Silent Parties: A Problem for Liberalism?

Liberalism is often under attack because of its alleged excessive "formalism". In the words of one of its main contemporary defenders, "the defining feature of liberalism is that it ascribes certain fundamental freedoms to each individual. In particular, it grants people a very wide freedom of choice in terms of how they lead their lives".\(^1\) In more continental language, this core idea has been summarized in the statement that what liberalism is all about is "the handling and organization of the conditions in which freedom can be realized".\(^2\) For liberals, individuals must be recognized as the ultimate arbiters of what gives value to their own existences, and the liberal principle of legitimacy is not satisfied whenever the state seeks to impose any particular comprehensive doctrine about the good life.

From many sides, however, it is said that an acceptable society in which to live needs a more substantial conception of the good, without which individuals are uprooted and anonymous.\(^3\) Somewhat along the lines of the traditional criticism of the Kantian doctrine, turning upon its focus on procedure and universalism to the detriment of content and particularism, contemporary liberalism is sometimes seen as an empty morality that, abstracting as it does from experience, is not able to provide the ethical resources necessary to ground acceptable pragmatic policies.\(^4\) I want to argue instead that, at least from one point of view, liberalism in all its versions is not formal enough. There is, I will claim, a specific problem with respect to which an important substantive aspect is surreptitiously introduced into the theory: the problem of moral status. As my argument unfolds, I shall deal with three different senses of "formal": formal as procedural, formal as neutral, and formal as analytic.

I.

Moral status has been generally discussed within ethics rather than within political theory. But contemporary political theory has an ethical basis, and, accordingly, it cannot fail to reckon with one of the most basic problems in moral philosophy. The notion of moral status is employed to shed light on specific answers to the question, which beings should have their interests protected, and to what degree? Every ethical approach includes -- or presupposes -- a theory of moral status, which is an essential part of value theory.\(^5\) At the center of ethics lies a set of norms to govern behavior towards (at least some) other entities. Obviously, rules of behavior can only be addressed to moral agents. Moral agents are those beings who can reflect morally on how to act, and whose behavior can as a consequence be subject to moral evaluation. On the other hand, asking which are the entities that should have their interests protected, is tantamount to asking who is a moral patient. If the moral agent is a being whose behavior may be subject to moral evaluation, the moral patient is a being whose treatment may be subject to moral evaluation. Moral patients are the others of the golden rule, "treat others as you would have them treat you". They are the beings who should be
taken into account when deciding how to act (of course, moral agents too are moral patients, when
they are, so to speak, at the "recipient" end of the action). It is apparent that not all beings are
necessarily moral patients. Depending on the selected criterion, a greater or smaller number of
entities will be excluded from moral consideration. Such entities have zero-grade moral status, and,
with them, one can do as one pleases: they are means to others' ends, or, at best, objects of
indifference.

Usually, in political theory, the problem of moral status -- with the attendant question of a clear
definition and consistent application of criteria for inclusion in, and possible relative ranking within,
the moral community -- is simply set aside, in favor of a quite abstract perspective. Political
philosophers, that is, merely take for granted that human beings make up a homogeneous
constituency, and depict them as equally endowed with one or more characteristics traditionally
considered as morally relevant. They tend to see all human beings as free and rational moral agents,
possessing the ability to regulate and guide their lives in accordance with some overall conception
of the good.6 If one employs such an abstract approach, and keeps inserting relative equality among
human beings within the normal background conditions of a liberal society, it is then easy to
translate surreptitiously the key notion of liberalism, that of "individual", into the more demanding
notion of "rational moral individual", or "person".7 The result is what has been aptly called the
agent/patient parity principle: the class of moral patients exactly coincides with the class of moral
agents.

To explore the implications of this view, I shall follow Thomas Nagel's political approach as
developed in his discussion of equality and partiality.8 According to Nagel, the problem of
reconciling the standpoint of the collectivity with the standpoint of the individual arises as a
problem about a division in each individual9 between two standpoints, the personal and the
impersonal, where the latter represents the claims of the collectivity. At a first stage, the basic
insight that appears from the impersonal standpoint is that everyone's basic interests matter, and no
one is more important than anyone else: "for a given quantity of whatever it is that's good or bad --
suffering or happiness or fulfillment or frustration -- its intrinsic impersonal value doesn't depend on
whose it is".10 In political theory, Nagel argues, the aim is to externalize through social institutions
the most impartial requirements of the impersonal standpoint.11 Liberalism takes various forms, but
they all include a system of individual rights against interferences of certain kinds -- and we should
think of these fundamental guarantees as deriving from the requirements of legitimacy, that is,
"unanimous acceptability of the basic framework by typically divided individuals".12 The procedural
focus of the state, therefore, expresses itself in securing the impartial protection of individuals from
murder, torture, enslavement and other unauthorized touchings of themselves -- the impartial
protection, that is, of the basic interests of individuals in life, freedom, and welfare.

Ideally, in this moral division of labor, the bulk of impartial values is to be realized by background
institutions, leaving individuals relatively free to pursue their own values in their specific plans of
life. In particular, it is the constitution which is charged with embodying those basic rights against
interference that are to be insulated against the effects of biases and parochial interests and that, at
the same time, preserve for each individual a private area in which she can develop her conception
of how to live (recall the twofold nature of Mill's principle as "harm principle" and as "principle of
liberty").13 In political morality, however, there are not only these two extremities -- (near) absolute
side-constraints and (near) absolute freedom. In political morality as contrasted to individual
morality, in fact, there is also an intermediate area which falls within the reach of ordinary political
bargaining and the calculus of interests. In this area, individuals living in a state that meets the
requirements of legitimacy are bound to accept the results of democratic decision-making, be they
derived from voting according to the majority rule or from institutionally reached compromise. We
are then left with at least three spheres: the basic, or constitutional, one, where generalized
prohibitions prevent basic individual interests from being infringed to achieve direct advantages or
to produce a greater overall balance of societal good; a middle grey area, that we can call political,
where certain infringements of non-basic interests are admitted even against the (or some)
individuals' will; and, finally, the private sphere of "free space" where individuals are sovereign,
and where their lives can be led as they choose.

The boundaries between the three areas are, as it would be expected, sometimes fuzzy, and many
controversies arise about whether a particular issue falls here or there. In particular, since virtually
every act one does affects others, even if only in trivial ways, there has been much discussion about
the correct construal of what constitutes "harm to others" and about the attending delimitation of the
private sphere. Examples include the interpretation of certain particular instances of freedom of
expression, owing to their possible detrimental influence on people's behavior, and the
interpretation of so-called "right to privacy", which conservatives tend to refer to collective units
rather than to individuals in order to regulate them.14 All this does not prevent, however, there
being issues that are clearly situated -- like, e.g., the injunction against murder or enslavement in the
first area, the level of taxation in the second one, and the choice of one's religion in the third one.

In what sense is it said that this overall structure is procedural rather than substantive? The basic
idea seems to be that side-constraints act as procedural indications which merely set a general
framework within which the goals are individually chosen. A legitimate state, that is, should not
offer a view of the good life -- it should confine itself to respect/guarantee the possibility for any
and all individuals to pursue their aims. Not only should it not directly force people along any
particular path, it should also, so to speak, patrol the territory in order to avoid the possibility of
some individuals coercing others.

It is apparent that such a description does not fit the whole functioning of contemporary liberal
societies. In what we have called the intermediate area, political bargaining normally produces at
least an outline of a theory of the good. The so-called welfare state is a good example: in this case,
a society opts for the view that it is possible to take something from the better-off in order to give
something to the worse-off -- it opts, that is, for the view that a society in which the weak receive
some help is better than a society in which the strong can enjoy their wealth fully undisturbed. Such
choices, however, cannot affect the first sphere. No one thinks that it would be possible to make
trade-offs between, e.g., welfare and basic protection -- for example by killing some people in order
to re-distribute their wealth. In fact, rights as embodied in the constitutions tend to be used "as a
test of the legality of the legislation", preventing the fundamental freedoms of the minority from
being infringed by specific worldviews of the majority.15

Let's describe the situation in a more abstract way. In sphere A, the first one, moral patients are
protected from state or other individuals' interference by fundamental rights: a fence is erected
around the basic interests of individuals. In sphere B, the second one, moral patients are somehow
interfered with: non-basic interests of individuals can be sacrificed on the basis of agreed proceedings. Finally, in sphere C, the third one, no other party is in question; no interests of moral patients are involved, as moral agents freely act without impinging on any other individual's life.\textsuperscript{16}

The aspiration to formality of liberalism concerns therefore area A -- the sphere of basic interests. In this case, institutionalized side-constraints on the behavior of moral agents are confined to the role of leaving individuals alone -- provided that they do the same with respect to others -- and do not force upon them any particular worldview. In area B, basic interests are not involved, and therefore particular worldviews emerge from political bargaining. In area C, no others' interests are touched. Similarly to what happens -- though with a different emphasis -- regarding the problem of the notion of "harm to other", debates about the formal nature of liberalism normally involve area C, due to a loose construal of basic interests. For example, advocates of what was once called "the enforcement of morals" and is now more aptly dubbed "moral environmentalism"\textsuperscript{17} claim that there are behaviors which violate interests though they do not directly involve other individuals -- a classical example is offered by particular sexual choices. Defenders of liberalism, however, do not accept such a wide construal of basic interests. They plausibly argue that, on the one hand, sexual freedom, being an integral part of individual freedom, is just the sort of interest which must be seen as basic, and which should therefore be constitutionally protected; and that, on the other hand, the "offence" caused to the sexual puritan by the relaxation of ambient taboos, arising as it does from \textit{external preferences about how others should behave}, typically involves a non-basic interest which must be discounted, being just an instance of those attempts to force a specific comprehensive doctrine on individuals that the liberal doctrine condemns. Thus, Thomas Nagel maintains that the freedom to act on one's personal sexual desires being a leading candidate for institutional protection as a right, a liberal society should decide in favor of such freedom, and against the (however deep) individual convictions about how others should live.\textsuperscript{18}

II.

There is, however, a different kind of situation in which a like response is advanced by defenders of liberalism -- and this time, I shall argue, with less plausibility. I shall start from a widely known -- but by no means unique -- instance: the question of abortion. What do liberals most commonly say in this regard? A widespread claim, in the case of abortion, seems to be that no particular view should be imposed on individuals -- which amounts to allowing abortion, so that those who want to practice it may do it, while opponents will continue avoiding it. For instance, in a book devoted to the topic, Ronald Dworkin argues that the abortion debate is actually a debate about the sacredness of human life in which one party (the pro-life movement) grants more weight to the \textit{natural investment}, that is, God's or nature's biological intervention, and the other (the pro-choice movement) stresses instead the \textit{human investment}, that is, the interest people have in the lives of their loved ones; and, from this factual interpretation, he seemingly draws a normative recommendation about how liberal societies ought to view abortion -- namely, that they should be permissive about it. Also, in a recent article, John Rawls states that opponents to abortion may present an argument in public reason for not granting a right to abortion; but, if they fail to win a majority, since they need not themselves exercise the involved right, they can recognise it as belonging to legitimate law, and forceful resistance as unreasonable.\textsuperscript{19}
Apparently, on these views, what is at issue in the abortion dilemma is merely a disagreement in worldviews between citizens -- and, as such, a personal question of individual conscience. The normative conclusion is therefore that the law should not take sides -- or, more strongly, that it should decide in favor of freedom. This means to say that the question of abortion falls in area C, that is, that in abortion no interests of others are involved. But this is simply question begging. As it has been stressed within the context of bioethical discussions, "the dispute about abortion is, largely, a dispute about whether or not abortion does have a 'victim'" -- whether, that is, there is or there is not another party involved -- and, as a consequence, one cannot simply ignore it on the grounds that people should not attempt to force others to follow their own moral views. It seems plausible to hold that, by simply ignoring the possibility that the fetus is another party with a moral status of its own, the conclusion defended by Dworkin and Rawls fails as a normative theory.

But the claim that what is in question in the abortion issue is merely a disagreement in worldviews between citizens seems to fail as an empirical description as well. For such an approach is not the model that prevails within liberal societies. If, in fact, abortion were seen as obviously falling in area C -- if, that is, our societies on the whole opted for the view that, as far as abortion is concerned, there definitely are no other parties' interests involved -- no distinctions would be traced between early and late abortions. Such distinctions somehow express the widespread idea -- which is also defended by many bioethicists -- that the problem of the moral status of unborn human beings is not a single issue, but one that should be split at least into two parts: the question of the status of the human sentient fetus (as in late abortions), and the question of the status of the embryo and the human non-sentient fetus (as in early abortions). In this latter case, some liberal authors do defend the idea that society should "take sides", as Will Kymlicka does when, with reference to the issue of embryo experimentation, he suggests the pursuit of a convergence in government commissions. In the light both of these difficulties and of the fact that abortion is a profoundly dividing issue, liberal societies are inclined to settle the matter through leaving it to be decided by some sort of political bargaining. What wins, therefore, is usually the majority's opinion, as expressed either directly by the voters, or indirectly by the political prevalence of one of the two confronting sides. Within such a framework, one can conclude that the issue of (both early and late) abortion tends to be seen as pertaining to area B. This corresponds to saying that, in the abortion issue, a) there are (at least sometimes) other parties' interests involved, and b) such interests are not basic because, were they so, they would be protected by being inserted in area A. So, we seem to have other parties who have non-basic interests, while apparently lacking basic interests.

The question of abortion is not the only one in which this paradox arises. Another -- and a very prominent one -- is the question of the treatment of the members of other-than-human species. What is, in this case, the standard liberal view? In the (uncommon) cases in which they directly confront the status of nonhuman beings, liberal authors advance, albeit in an scarcely articulated way, the suggestion that animals, though they are indeed other parties, should not be covered by institutionalized side-constraints -- an idea presumably influenced by the previous, more extreme view according to which legislation concerning animals falls within the so-called "crimes without victims". Joel Feinberg offers a good example of the way this suggestion is formulated when he states that "kindness and 'humanity'", while not sufficient for human beings, are "sufficient to satisfy the rights of animals". Such words almost literally echo John Rawls's view that, while humans are owed equal justice, we can only have duties of compassion and humanity towards animals. This appears tantamount to saying that in the case of nonhumans as well we find other
parties who have non-basic interests while lacking those basic interests which should be protected by being inserted in area A.

It is easy to see why the paradox arises. If, in fact, human sentient fetuses and the member of other species were ceteris paribus recognized to have basic interests to be placed in area A, without changing the ways in which it is permissible to treat them, the structure of the area would be transformed. To put all this more formally, we can imagine area A as a field of forces that represent individual basic interests, and that are governed by procedural principles which both protect them and curb them, by compelling them, so to speak, to run in parallel in order to avoid mutual interference. It is clear that if some of the included forces were granted the possibility of doing as they please with other included forces the idea of a pure procedural framework would collapse. As a consequence, the interests of the disadvantaged beings cannot be inserted, lest the procedural core of liberalism be undermined.

Is there a possibility of avoiding the paradox? The only way that seems open, and the one that contemporary liberalism has actually opted for, lies in claiming that the interests in question can be discounted -- that is, can be excluded from area A -- not because they are non-basic interests, but because the individuals who bear them can be discounted. This would somehow save the previous distinction, with area B including non-basic interests of, let's call them, basic individuals, and basic interests of non-basic individuals.

It is, however, apparent that liberals cannot ground the view that the individual bearers of the interests involved are second-class individuals, or non-standard parties, without putting once again formality at risk, albeit in a different sense -- a sense which has to do with liberal neutrality. For by confining the side-constraints characterizing area A to some parties, one merely pushes the problem onto a higher level. If a liberal state should be neutral in the sense of avoiding perfectionism in evaluating the merits of competing conceptions of the good life, it should be also neutral in the sense of avoiding perfectionism in evaluating the comparative moral status of individuals. But by granting protection only to some individuals, and leaving other individuals more or less at their mercy -- insofar as non-standard parties' interests will always be overridden by the interests of standard parties -- contemporary liberal theory breaks the moral community into two constituencies which are hierarchically arranged, and it attributes differential value to individuals. Hence, far from merely providing general, formal conditions for morality, it advances a substantive and specific interpretation of it, thus giving up neutrality among individuals.

III.

Against the claim that the subdivision of the moral community into two levels which is required to save the liberal claim to formalism invalidates such a claim at a higher level, thus disclosing the substantive nature of present liberal theory, one might advance a rejoinder. The moral community, one might say, is one thing; what we may call the "political community" is something else altogether. This reply, which is somewhat reminiscent of the interpretation of justice as an artificial virtue, and of the distinction between natural and what we may call "institutional" duties, is deeply rooted in the history of political philosophy, and in particular in the social contract tradition. Following Rawls, it could be roughly summarized as follows. Political philosophy is a separate and narrower subject than ethics, because it must regulate the relations through common political
institutions among persons who hold a plurality of comprehensive moral views. On this account, political society, unlike more or less natural communities, is a sort of artifact -- a cooperative enterprise whose creation and maintenance depends on the coordinated work of its parties. To create and to maintain such enterprise, one must have some specific cognitive characteristics -- remember the construal of all human beings as free and rational moral agents, endowed with the ability to regulate and guide their lives in accordance with principles. Simply, those who do not contribute to the enterprise are not accorded the advantages it confers.28

The reply is surprising, however. If, as liberalism argued since its dawn, states are instituted, mainly and primarily, to secure the individuals' interest in basic protection from interference, what have specific cognitive skills to do with such interest? Granted, specific cognitive skills are required to vote, to represent other members of the community, to exercise freedom of speech or of religion. But can a theory still be considered liberal when, as Rawls suggested, it entrusts life-and-death decisions regarding certain individuals to the plurality of “comprehensive” moral views? Are liberals justified in maintaining that individuals who cannot understand, for example, what voting is, may be deprived of basic moral protection? Isn't this an unwarranted inference?

If it is, one can plausibly argue that what made it go unnoticed cannot be anything but the surreptitious move we have noted at the outset -- that is, the translation of the key notion of liberalism, that of "individual", into the more demanding notion of "rational moral individual", or "person". Though endowed with an important history within moral philosophy, the notion of person was easily appropriated by political philosophy just because, among its several interpretations, one corresponded well to the particular sort of party that liberal authors had, and still have, in mind. The apparently harmless steps are the following: to be a party in political society an individual should be a rational moral agent; rational moral agents are called persons; to be a party to political society one should be a person. What is the result of such a translation? Because "person" is also normally used to mean "individual", what this particular instance of transitivity achieves is to conceal the substantive nature of its notion of individual. The requisite of rational moral agency is, so to speak, only hinted at, and such phrases as "all persons are equal" or "personal freedom" sound as if they really covered all members of the society.

But, in contrast with what the abstract approach of political philosophers suggests, it is clear that human societies do not include only "persons". It is undeniable that our communities include adult human beings who, on account of structural problems due to genetic or developmental anomalies, or of contingent problems due to diseases or accidents, will never acquire, or have forever lost, the characteristics that we consider as typical of persons -- the brain-damaged, the severely intellectually disabled, the irreversibly senile. What is our position with reference to these non-paradigmatic humans? Do we hold either that our "personal" freedom includes the possibility to do with them as we please (area C), or that decisions about their basic interests can fall within the reach of ordinary political bargaining (area B)? We do not. In other words, we believe that institutionalized side-constraints -- the procedural aspects of the state organization that express themselves in securing the individuals' impartial protection -- apply to them too. Though non-paradigmatic humans may have a reduced capacity for independent living, we think they should be fully assimilated into the wider society.

Why do we think so? Because, I hold, we correctly see that the liberal notion of individual cannot
be validly translated into the notion of "rational moral agent". If one wants to avoid substantivity -- that is, once again, if one wants to remain formal -- the definition of individual should be, so to speak, analytically true. And if one starts from the central idea of liberalism, the idea of freedom, it is unwarranted to conceive of it in terms of the Kantian "freedom of the will"\textsuperscript{29} rather than in terms of the less demanding notion of "freedom of choice". The only analytic definition of individual is not that of a rational moral agent, but that of a chooser -- a being who can exhibit a series of attitudes ranging from deliberated decisions to, in the words of American philosopher Gregory Vlastos, those "subtler modulations and more spontaneous expressions of individual preference"\textsuperscript{30} which could scarcely be called decisions. And this because, as it has been aptly noticed, what liberals value is not (a certain sort of) freedom for its own sake, but rather the individuals' own goals, which are the most important things in their lives.\textsuperscript{31} In other words, in order to be able to enjoy freedom, an individual merely needs to possess those mental and physical abilities which enable her to have goals and to pursue them.

IV.

Where does this leave one with respect to human sentient fetuses and nonhuman animals? What kind of modifications should liberalism embody to avoid the surreptitious introduction of substantivity that the passage from the individual conceived as chooser to the individual conceived as a rational moral agent implies? At this point, the situations of human sentient fetuses and of nonhuman animals part company. Many nonhuman animals are certainly choosers: they clearly evince their preferences, and actively pursue their goals.\textsuperscript{32} As a consequence, their basic treatment - inclusive of the protection of life, freedom and welfare -- should be removed both from mere 'personal' choice (area C) and from majoritarian politics (area B), and should instead be submitted to institutional side-constraints (area A).\textsuperscript{33}

The situation is different and much more controversial as regards human sentient fetuses. Can we see them as choosers? Notice that all revolves around this point. For, though a recent strand of bioethical thought tends to grant an interest in (and accordingly a right to) life only to those beings who are self-aware, we can here ignore this stance, since liberalism does not appeal to such nuanced differences, but revolves instead around a single, categorical core concept. Is this core concept applicable to human sentient fetuses? Well, no and yes. No, if we see choice as a notion directly connected to action, insofar as such beings obviously have no possibility of engaging in the pursuit of their goals. Yes, if we see choice as a notion which includes more passive aspects, like the mere exhibition of pro- or con-attitudes. Of the two answers, the latter seems more consistent with the present treatment of the most profoundly disabled among the non-paradigmatic humans we mentioned before, who, as far as agency is concerned, are apparently in the same boat as sentient fetuses.\textsuperscript{34} If we opt for this alternative, we should remove late abortions from area B, and insert instead their prima facie prohibition in area A. The proviso "prima facie" is needed in the light of the particular fact that the late abortion situation is quintessentially a case of conflict -- the conflict between the mother's interests and the unborn's interests -- and such a peculiar, radical conflict should make room for some further assessments of the situation.\textsuperscript{35}

In the face of these considerations, a question seems naturally to arise: why do liberal societies actually behave quite differently in the three instances we have considered? Why, that is, are profoundly intellectually disabled humans as institutionally protected as any normal human being,
while on the one hand, nonhuman animals, and, on the other, human sentient fetuses are commonly handed over to the outcomes of majoritarian politics? I suggest that, behind these different standards, lies a theoretical attitude which is older than liberalism, and which liberalism is at pains to free itself from, but which always turns up again like a bad penny.

Put very roughly, what we can discover here is the influence of that contractarianism of Hobbesian descent according to which it must be mutually advantageous for individuals to accept conventions that recognize and protect each other's interests. Such a doctrine includes within the factors that should be taken into consideration in order to build an organized society what we might call the "threatening power" of the possible parties, thus excluding a priori those beings lacking any capacity for retaliation, or even self-assertion. While in the crudest versions of contract-based doctrines the reference is to physical power, as far as most contemporary agreement-based theories are concerned, a weakened and revised version of threatening power can be clearly recognized in the ability to speak out for oneself. A further step is the possibility of having someone who speaks out on one's behalf. 36

The importance, both actual and metaphorical, granted to the fact of speaking out can be traced in many areas of moral and political reflection. In general, the centrality of the capacity for language among criteria for (full) moral status in most mainstream western philosophy is connected to the question of the cognitive skills it may be a mark of. I will not, however, enter here into the details of this particular aspect and of the attendant discussions. 37 What is relevant in this context is instead the connection that can be established between the possession of language and the ability to assert one's interests it confers. Such a connection, which is normally present in a more or less implicit way, becomes in some instances particularly evident. An especially obvious example is the case of the avowed centrality of verbal capacities in the so called discourse ethics, apropos of which one of its main upholders, the German philosopher Jürgen Habermas, openly admits that it has difficulties in dealing with the vulnerability of the "dumb creature". 38 Another example is the significance often attributed to the ability to claim something, as demonstrated e.g., within the general debate on rights, by that "choice theory" which -- in contrast with the "interest theory" grounding rights in the benefit one derives from them -- openly connects the possession of a right to the power to assert it. 39 This theoretical aspect finds a clear parallel in the social fact, emphasized by authors dealing with the sociology of law, that the recognition of rights actually requires some sort of force and imposition.

It is worth stressing that such force and imposition should not necessarily come directly from those who aspire to rights. They may come instead from different, enlightened and more powerful groups which can make their voice heard on behalf of other silent parties. As it has been observed, "a form of strength which is anything but negligible is represented by cultural factors such as the ethical values accepted by a substantial part of the community . . . which is capable of imposing its values". 40 This is just what happened, after centuries of moral and political dismissal, in the case of profoundly intellectually disabled human beings: overcoming indifference and opposition, someone powerful enough spoke out for them, and, starting from the 1960s, a series of international declarations on their rights were issued. 41 This is, however, what -- perhaps due to the invisibility of the entities involved -- has not actually happened in the case of human sentient fetuses, despite the analogies between them and some among these non-paradigmatic human beings. All the more
so, this is what has not happened in the case of those nonhuman animals who are clearly choosers -- who, that is, clearly meet the central requirement of liberalism -- and would therefore deserve a form of institutionalized protection from murder, torture and enslavement. For nonhuman animals are quintessentially silent: not being able to speak out for themselves, they haven't as yet found any group influential enough to effectively claim their rights.

If, however, liberal reason finally gets rid of the shadow of Hobbesian self-interest -- if, that is, it comes to recognize that by its implicit reference to power it artificially restricts the expansive force of impartiality -- even silent parties will finally make their way to a fair coexistence with us in our societies. At least as far as the status of nonhumans is concerned, some signs of a shift are already detectable. It is plausible to claim that only if such a process continues will liberalism free itself of any form of substantivity, actually achieving its self-proclaimed formal -- that is, procedural, neutral, and analytic -- nature.

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Notes


2. See "Michel Foucault et la question du liberalism", text established by M. Senellart and derived from a lesson held on January 24, 1979 as a part of the course "Naissance de la biopolitique" (College de France, year 1978/1979).


7. This specific construal of "person" is characteristic of political philosophy. In bioethics, a "person" is most often seen as a (more or less) rational self-aware being, and the requisite of full moral agency is frequently dropped.


9. Clearly, the word "individual" refers in this specific case to moral agents. Also, it should be clear that in the following argument "personal" and "impersonal" have no particular connection with the notion of person, but bear instead on the contrast between the self-interested and the impartial stance.
10. Ibid., p. 11.

11. Ibid., p. 53.

12. Ibid., p. 141.


16. From now on, when I employ the term "interest" without further qualifications, I will do it with reference to those interests which are not so trivial as to clearly fail to pass the "harm to others" test mentioned above.


18. Ibid., pp. 146-147.


22. Actually, in U.S., area A is involved in the abortion question, but only in the opposite sense that the discussion revolves around the possible existence of a constitutional right to abortion.


27. See e.g. John Rawls, A Theory of Justice, cit., p.114-117.

28. For Rawls’s claim that there is a distinction between a political conception of the basic principles of society and a broader moral conception, and that, as a consequence, there is a special question of the principles that apply to our relations to one another when we are engaged in the enterprise of enforcing and following the rules of a common state, see in particular his "The Idea of Public Reason Revisited", cit.


32. In this regard, it is worth noticing that, within the field of bioethics, a case has even been made for the attribution of personhood to some members of other species, most notably the nonhuman great apes. See e.g. Peter Singer and Paola Cavalieri, "Apes, Persons, and Bioethics", in B. Galdikas, N. Briggs, L. Sheeran, G. Shapiro, and J. Goodall (eds), All Apes Great and Small: Volume I: African Apes, Kluwer Academic/Plenum Publishers, New York 2001; and the special issue of Etica & Animali devoted to Nonhuman Personhood (vol. 8, 1998).

33. This would mean at the very least to remove their status of property, and to make them subjects, rather than objects, of legal rights. See my The Animal Question, Oxford University Press, Oxford 2001, Chapter VI.

34. On the actual abilities of these unfortunate members of our species see among others Christoph Anstötz, "Profoundly Intellectually Disabled Humans and the Great Apes: A Comparison", in P. Cavalieri and P. Singer, The Great Ape Project, St. Martin's Press, New York 1994, pp. 158-172. The double standards in the treatment of human sentient fetuses and comparably mentally endowed members of our species is -- albeit with different nuances -- noticed also by English philosopher John Horton, when he states that "one suspects that Rawls and many other liberals would be rightly unimpressed by [the] observation on behalf of a religious cult that its practice of infant sacrifice did not require non-adherents to participate". See John Horton, "Rawls, Public Reason and the Limits of Liberal Justification", Paper for the Political Studies Association-UK, 50th Annual Conference,10-13 April 2000, London.

Boston Review, Summer 1995, where she so concludes her argument: "if I was correct in saying that there is nothing unreasonable in believing that at least early abortion violates no rights. . .". (Italics mine). For an exploration of the possible qualifications, see e.g. the tentative discussion by Joel Feinberg in "Abortion", in Tom Regan (ed.), Matters of Life and Death, 2nd edn, Random House, New York 1986, especially pp. 275-287.

36. Along these lines, John Horton observes that a democratic decision-making process seems especially vulnerable to doubts about the legitimacy of a policy "where the decisions relate to those who are not party to the political process itself, whether it be fetuses, children, future generations or animals". See his "Rawls, Public Reason and the Limits of Liberal Justification", cit. For a discussion of how mutual advantage is introduced even into an impartialist contractarian theory such as Rawls’s through the acceptance of Hume’s requirement of relative equality in power between the parties, cf. Paola Cavalieri and Will Kymlicka, "Expanding the Social Contract", Etica & Animali 8 (1996).

37. I have dealt with this facet of the issue in The Animal Question, cit., pp. 19-22 and 41-47.

38. See "Treffen Hegels Einwände gegen Kant auch auf die Diskursethik zu?", in Jürgen Habermas, Erläuterungen zur Diskursethik, Suhrkamp Verlag, Frankfurt a. M. 1991. Not haphazardly, Habermas, who distinguishes the universalist point of view of morals -- having to do with the right -- from the partialist point of view of ethics -- having to do with the good -- tends to think that the question of abortion should be dealt with within the latter, rather than the former, context. See his "Erläuterungen zur Diskursethik", ibid.

39. The choice theory is advanced by H. L. A. Hart, while the interest theory is defended, among others, by Joseph Raz.


41. On the issuing of such declarations, as well as on specific national exertions in the direction of their implementation see Christoph Anstötz, "Profundly Intellectually Disabled Humans and the Great Apes: A Comparison", cit, pp. 158-163.

42. A more in-depth treatment of this point can be found in Paola Cavalieri and Will Kymlicka, "Expanding the Social Contract", cit.

43. I do not consider here the attempts -- usually endorsed by religious groups -- to grant legal personhood to the human fetus since its conception because, by lumping together the embryo/non-sentient fetus and the sentient fetus, they confuse exactly that which should be kept separated. As regards nonhumans, on the other hand, in U.S. the growing interest in the topic is demonstrated by public debates among legal scholars. Law professor Cass Sunstein, for example, recently supported the appointment of legal guardians for animals, and constitutional scholar Laurence Tribe, after arguing that the status of animals as things must be rethought, observed that the 13th Amendment to the U.S. Constitution forbidding slavery nowhere states that only humans are covered (cf. David Bank, "A Harvard Professor Lobbies to Save U.S. Chimps", The Wall Street Journal, 4/25/02, p. 1). Moreover, a first practical step in the direction of change has been taken in Europe by the
Bundestag, which has given animals a -- though quite limited -- sort of constitutional protection by inserting them into a clause of the German Basic Law (see www.cnn.com/2002/WORLD/europe/05/17/germany.animals/index.html.

44. I would like to thank Will Kymlicka, Harlan B. Miller, Thomas Nagel and Peter Singer for their helpful comments on drafts of this paper.