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ARTHUR KUFLIK

I. The Circumstances of Humean Justice

For Hume, the virtue of justice is its “usefulness” to the support of society.¹ To help prove this point, he guides us through a series of imaginative thought-experiments. Suppose that resources were infinitely available or that human beings were generous and kind without limit: in such unusual circumstances, nobody would have even “dreamed of” the various property restrictions associated with justice. If the supposition seems too fanciful, the same point can be illustrated, at least to some extent, by special real-life circumstances as well: e.g., by the way that air or water or land go unregulated in those places where they are super-abundant or the way in which the line between what is “mine” and “thine” blurs in loving families or between intimate friends.

Moving to the opposite extreme: suppose that resources were so scarce as to render it impossible for most people (regardless of their cooperative exertions) even to subsist. Or suppose that people were not merely limited in their benevolent concern but “perfectly malicious”! Once again, there would be little or no point to the observance of rules of justice. On Hume’s account, such rules define a scheme of social cooperation. But by hypothesis, extreme scarcity makes even well-meaning cooperative effort unproductive. Extreme villainy makes it pointlessly dangerous. Indeed, in a world wholly villainous, just cooperative schemes would be altogether impossible.

What can we conclude? There is a *range of circumstances* within which schemes of justice make sense: (1) moderate scarcity (resources are adequate to sustain people, but not so extensive that everyone could have as much as might be desired); and (2) limited benevolence (people are neither saintly nor satanic; though clearly concerned about themselves, they are not incapable of caring about what happens to others).

John Rawls has dubbed these conditions “the Humean circumstances of justice.”² Hume wants us to notice that they are the very conditions under which justice is both practically possible and socially necessary. Fortunately, they are also the conditions that most commonly prevail. (“The common situation of society is a medium amidst all these extremes” [EPM 188].)

II. A More Puzzling Thought-experiment

Suppose we grant that the foundation of justice is its usefulness to society. This raises a certain worry: aren’t there groups whose members ought to be treated justly even though “society” could flourish just as well if they weren’t? (Another way to put the point is to ask: just *who* are the members of “society”?) This very issue underlies one more puzzling, and even disturbing, Humean thought-experiment:

Were there a species of creatures intermingled with men, which, though rational, were possessed of such inferior strength, both of body and mind, that they were incapable of all resistance, and could never, upon the highest provocation, make us feel the effects of their resentment; the necessary consequence, I think, is that we should be bound by the laws of humanity to give gentle usage to these creatures, but should not, properly speaking, lie under any restraint of justice with regard to them, nor could they possess any right or property, exclusive of such arbitrary lords. Our intercourse with them could not be called society, which supposes a degree of equality; but absolute command on one side, and servile obedience on the other.... And as no inconvenience ever results from the exercise of a power, so firmly established in nature, the restraints of justice and property, being totally *useless*, would never have place in so unequal a confederacy. (EPM 190-191)

What can we learn from this thought-experiment? What insight into justice do we gain by imagining a “species of creatures intermingled” among us who, though endowed with some ability to think and to reason, are: (i) greatly inferior to us both physically and mentally; (ii) “incapable of all resistance” to our provocations; and (iii) unable to “make us feel the effects of their resentment”?

Hume's analysis is that while we (i) must surely be kind to such creatures (indeed, we are "bound by the laws of humanity to give gentle usage" to them), it (ii) would make no sense to think of ourselves as bound by rules of justice in our interactions with them. With inequality so great, the notion that we and they form one and the same society has no place. To illustrate this fantasy with a more real-life example, Hume suggests that something like "this is plainly the situation of men with regard to animals," though he leaves it "to others to determine" just "how far" animals "might be said to possess reason."

Whatever we might think of the parallel between the imaginary creatures of Hume's thought experiment and the real-world animals "intermingled" among us—we may still ask, what could make it appropriate for us to be kind but *not* just? What would a creature have to be like for us to be bound by laws of humanity but not of justice?

At first glance, the answer seems to be that creatures of the sort that Hume describes are simply *too weak to make us pay a significant price* for ignoring rules of justice in their case. To be sure, this view of the matter is naturally suggested by certain features of the text: notably, the reference to the "inferior strength" of the creatures and the observation that "as no inconvenience ever results" from not including such creatures within the protective scope of justice's restraints, justice becomes "totally useless" in their case. Thus, some commentators³ see in the passage at hand a third dimension to the Humean "circumstances of justice": justice is only for those who are *roughly equal in ability to inflict harm* upon one another. This would draw Hume closer to a purely egoistic account of what makes justice a virtue.⁴

As I shall argue, however, the matter is not so clear and simple: no single interpretation of the passage at hand can capture all that Hume seems to be saying in a way that is consistent with what he says elsewhere in the *Treatise* and the second *Enquiry*, and in a manner that coherently and cogently establishes Hume's own conclusions in the passage itself.

The best we can do then is to offer reconstructions that run the risk of having to (i) discount some element of Hume's text and/or (ii) attribute to Hume an obviously false or highly implausible claim. The interpretation that I shall offer here opts for (i) rather than (ii), whereas, as I shall argue, the "no justice without approximate equality of power" thesis unhappily makes us pay both these prices: on the one hand, it ignores other important features of Hume's text, and on the other hand, it makes it difficult for us to arrive at Hume's more specific conclusions about animals and Indians unless we are willing to claim (implausibly) that all animals are weak and harmless and that Indians (even as late as the mid-eighteenth century) were roughly equal in power to Europeans.

III. Problems with the Thesis that Humean Justice Presupposes Approximate Equality of Power

In moving from the *Treatise* to the second *Enquiry*, did Hume come to the more explicit realization that "equality of power" is indeed a third "circumstance" of justice?" There are, I believe, many difficulties for such a reading of the text. For one thing, even within the human species, there are many individuals (e.g., young children who have been orphaned, adults who are paraplegic, those who are deaf or blind) whose condition renders them especially vulnerable to physical assault, theft, and deception. But far from thinking that justice is irrelevant in such cases, we are prepared to believe that its enforcement is of the greatest urgency. *Justice does not cease to be a moral virtue simply because, under the circumstances, injustice can be perpetrated with impunity.* Of course, the fact that a position is incongruous with our own most deeply held moral convictions, and thus strikes us as highly implausible, is hardly a conclusive argument against its attribution even to a great philosopher. But the sentiment with which the suggested interpretation jars, is a sentiment with which *Hume* himself would concur:

'Tis requisite, then, to find some motive to acts of justice and honesty.... For shou'd we say, that a concern for our private interest or reputation is the legitimate motive to all honest actions; *it wou'd follow, that wherever that concern ceases, honesty can no longer have place. But 'tis certain, that self-love, when it acts at its liberty, instead of engaging us to honest actions, is the source of all injustice and violence; nor can a man ever correct those vices, without correcting and restraining the natural movements of that appetite.* (T 480, first emphasis added)

In addition to this *normative* worry about the "equal power" interpretation, there are *factual* difficulties: though animals of certain kinds are indeed docile and submissive, there are others (e.g., grizzly bears and tigers, even domesticated animals such as horses and dogs) who are eminently capable of adversely reacting to unwanted human presence and expressing their displeasure in ways that are humanly costly. Should tigers and bears (at least those "intermingled" among us in zoological parks), or horses and dogs (on farms, in homes), be included within the protective scope of the "restraints of justice" while such harmless creatures as dodo birds and passenger pigeons are quite properly exploited to oblivion? Nothing in the text remotely suggests that Hume is prepared to discriminate among different species of animals along *these* particular lines; nor does it seem right to do so.

IV. Difficulties Internal to the Passage at Hand

For those who would ascribe to Hume the view that “restraints of justice” apply only to those who are approximately equal in their ability to harm one another—additional difficulties arise as soon as we consider the remainder of the very same passage. For whether or not he was right about the senselessness of justice to animals (contemporary advocates of “animal rights” would surely have much to say to him about this matter), Hume does suggest that a comparable attitude should *not* guide Europeans’ dealings with *American Indians* or govern the relations of men to *women*.

What is the evidence for this claim? Hume describes his fellow Europeans as “tempted to imagine” Indians in the same position as animals. The implication is clear: instead of reflecting dispassionately, they were succumbing to a temptation; instead of disinterestedly striving to achieve an accurate view of the Indians, they were self-servingly imagining Indians to be little different from animals. Hume sounds an equally critical chord when he characterizes as “severe tyranny” the treatment of women that men are in a position to mete out whenever they are united in respect to “bodily force.” To confirm that ‘tyranny’ (whether “severe” or not) is, for Hume, a term of condemnation, we have only to look three pages further into the second *Enquiry* to find him criticizing a strict egalitarian view of justice on the ground that a perfectly equal division could only be maintained by “the most rigorous inquisition” and “the most severe jurisdiction”; among the reasons why such an arrangement would be morally unacceptable is the fact that “so much authority must soon degenerate into *tyranny*” (EPM 194, emphasis added).⁵

Why then did Hume think that Indians and women would not be inappropriate recipients of just treatment? Was it their great capacity to inflict costly retaliatory harm on would-be oppressors? Depicting them as equal in power to European males would not have been credible, either to Hume or his readers. The capacity of American Indians to resist European expansion was, even in Hume’s day, in serious decline. Significant progress in achieving equal legal and economic rights for women did not occur until well after the eighteenth century.

To be sure, European settlers suffered, from time to time, the effects of Indian retaliation for their encroachments, but in most cases, the Indians were defeated, deported and, between war and disease, decimated. Perhaps in 1751, Indians still wielded power sufficient to sober Europeans who a century earlier might have been “tempted to imagine” that their technological superiority would easily enable them to bypass norms of honesty and equity with impunity. But by 1900, there was little left for European-Americans to fear from the relatively few remaining descendants of the original Americans. Along the way, treaties were made but quickly broken; land boundaries acknowledged only to be violated. What might

have been only erroneously “imagined” in 1650 had come true. Would Hume then be committed to the view that “white” people in the twentieth century (if not in 1751 when the passage at hand was published) were only required to be kind, but not just, to Indians?

As for the power wielded by women, Hume makes a point of acknowledging how, in his own day, most women were in a condition comparable to slavery: denied property rights and contractual prerogatives, and subordinated to fathers, husbands, brothers. This “severe tyranny”—to use Hume’s own phrase—was a stable arrangement and had been for centuries. Still, Hume takes evident pleasure in noting that in at least some places, women were able to “break the confederacy of men” against them (thanks to their “insinuation, address and charm”) and thereby enjoy some of the rights and privileges previously reserved only for (some) men. (But Hume’s claim that such women were thus able to “share with the other sex in *all* the rights and privileges of society” [EPM 191, emphasis added] does seem to be somewhat exaggerated).

On the proposed “equality of power” interpretation, are we to suppose that the women whose charm was not sufficient to sway the men in their lives, who lacked the ability to address their oppressors with persuasive eloquence, were quite properly denied just treatment—since justice is an appropriate virtue only in respect to those who have whatever it takes (whether force or charm) to make would-be oppressors desist from denying it? This does not appear to be Hume’s own way of thinking about the matter. For as we have seen, when Hume describes the typical condition of women who have not succeeded in breaking the confederacy of men as a “severe tyranny,” he is speaking in terms that for him are clearly condemnatory.

V. Further Problems

External to the passage at hand, but internal to Hume’s own body of writings, there is additional evidence to support the suggestion that “no justice without approximate equality of power” was not a feature of Hume’s own most considered view. Both in the *Treatise* and in the second *Enquiry*, Hume argued against the view that self-love is the most powerful, let alone the sole, principle, either of human motivational nature or of morality. (Cf. T 487: “’tis rare to meet with one, in whom all the kind affections, taken together, do not over-balance all the selfish” and T 480, quoted above.) But interestingly enough, his critique of egoism, both psychological and ethical, becomes, if anything, more emphatic in the second *Enquiry*, the locus of the disputed passage. In Section V, Part I (EPM 215–217), he characterizes the “deduction of morals from self-love” as an obvious but incorrect thought; in Section V, Part II, he offers an “*experimentum crucis*” against the claim that “all our concern for the public might be resolved into a concern for our own

happiness and preservation" (EPM 219); and in Appendix II, he provides a sustained refutation of psychological egoism without parallel in the *Treatise*.

It would be odd for Hume to be spending so much time in the *Enquiry* railing against psychological egoism and against egoistic foundations for morality while at the same time *adding* a quasi-egoistic condition to his account of when justice is a virtue.

To sum up the case against taking "equality of power" to be among the circumstances of Humean justice: this reading does not allow Hume a factually sound and morally plausible way to arrive at his own substantive conclusions about animals, women and Indians; moreover, it is at odds with key philosophical claims that Hume makes both in the *Treatise* and (with even greater emphasis) in the second *Enquiry* itself.

VI. An Alternative Interpretation

What then *are* we to make of Hume's talk about conditions under which justice would become senseless by virtue of having been rendered "useless"? Useless how? Useless for whom?

To begin with, we should probably be clear that Hume's purpose in this passage is not to show us how unjust treatment is sometimes permissible; his point is that whether we are interacting with his imaginary "race of creatures" or with real-world animals, rules of justice—defining prerogatives of property and of contract—are inappropriate. Thus, on Hume's account, it is *not possible to be either just or unjust* in our dealings with such creatures. (Note how this parallels his discussion of such hypothetical conditions as super-abundance and super-benevolence: he does not treat those extremes as circumstances in which it is all right to perpetrate injustice but rather as conditions under which notions of both justice and injustice are irrelevant. ["when there is such plenty...the distinction of property is entirely lost" (T 495)]).

We must also recall that by *justice*, Hume has in mind primarily those rules that stabilize possession of external goods, regulate their transfer by consent, and specify the conditions under which people may regard one another as mutually obligated. Just rules (in effect, rules of property and of contract) do not reflect pre-existent natural right; rather, they define institutional arrangements whose widespread acceptance is conducive to the public interest. An individual act of justice is not immediately or intrinsically agreeable to us but only makes sense against the backdrop of a larger scheme, in which all or most members of society concur. It is in this sense that justice is an "artificial" virtue: it reflects "artifice" and design,⁶ and it typically features many somewhat arbitrary or conventional elements.

The chief "rights and privileges" which Humean justice specifies are the right to appropriate and to hold property, the right to transfer title by

consent, and the right to make contracts. It is important to recognize that these rights are, in Hohfeldian terms, not claim-rights to some level of well-being, but powers or prerogatives: the prerogative of actually creating rights and duties (by appropriating property), and/or altering the pre-existing structure of rights and duties (by making contractual agreements). Thus by appropriating a piece of land as one's own property, one comes to have certain rights against others not to use the land without one's own permission. This is a form of authority. In addition, the property-appropriators also gain the authority to decide who shall succeed them in exercising such authority.

Clearly such rights—the right to exclude others in accordance with mutually acknowledged rules of private appropriation, the right to bequeath, the right to enter into contractual arrangements—presuppose the capacity to understand and to follow rules, the capacity to communicate fairly sophisticated intentions, etc.

We are now in a position to understand why, on Humean grounds, we might have duties of kindness but not of justice in regard to Hume's hypothetical "race of creatures," or more importantly, in regard to (most) actual animals.

On Hume's view, the nature of non-human animals⁷ is in many respects continuous with human nature—in their ability to infer causes from effects and effects from causes, to love and hate, to experience pride and humility, and to be infected, through sympathy, by one another's thoughts and feelings, etc. (T 176–179 and T 397–398). At the same time, however, there is a significant difference in the *extent* or *degree* to which (most?) animals can sustain lengthy and complex thought, use their reason and understanding, imagine what is not immediately present (T 326; 397; EHU 84 note) and these differences in degree can, in certain matters, be tantamount to a difference in kind:

The *causes* of these passions are likewise much the same in beasts as in us, making a just allowance for *our superior knowledge and understanding*. Thus animals have little or no sense of virtue or vice; they quickly lose sight of the relations of blood; and *are incapable of that of right and property....* (T 326, emphases added)

Why then are (most?) animals incapable of grasping relations of right⁸ and property?

As animals are but *little susceptible* either of the pleasures or pains of the *imagination*, they can judge of objects only by the sensible good or evil, which they produce.... Love in beasts is not caus'd so much by relation, as in our species; and that because their *thoughts are not so active as to trace relations* (T 397, emphases added).

Putting these thoughts together, we can formulate Hume's deepest reason for excluding his imaginary race of creatures, and at least those animals that are relevantly like them, from possessing "any right or property." At the same time, we can put a more plausible, *and* more plausibly Humean, "spin" on his claim that "our intercourse with them could not be called society, which supposes a degree of equality..." (EPM 190).

Having and exercising the Humean rights of justice—the right to exclude others in accordance with mutually acknowledged rules of private appropriation, the right to bequeath, the right to enter into contractual arrangements—presupposes the capacity to understand and to follow rules, the capacity to communicate fairly sophisticated intentions, etc. These are capacities that Hume seems to believe that non-human animals do not have to any significant degree. *Thus, what makes Humean notions of justice and injustice irrelevant, in our dealings with (most kinds of) animals is the inability of those animals to understand and to follow rules, rules of the sort that define the prerogatives which justice would confer.* This is what renders "useless" (to the animals as well as to ourselves) any reference to either "justice" or "injustice" in their case, *rather than* the fact that humans could, if they put their minds to it, subordinate those animals without having to suffer significant retaliatory consequences.⁹

What best explains the suggestion that "our intercourse with them could not be called society which presupposes equality" is this:

tho' it be possible for men to maintain a small uncultivated society without government, 'tis impossible they shou'd maintain a society of any kind without justice, and the observance of those three fundamental laws concerning the stability of possession, its transfer by consent, and the performance of promises. (T 541, emphasis added)

Thus it is not the disparity in brute power between themselves and us but the gross inequality in their capacity to understand and to follow rules of property and of contract that not only makes it "useless" to confer on animals the rights and prerogatives of justice but precludes the possibility of describing our relations to them as constituting genuine "society" (in Hume's view of what society requires). After all, why should relations between healthy, able-bodied persons and much frailer and weaker persons not be termed genuine "society" so long as the latter are able to operate within a framework of mutually understood and acknowledged terms of association?

On this view, animals would not be entitled to the benefits bestowed by a system of justice *even if* they could inflict serious harm upon humans who move in upon their pre-existing habitats; concern not to be cruel nor to

inflict injury beyond what is required by human defense and preservation is all that would be appropriate in their case, whatever their relative strength and capacity to inflict harm.

By the same token, Indians ought to be treated justly even if they no longer have the capacity to mount an effective resistance to European-American domination. And women are entitled to justice—to the benefit of being able to own property and to make contractual arrangements, even if they lack the charm and/or insistence to break the “confederacy” of whichever men might be forcibly denying them such prerogatives.

Why then does Hume even discuss the fact that most women in most societies have not been able to break that confederacy down and so are living under “severe tyranny”? Not, I suggest, to prove that the tyrannizing of such women is no injustice, or that such deprivation of right and property does not elicit, or merit, moral disapproval.

Rather, this seems to be a passage in which Hume has blurred a distinction that he himself clarified and emphasized quite ably near the beginning of his discussion of justice in the *Treatise*. This is the distinction between “two questions”: one concerning “the manner in which the rules of justice are establish’d by the artifice of men” and the other concerning “the reasons, which determine us to attribute to the observance or neglect of these rules a moral beauty or deformity” (T 484). In effect, Hume has wandered, unwittingly, from the question of what makes justice a moral virtue to the more social scientific question of the conditions under which we can regard the evolution of just arrangements as more or less likely to take place. Reflecting on disparities in power can help us to predict when justice will indeed be rendered, not when it is morally virtuous to do so.¹⁰

VII. One Further Interpretive Issue: On Not Feeling the Effects of Resentment

The interpretation suggested here may cast in a somewhat different light the otherwise puzzling statement that the creatures of Hume’s imaginary world (and presumably also animals in our own world) are not only “incapable of all resistance” but “could never, upon the highest provocation, make us feel the effects of their resentment.” It is natural to infer¹¹ from these remarks the proposition that while the creatures in question do feel resentment, their inability to mount resistance leaves us somewhat unwilling to respond to that resentment with any intention to reform our ways.

Hume’s imaginary race of creatures aside, we can hardly accept the claim that animals in our world—even domesticated animals such as horses or pigs—are incapable of “all resistance” as anything other than literary exaggeration. Perhaps Hume only means to say that animals are incapable of any *effective* resistance—i.e., resistance sufficient to make humans desist from

using animals in whatever ways they wish. Even this may not be entirely true of some of the swifter or willier or more ferocious of wild animals. (What humans may be able to do, at will, is destroy these animals' natural habitats and thus undermine their existence altogether.) Perhaps Hume is thinking primarily of the domesticated animals (who are more characteristically "intermingled among us") and who do seem incapable, not of mounting any resistance at all, but of resisting in a way that could ultimately release them from their subservient plight. But as we have seen, this line of thinking—which may have momentarily attracted Hume's attention—would also lead to what Hume clearly wants to avoid: namely, a comparable conclusion about the irrelevance of having to keep treaties made with the Indians or to deal fairly with women who are not especially insistent or articulate.

More interesting, though no less initially puzzling, is the claim that animals "could not make us feel the effects of their resentment." If animals do offer resistance (no matter how feeble), then why can't we *feel* the "effects" of their "resentment" (even if we selfishly choose not to respond to it)? Although the point about their inability to resist and the point about their inability to make us feel (the effects of) their resentment sit side by side, resentment is not the same as physical resistance. Resentment is a very special variety of anger: it is anger inextricably bound up with the thought that one has been badly or wrongly treated; hence, there can be resistance (even motivated by anger) without resentment and there can be resentment without resistance. Resentment, construed as a moral feeling, presupposes the capacity for a sense of right and wrong. *Resentment at injustice presupposes the capacity to understand—and appreciate—the usefulness of rules of justice.*

Certainly, animals can and do have intense negative feelings—anger, frustration, disorientation—on account of how we humans interact with them. In contrast with so many other philosophers of the early modern period, Hume himself emphatically maintains not only that animals do have such feelings as love and hate (T 396–397), pride and humility (T 324–328), but that we humans can and do recognize much animal behavior as manifesting thoughts and feelings in them no less than the comparable behavior would in ourselves (T 178). Finally, Hume would be fully prepared to acknowledge that through the mechanism of sympathy, one creature can often feel what another creature is feeling, at least if the creatures resemble each other sufficiently. Under this heading he would certainly allow that many animals are sufficiently similar to ourselves to permit such a response to operate (T 316–324).

What then is the point of suggesting that we cannot be made to feel the effects of animal resentment? In light of the suggestions offered in the preceding section, consider the following reinterpretation: what Hume was trying to say, albeit not very clearly, is not that animals are incapable of getting angry and reacting violently against us, but rather, that since animals

are not capable of a sense of justice, nothing they do in reaction to human encroachments could be a reflection of their being angry *at or about* human *failure to observe rules of justice*. Hence no matter how angry they might feel, and no matter how sympathetically we might ourselves feel their angry feelings, their reactive behavior *cannot count as an expression* of their resentment. Of course, this is by no means incompatible with our responding benevolently to their distress, and hence, in the matter of human encroachment upon animal "territory," taking ourselves to be bound, not by any consideration for animal property rights but by humane benevolence ("laws of humanity") to make sure they have a viable habitat.¹³

VIII. The More General Wisdom Underlying Hume's Theory: Questions about His Application of His Own Theory

Whatever we might think of his views about the nature of justice and the nature of non-human animals, I suggest that underlying Hume's claim that we owe to animals kindness but not justice is a more general insight, with which most people would, upon reflection, strongly concur, and which Hume was perhaps the first major philosopher to emphasize: how a morally virtuous human agent ought to treat beings of another kind (e.g., animals, plants, space aliens, etc.) must depend on the nature and capacities of the being in question. Toward a non-sentient being incapable of experiencing pain and suffering, there is no duty to refrain from cruel and inhumane treatment. Toward a being incapable of thinking and communicating, there is no duty to recognize, and respect, a right to freedom of thought and speech.

Thus not merely in Hume's own somewhat limited conception of what justice involves, but by our own lights as well, moral standing is not all or nothing, but rather, a function of relevant qualities and capacities. As there are different dimensions of moral concern, so also beings who are relevantly different in their natures and capacities may properly elicit different kinds of consideration.¹⁴

All this said, it is still open to us to distinguish Hume's general insight from his own particular conception of right and justice; and his particular theory from his own practical application of it. We may want, for example, to insist that justice is not merely about rules defining schemes of property and contractual obligation; that questions of justice are questions about when it is morally legitimate for the people to use their collective power to enforce moral duties and obligations. Thus, in our terms, if Hume would agree to the idea that humane treatment of animals is not only something we are "bound by the laws of humanity" to do but something we can rightly use community force to *compel* one another to do, then in our terms, and for

our purposes, he would be granting that how we relate to animals is a matter of justice, and not only of dutiful benevolence.

Similarly, even if the suggested interpretation is closer than the "equality of power" interpretation, both to the spirit and to the letter, of Hume's view, we may still wonder, whether Hume's view, thus interpreted, actually leads to the sweeping conclusion that all animals are beyond the protective scope of justice's restraints. If what matters is the capacity to understand and to follow mutually recognized rules of property and contract, are lions and horses on a par with porpoises and chimpanzees? At least in principle, shouldn't we be able to differentiate between and among different animal species?

Clearly this is not the place, nor do we philosophers, as philosophers, have the expertise, to settle such a matter. But for present purposes, it is worth noting, that what counts as a case of Hume misapplying his own theory will differ considerably depending on which of the two different interpretations of his theory we opt for. On the "approximate equality of power" interpretation, Hume fails to apply his own theory correctly when he fails to remember that some animals are capable of inflicting costly retaliatory harm upon their human oppressors; the more harmless of animal creatures must settle for human kindness; only those creatures capable of reacting to human encroachments in humanly costly ways ought to enjoy the "rights and privileges" of justice. On this view, Hume erred in ignoring the difference between tigers, bears, and wolves on the one hand and cows, sheep, and ducks on the other. On the "capacity for rule-understanding and rule-following" interpretation, however, Hume may have erred in not acknowledging the possibility that porpoises or chimpanzees or even dogs and wolves are capable of participating in structured schemes of mutual assistance and mutual restraint.¹⁵

But here I think it is worth our noting that Hume does actually, if only briefly, allow for something like this possibility when he adds, "I leave to others to determine how far animals may be said to possess reason": in other words, Hume is *not* in fact taking a final stand on the empirical question of just which animals may or may not be capable of participating in the conventions definitive of just institutions and of meaningfully exercising, and benefitting from, the privileges and prerogatives of (Humean) justice. Thus, another virtue of the present interpretation is that it puts in perspective, and gives new meaning to the Humean aside—"I leave to others to determine how far they may be said to possess reason"—a reference not to the fact, but to the *extent*, of animal reasoning capability. It is a disclaimer reflecting his empiricist wisdom that the full facts about animals are not to be settled by armchair dispute, much less a priori philosophical argumentation. So in principle, Hume would be prepared to acknowledge some morally relevant differences among animal species.

IX. Some Brief Concluding Observations

The passage we have been discussing is difficult and puzzling. As noted earlier, it may well be that no one interpretation can capture all of what Hume seems to be saying at EPM 190-191 and yield a coherent, cogent argument that is at the same time compatible with the rest of what Hume has to tell us in the *Treatise* and the second *Enquiry*. The “equal power” interpretation has difficulty delivering Hume’s own conclusions about women, Indians, and animals, without making false factual claims (e.g., about the harmlessness of animals and the powerfulness of women and Indians). And it is in serious tension with larger and more fundamental views (e.g., the rejection of both psychological and ethical egoism) that Hume expounds in the *Treatise* and, with still greater emphasis, in the second *Enquiry* itself. The interpretation offered here has, I believe, significantly more virtues than its rival. It yields the *substantive* conclusions Hume himself is seeking to establish—viz., though the “restraints of justice” do not (for the most part) apply to humans in their dealings with animals, they do apply to men’s dealings with women and to European-Americans’ dealings with Indians. It arrives at those conclusions *without* having to make false claims about the impotence of animals or the powerfulness of women and Indians; *without* relying on psychologically and ethically egoistic views that Hume himself rejects as false; in particular, *without* relying on morally problematic and un-Humean intimations about how justice ceases to be a virtue under circumstances in which injustice can be perpetrated with impunity. Finally, it moves to those conclusions *by invoking fundamental Humean ideas* about (i) the role of justice as a condition of the possibility of genuine “society”, (ii) the character of the rights which justice confers, and (iii) the evident limitations of non-human animal minds.

NOTES

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1 The writings of Hume to which I shall refer are: *A Treatise of Human Nature* (henceforth T), edited by L. A. Selby-Bigge and P. H. Nidditch (Oxford University Press, 1978); *An Enquiry concerning the Principles of Morals* (henceforth EPM), edited by L. A. Selby-Bigge and P. H. Nidditch (Oxford University Press, 1976); and *An Enquiry concerning Human Understanding*, edited by L. A. Selby-Bigge and P. H. Nidditch (Oxford University Press, 1976).

Relevant passages are in EPM III i 145–153, 183–192; for earlier parallels see T 494–496. Cf. “Justice is useful to society” (EPM 183); “public utility is the

sole origin of justice" (EPM 183); "By rendering justice totally *useless*, you thereby totally destroy its essence, and suspend its obligation upon mankind." (EPM 188): "The necessity of justice to the support of society is the sole foundation of that virtue" (EPM 203).

2 John Rawls, *A Theory of Justice*, (Cambridge MA: Harvard University Press, 1971), 126–130.

3 Brian Barry has provided a searching discussion of the Humean circumstances of justice in which he suggests that a "third" circumstance—approximate equality of power, makes "an explicit appearance only in the *Enquiry*, though it is implied by the account of the origins of justice in the *Treatise*" (*Theories of Justice*, University of California Press, 1989, section 18). But while Barry is sure that the passage at issue here supports this interpretation, he also believes that "Hume must be accused of drawing back from the full implications of his doctrine" when he says that Europeans were only "tempted to imagine" themselves "above" justice in their relations to Indians. On the view I am defending in this paper, the "equality of power" condition does not cohere with the rest of Hume's theory and so his apparent view about European-Indian relations is not so much a matter of "drawing back" from his own theory as it is a sound(er) application of it. In brief, the problem is with the "equality of power" condition itself rather than with what Hume has to say about European-Indian relations.

4 Here it might be asked, why isn't benevolence comparably contingent upon the capacity of potential recipients to make others pay a price for not rendering it? Those who take the "equality of power" interpretation under consideration here would presumably point to the difference between the "natural" virtue of benevolence and the "artificial" virtue of justice: benevolence is immediately agreeable to us, from a moral standpoint, but the requirements of justice only elicit our approval insofar as they define a scheme useful to society. This way of explaining things leaves some crucial issues somewhat unresolved: (i) *what* is it about the creatures in Hume's thought experiment that would make justice to them useless? (ii) *who* are the members of society whose good is served by the widespread acceptance of the rules of justice? I shall suggest that the "power" interpretation does not provide the most plausibly Humean answers to these questions.

5 The underlying thought is that since humans are unequal in their ability to take care of whatever wealth they might be assigned, disparities in wealth would naturally arise. Extensive government surveillance would have to be mounted in order to identify and forcibly correct for inevitable inequalities.

6 Albeit sometimes a design that has evolved by spontaneous mutual accommodations rather than explicit agreement.

7 Perhaps the first important essay dealing with Hume's account of the moral difference between humans and other animals is Knut Erik Tranøy's "Hume, Animals, and Men" (*Journal of Philosophy* 56 [January–December 1959]: 94–103). Tranøy focussed his attention, not on the passage under consideration here, but on the discussion in *Treatise* 467–468, where Hume starts with the idea that we do not regard incest as a vice in animals and moves to some very large conclusions about whether moral distinctions are

based in human sentiment or have an independent reality to be apprehended by reason. Tranöy argued that since Hume's view that animals are not capable of moral agency seems to rest on their inability to engage in certain kinds of reasoning, Hume actually contradicts his own view of the nature of morality. He turns out to be more of a rationalist about morality than he would like to admit. Against Tranöy, Denis G. Arnold has recently argued that Hume is not forced to be a rationalist about morality in order to deny that animals are capable of moral agency ("Hume on the Moral Differences between Humans and other Animals," *History of Philosophy Quarterly* 12.3 [July 1995]: 303-316). On Arnold's view, there are three Humean conditions of the possibility of moral agency: reason, sympathy and the sentiment of humanity. Hume's view of morality affords reason a role, but this by no means makes reason the foundation of morality for Hume. Hence a non-human animal species whose members were as rational as humans and who were even capable, as Hume says animals are, of genuine sympathy, might still fail to qualify as Humean moral agents. Arnold maintains that for Hume, "to be understood as moral" a species of creature must also exhibit a "species-wide sentiment of fellow-feeling."

In "Hume, Animals and the Objectivity of Morals" (*The Philosophical Quarterly* 35.139 [April 1985]: 117-133), Stephen R. L. Clark addresses this same passage and criticizes Hume's attempt to argue from our sense that incest is not a vice in animals, though it is in humans, to the conclusion that morality is grounded in human sentiment rather than in objective nature. Clark points out other ways to interpret our reaction to animal incest. For example, Clark suggests that we may infer from "the bad effects of inbreeding and the disinclination at least of females to have sex with their close relatives, that incest...is indeed a natural evil." He also explores the possibility that although it is a natural evil, the animals themselves may not be morally blameworthy for having sex with their nearest relatives. For Hume, this would depend on the motive of the agent. And although an animal may have sex with daughter, sister, or mother, and find pleasure in it, such behavior may not be, strictly speaking, an act motivated by the desire to be incestuous.

8 Here the term "right" denotes claims specified by the rules of the social system.

9 A referee for *Hume Studies* asked why the inability of the animals to make contracts and exercise property rights should "make justice useless to them, given that we could regulate our behavior toward them in a just manner?" Of course, for Hume, to be the beneficiary of just treatment is to have contractual and property rights. These are prerogative-rights which animals could not exercise for themselves. Thus, I think it is interesting to imagine someone serving as a kind of trustee or guardian to animals—making "contracts" on their behalf, negotiating and representing their "property rights." But, while animals can be loyal, they cannot understand and observe contractual obligations. They are often territorial but they cannot understand and apply property rules and keep track of specific property rights. So in the end, I think it would make more sense to say that it is *the guardian*, not his/her animal ward, who has become contractually obligated and bound by the rules of property. And it would be the guardian who is bound to train or

condition the animal to behave in certain ways, and who is liable for damages if the animal does not so behave.

10 "Thus self-interest is the original motive to the establishment of justice; but a sympathy with public interest is the source of the moral approbation which attends that virtue" (T 499–500).

11 This is so, not by virtue of strict logical implication but as a matter of "conversational implicature."

12 Although he sometimes uses the term 'resentment' as though it were synonymous with anger, Hume clearly understood and appreciated the difference. For example, Hume discusses the possibility of a harm that has befallen us on account of someone else's innocent behavior. He remarks that we feel hatred toward that person *but* we are not comfortable with this feeling, unless we can find a way to attribute a bad motive to the other person, and thus turn our hatred into a more morally justifiable attitude (T 350–351; see also T 418; EPM 195–196).

13 Here one might ask, does it make any practical difference whether we act in the name of benevolence or justice, so long as we are bound to leave them a humanely ample environment? The answer may well be that it does make a difference—the difference between (merely?) having to insure that the animals do have a good life in some habitat or other, whether their "own" original and natural one, or some other equally viable one arranged for by us humans—versus having to give extra weight to the fact that a particular place has been their historical home, irrespective of whether it is more conducive to their survival and flourishing.

14 Cf. Rawls, *A Theory of Justice*, 512.

15 Thus, Annette Baier has argued—in the spirit of Hume—that horses and dogs may have what it takes to participate in at least certain social conventions and hence that a "primitive precursor" to the duty of fidelity ought to govern our dealings with them. ("Knowing our Place in the Animal World" in her *Postures of the Mind* [Minneapolis: University of Minnesota Press, 1985]: 139–156.) Charlotte Brown explains why, from a Humean perspective, there are animals who should be regarded as capable of moral agency and of having at least some of the natural virtues and vices, if not the artificial virtue of justice ("Humean Animals," 18th International Hume Conference, University of Oregon, Eugene, August 1991). Peter Fosl maintains that in light of Hume's own insistence on the continuities between humanity and animality, humans and animals can convene social relationships (albeit somewhat limited in character) that make it both possible and desirable to incorporate animals into "the moral institutions of justice" ("Common Life and Animality in Hume" forthcoming in *1650–1850: Ideas, Aesthetic and Inquiries in the Early Modern Era*).

Against Charlotte Brown's suggestions, Antony E. Pitson ("The Nature of Humean Animals," *Hume Studies* 19.2 [November 1993]: 301–316) argues that animals are, in Hume's theory, neither capable of moral sentiment nor of natural moral virtue. According to Pitson, Hume takes animals to be incapable of moral sentiment insofar as they are incapable of taking a "common or general view of what is appraised" (303). Pitson also explains

how for Hume a trait becomes a virtue “only when it is exercised with a certain discrimination.” Thus for an act to reflect the natural virtue of benevolence, the agent “must be able to assess its likely effects so as to exercise it in favor of those who will truly benefit from it” (Pitson, 311). Denis Arnold takes Pitson’s interpretation of Hume to be comparable to Tranøy’s—“making reason the basis” for the moral difference between humans and animals, and so he believes his critique of Tranøy applies with equal force to Pitson (Arnold, 316 n 19). My own position is closest to that of Pitson, but I am not committed here to the larger claim that Humean non-human animals cannot exhibit any of the natural virtues or experience anything like moral sentiment. To defend Hume’s conclusions about animals, women and Indians at EPM 190-191, in light of other major Humean theses, we need only appeal to the fact that (most) animals are not sufficiently capable of imagination and foresight to be able to understand rules of contract and property and to appreciate the long-term benefits of living under such rules.

16 Are we to take this interpretation as preferable because it is the more faithful rendering of what Hume actually did say in the passage at hand, or is it rather a rendering of what, given the rest of Hume’s views, Hume should have said? I believe the situation here is not quite “either/or”: the passage at hand pulls us in different directions. To be sure, the “power” interpretation is, as noted earlier, supported by several key phrases in the text. But it conflicts with other major Humean theses and only permits us to reach Hume’s more specific conclusions if we attribute to Hume some obviously false claims about the harmlessness of animals and the powerfulness of Indians and women.

At the same time, however, other features of the passage at hand point in the direction of the “capacity for a sense of justice” interpretation offered here. Thus, I have argued that the suggested position—that the reason there is no point in extending justice to Hume’s imaginary creatures or to (many) non-humans is that they are not capable of understanding rules and exercising contractual and property rights—is certainly what Hume should have said, given the rest of his philosophical doctrine. But I also think that this is a position that Hume was subliminally working toward, even if he never made it fully explicit, even to himself. This is what helps explain the relevance of his characterization of the imaginary creatures as weaker *in mind* and of his parting remark about the need for others to determine just “how far” animals “may be said to possess” *reason*. It puts in a better light his (otherwise puzzling) suggestion that (despite our capacity to sympathize with animals, and they with us), we never quite feel (anything like the effects of) “their resentment.” Finally, it makes deeper Humean sense of the idea that (although animals often live among us) we and they do not form one genuine “society.”

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