth, we cannot say of any given X that it is a "potential Y" unless certain further—rather strict—conditions are met. (Otherwise the concept of potentiality, being universally and promiscuously applicable, will have no utility.) A number of possible criteria of proximate potentiality suggest themselves. The first is the criterion of causal importance. Orange powder is not properly called a potential building block because of those elements needed to transform it into a building block, the cement (as opposed to any of the qualities of the orange powder) is the causally crucial one. Similarly, any pauper might (mislead-

ingly) be called a "potential millionaire" in the sense that all that need be added to any man to transform him into a millionaire is a great amount of money. The absolutely crucial element in the change, of course, is no quality of the man himself but rather the million dollars "added" to him.

What is causally "important" depends upon our purposes and interests and is therefore to some degree a relativistic matter. If we seek a standard, in turn, of "importance," we may posit such a criterion, for example, as that of the ease or difficulty (to some persons or other) of providing those missing elements which, when combined with the thing at hand, convert it into something else. It does seem quite natural, for example, to say that the orange powder is potentially orange juice, and that is because the missing element is merely common tap water, a substance conveniently near at hand to everyone; whereas it is less plausible to characterize the powder as potential cake since a variety of further elements, and not just one, are required, and some of these are not conveniently near at hand to many. Moreover, the process of combining the missing elements into a cake is rather more complicated than mere "addition." It is less plausible still to call orange powder a potential curbstone for the same kind of reason. The criterion of ease or difficulty of the acquisition and combination of additional elements explains all these variations.

Still another criterion of proximate potentiality closely related to the others is that of degree of deviation required from "the normal course of events." Given the intentions of its producers, distributors, sellers, and consumers, dehydrated orange juice will, in the normal course of events, become orange juice. Similarly, a human embryo securely imbedded in the wall of its mother's uterus will in the normal course of events become a human child. That is to say that if no one deliberately intervenes to prevent it happening, it will, in the vast majority of cases, happen. On the other hand, an unfertilized ovum will not become an embryo unless someone intervenes deliberately to make it happen. Without such intervention in the "normal" course of events, an ovum is a mere bit of protoplasm of very brief life expectancy. If we lived in a world in which virtually every biologically capable human female became pregnant once a year throughout her entire fertile period of life, then we would regard fertilization as something that happens to every ovum in "the natural course of events." Perhaps we would regard every unfertilized ovum, in such a world, as a potential person even possessed of rights corresponding to its future interests. It would perhaps make conceptual if not moral sense in such a world to regard deliberate nonfertilization as a kind of homicide.

It is important to notice, in summary, that words like *important*, *easy*, and *normal* have sense only in relation to human experiences, purposes, and techniques. As the latter change, so will our notions of what is important, difficult, and usual, and so will the concept of potentiality, or our application of it. If our purposes, understanding, and techniques continue to change in indicated directions, we may even one day come to think of inanimate things as possessed of "potential interests." In any case, we can expect the concept of a right to shift its logical boundaries with changes in our practical experience.