

# ARTICLES

## A CONTRACTARIAN VIEW OF ANIMAL RIGHTS: INSURING AGAINST THE POSSIBILITY OF BEING A NON-HUMAN ANIMAL

By  
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*Contemporary research regarding non-human animals' intelligence, emotional life, and capacity for reciprocity strongly suggests the need for a sweeping re-evaluation of their legal status as mere property. In this essay, the author will contend that the contractarian theory of philosopher John Rawls provides an ideal basis for this re-evaluation. Rawls's theory holds that the just rules for a given real-world society are those that would rationally be chosen behind an imaginary "veil of ignorance," where the deciding parties are placed in an "original position" in which they have no idea of their personal qualities or the positions they will ultimately occupy in a real-world society. In the "original position," Rawls contends, parties will metaphorically "insure against" contingencies such as being poor or disabled, by arranging society to offer a social safety net for persons in those situations. However, what about the contingency of being a non-human animal? The author will argue that although Rawls intentionally left this contingency out, it should be included. The author comments on the profound changes to current law that would result if rules devised behind Rawls's veil of ignorance took into account the contingency that, in real-life society, parties would be not humans, but non-human animals.*

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## I. INTRODUCTION

Peter Singer has put forward a well-developed version of what a utilitarian perspective on animal rights might look like.<sup>1</sup> But what about a contractarian view of animal rights?

John Rawls noted that “[d]uring much of modern moral philosophy the predominant systematic theory has been some form of utilitarianism,” and he offered a worthy competitor in “the traditional theory of the social contract.”<sup>2</sup> In a nutshell, Rawls argued that the just rules for a given real-world society are those that would rationally be chosen behind an imaginary “veil of ignorance,” where the deciding parties are placed in an “original position” in which they have no idea of their strengths and weaknesses (or, indeed, any of their personal qualities) or of the positions they will ultimately occupy in a real-world society.<sup>3</sup>

<sup>1</sup> See generally Peter Singer, *Animal Liberation* (Harper Perennial 2001) (arguing for animal liberation under the utilitarian model).

<sup>2</sup> John Rawls, *A Theory of Justice*, vii–viii (Harvard U. Press 1971).

<sup>3</sup> *Id.* at 11–22.

The shift Rawls brought to moral philosophy in general is long overdue in the field of animal rights in particular.

A contractarian approach should govern our analysis of animal rights issues and those behind Rawls's veil of ignorance ought to consider the contingency that, in society, they may end up not as a human being, but rather a non-human animal. Only by considering this contingency—and insuring against it as they would insure against any other contingency, can those behind the veil of ignorance devise rules that are truly just.<sup>4</sup>

Philosopher Mark Rowlands reaches the same conclusion: Rawls's contractarian philosophy implies the need to take non-human animal rights into account.<sup>5</sup> However, this essay will supply a version of the argument that is somewhat different from Rowlands's and will consider the concrete legal implications that might follow in the American system if contractarian justice were extended to animal rights issues.

Rawls was conservative in extrapolating from his basic contractarian framework. Rightly so: he was looking for philosophical tenets that uncontroversially and logically followed from his basic assumptions. This essay goes beyond the idea of pure logical entailment, to consider the kinds of real-life laws and regulations that might, in practice, result from thinking about animal rights from a contractarian perspective. This essay considers animal rights not only from a philosophical viewpoint, but also from a legal viewpoint, and attempts to translate a new concept of animal rights into actual legal measures that affect real-life non-human animals and the people who co-exist with them.

Rawls himself rejected the application of his contractarian theory of justice to non-human animals.<sup>6</sup> Though he remarked that “[a]t the

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<sup>4</sup> For these purposes, “insuring against a contingency” means deciding, behind the veil of ignorance, to arrange the rules of a real-world society so that, if the contingency occurs and affects them, it will not do too much harm. For example, creating a social safety net is one way of insuring against the contingency that one might be poor.

<sup>5</sup> See generally Mark Rowlands, *Animals Like Us* ch. 3 (Colin McGinn ed., Verso 2002) (discussing similarities between Rowland's “impartial position” and Rawls's “original position”); Mark Rowlands, *Animal Rights: A Philosophical Defence* ch. 6 (Palgrave 1998) (analyzing Rawls's original position theory and contractarianism).

<sup>6</sup> Rawls, *supra* n. 2, at 504–12. While Rawls's decision to exclude non-human animals is clear, his expression of his views is ambivalent. “Our conduct toward [non-human] animals is not regulated by these principles [of justice], or so it is generally believed.” *Id.* at 504. Could Rawls have been suggesting the general consensus on this score is perhaps not as well-founded as it might seem? He seems to be hedging his bets. Rawls also emphasizes that humans surely do not have carte blanche, morally, with respect to non-human animals. “Certainly it is wrong to be cruel to [non-human] animals and the destruction of a whole species can be a great evil.” *Id.* at 512. He also opens the way to taking non-human animals' interests into consideration in some future metaphysics that would give an account of “the natural order and our place in it.” *Id.* Finally, Rawls mentions the way in which the “spontaneous play of children and [non-human] animals” leads to innovation, diversity, and complexity by “call[ing] forth a more complex array of abilities and new ways of doing things.” *Id.* at 429. This passage

basis of the theory, one tries to assume as little as possible,”<sup>7</sup> he effectively assumed away billions of the world’s creatures, including our close evolutionary cousins.

Martha Nussbaum, once Rawls’s student, joins Rawls in rejecting the application of contractarianism to animal rights.<sup>8</sup> Unlike Rawls, she recognizes the importance of contemporary research regarding the intelligence and capacity for reciprocity of non-human animals<sup>9</sup>—research not available to Rawls. Yet, even with this research to rely on, Nussbaum admits a failure of imagination prevents her from incorporating non-human animals as part of a contractarian approach to devising just social rules.<sup>10</sup>

Part I of this essay explains how Rawls erred in excluding non-human animals from his theory of contractarian justice and notes many elements in Rawls’s own theory that actually militate in favor of recognizing animal rights as an integral part of contractarianism.

Part II demonstrates that Nussbaum, too, is in error. As research reveals more similarities between humans and non-human animals, the leap of imagination required to imagine oneself potentially being a non-human animal becomes easier to make. In any event, as Mark Rowlands argues, this imaginative leap simply is not required for the analytical consideration of what would be best from a non-human animal’s perspective.

Part III suggests which substantive principles might follow from applying contractarianism to the subject of animal rights. That is, which particular societal rules those behind the veil of ignorance would settle upon if they did not know whether they would turn out to be humans or non-human animals.

As research makes it ever more clear that non-human animals are far closer to “persons” than “property,”<sup>11</sup> the current system’s insistence on categorizing them as property seems more inaccurate and un-

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indicates some recognition by Rawls of the intelligence of non-human animals as expressed in their capacity to innovate.

<sup>7</sup> *Id.* at 129.

<sup>8</sup> Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 327–33 (Harvard U. Press 2006).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 332–33.

<sup>11</sup> See generally e.g. Jeffrey Moussaieff Masson & Susan McCarthy, *When Elephants Weep: The Emotional Lives of Animals*, xxii–xxiii (Delacorte Press 1995) (using accounts from scientists studying non-human animals in the field to conclude non-human animals experience a range of emotions as humans do, and this should inform human moral choices); Marc Bekoff, *The Emotional Lives of Animals: A Leading Scientist Explores Animal Joy, Sorrow, and Empathy—and Why They Matter*, xviii–xx (New World Library 2007) (compiling scientific evidence in the field of cognitive ethology, the study of non-human animal minds, to support the existence of a variety of emotions in non-human animals); Jane Goodall, *My Life with the Chimpanzee*, 20–21 (Aladdin 1996) (discussing the human-like qualities of chimpanzees); Randolph E. Schmid, Associated Press, *Apes Shown to Be Able to Plan Ahead*, [http://www.breitbart.com/article.php?id=D8HMGU6O0&show\\_article=1](http://www.breitbart.com/article.php?id=D8HMGU6O0&show_article=1) (May 18, 2006) (discussing how orangutans and bonobos ascertained which tool worked best for a given purpose and remembered to bring it

fair. Contractarianism is the best guide in figuring out how to modify laws to accommodate what research has revealed regarding non-human animals' surprisingly humanlike capacities, and to move their legal status far closer to that of persons, rather than inanimate objects utterly subject to human will and whim. Like children and the mentally disabled, under a contractarian philosophy, non-human animals would be accorded the subset of human rights which fits with the reality of their capacities.

## II. ELEMENTS OF RAWLS'S THEORY THAT COUNSEL IN FAVOR OF INCLUDING NON-HUMAN ANIMALS IN A CONTRACTARIAN PHILOSOPHY

### A. *Can a System that Leaves Out Those with Lesser or Different Capacities Truly Be Deemed "Justice as Fairness"?*

Contrary to Rawls's ultimate conclusion, elements of his own theory suggest that non-human animals should be included in a contractarian theory of justice. For example, Rawls describes the "original position as an "initial choice situation" in which "no one should be advantaged or disadvantaged by natural fortune" and no one can "tailor principles to the circumstances of one's own case."<sup>12</sup> Thus, humans should not be able to rely on the fortune or circumstance of happening to be human in the original position. To give another example, Rawls postulates that, in the original position, parties would embrace the difference principle, which says that inequality is only justifiable if it improves the status of the least well-off.<sup>13</sup> In our society, the least well-off surely are non-human animals.

#### 1. *Rawls's Concept of Insuring Against the Event One Will Have Lesser Capabilities than Others in Society Applies in the Event One is a Non-human Animal*

First and foremost, Rawls's theory offers a conception of "justice as fairness."<sup>14</sup> Unlike the calculus of suffering and joy favored by utilitarians,<sup>15</sup> Rawls's theory focuses on the equality of persons within a particular system of justice, and on the fairness of the rules adopted vis-à-vis each of these persons.<sup>16</sup> Based on this description alone, Rawls's system might seem to be anathema to an animal rights viewpoint. Many would argue that non-human animals simply should not be counted as "persons" because, first, they lack the capacity to exercise autonomy and moral choice and, second, they lack a sufficiently so-

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along with them hours later) [hereinafter *Non-human Animal Cognition and Emotions*].

<sup>12</sup> Rawls, *supra* n. 2, at 8.

<sup>13</sup> *Id.* at 75.

<sup>14</sup> *Id.* at 3.

<sup>15</sup> Singer, *supra* n. 1.

<sup>16</sup> *Id.* at 11.

phisticated intelligence. However, these very same points could be made with respect to severely mentally disabled people and very young children, all of whom are clearly included in Rawls's theory. Moreover, as noted above, research is revealing that non-human animals are much more similar to humans in their analytical and emotional capacities, as well as in many more respects, than had previously been thought.<sup>17</sup>

Under Rawls's theory, a person behind the veil of ignorance must consider the contingency that he or she will be born severely mentally disabled, and the reality that for years, he or she will be a child. According to Rawls, one thing those behind the veil of ignorance will doubtless seek to do is to

*insure themselves against the possibility* that their powers are undeveloped and that they cannot rationally advance their interests, as in the case of children; or that through some misfortune or accident they are unable to make decisions for their good, as in the case of the seriously injured or mentally disabled.<sup>18</sup>

Here, as noted above, insuring against a possibility means choosing social rules that improve the real-world position of those for whom that possibility actually comes to pass. Why not also insure against the possibility that one would be a non-human animal, and thus subject to similar incapacities? This kind of safety net-like "insurance"<sup>19</sup> can be procured without limit in the original position behind the veil of ignorance. Therefore, it is rational to insure oneself against all contingencies that may arise where one will remain recognizably oneself.

It is unnecessary to insure against becoming an inanimate object such as a chair or a car, for such objects are insensate and indifferent to what happens to them. For this reason, if one somehow became one of these objects, one would no longer remain, in any sense, oneself. Of course, one might be able to imagine one's mind *trapped inside* the body of a car or chair, but one cannot imagine oneself truly *being* a car or chair, for that inherently implies one would be insensate and indifferent. Then one would no longer truly be oneself. Many non-human animals, however, are far from indifferent to what happens to them. To the contrary, they have the capacities to suffer joy and pain, just as humans do.<sup>20</sup> They want their children to thrive; they want to be

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<sup>17</sup> See generally *Non-Human Animal Cognition and Emotions*, *supra* n. 11 (numerous and varied sources recognizing the emotional and cognitive abilities of non-human animals).

<sup>18</sup> Rawls, *supra* n. 2, at 248–49 (emphasis added).

<sup>19</sup> *Supra* n. 4. Here, insuring against a contingency means choosing social rules that improve the real-world position of those for whom that contingency actually comes to pass.

<sup>20</sup> See e.g. John Noble Wilford, *Evidence of Chimps' Intelligence Grows*, Intl. Herald Trib., <http://www.iht.com/articles/2007/04/18/arts/snchimps.php> (April 18, 2007) (chimps seen as social creatures, capable of "empathy, altruism, self-awareness, cooperation in problem solving and learning through example and experience" and "even outperform[ing] humans in some memory tasks"); Jonathan Leake, *Dolphins 'Know Each*

warm and sheltered and fed; they want to avoid predators.<sup>21</sup> These capacities are the reason it makes sense to imagine oneself as, say, a cat, a dog, or a horse, and to imagine what one would want the legal system to look like if one were in that position.

Which non-human animals, in particular, have capacities such that the contingency of becoming one of them should be taken into account behind the veil of ignorance? The information needed to answer this question has evolved over time as more research on particular species has been done, and will doubtless continue to evolve. For now, the highest priority should be to ensure that non-human animals that are plainly sentient and have many of the same capacities as humans, such as dolphins and apes,<sup>22</sup> or the dogs and cats<sup>23</sup> that are our close companions, are included in the grand insurance scheme the parties behind the veil of ignorance will devise.

In the end, it is Rawls's and Nussbaum's position that is extreme. They would exclude *all* non-human animals from consideration behind the veil of ignorance, regardless of their degree of intelligence or the closeness of their emotional range to that of humans.<sup>24</sup> This extreme stance should be abandoned. Instead, those behind the veil of ignorance should include in their deliberations a reasoned consideration of the specific factual, research-based case for each species. This consideration should not depend on the species line, which is an exceptionally poor proxy for moral personhood. This consideration would ensure the protection of non-human animals through laws in real-life societies.

Not every possible step can be taken now, but that is no reason not to take the first step in the direction of analyzing animal rights issues from a contractarian perspective and amending laws accordingly. If a contractarian perspective is applied to animal rights, it reveals current societies to be highly unjust and suggests the need for major legal reform. Of course, this reform will not occur overnight, but it defines the ideal world to which society should aspire. Every movement in the di-

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*Other's Names*, Sun. Times, <http://www.timesonline.co.uk/tol/news/uk/article714144.ece> (May 7, 2006) (dolphins share human ability to recognize themselves and other members of the same species as possessing separate identities); Anushka de Rohan, *Deep Thinkers: The More We Study Dolphins, The Brighter They Turn Out to Be*, The Guardian, <http://www.guardian.co.uk/science/2003/jul/03/research.science> (July 3, 2003) (dolphins recognize their mirror images and build a network of relationships within their communities).

<sup>21</sup> See e.g. *id.*

<sup>22</sup> *Id.*

<sup>23</sup> See generally e.g. Stephen Budiansky, *The Character of Cats: The Origins, Intelligence, Behavior, and Stratagems of Felis Silvestris Catus* (Penguin Books 2003) (former U.S. News & World Report correspondent and Nature editor discusses evidence as to cats' intelligence); Stephen Budiansky, *The Truth About Dogs: An Inquiry into the Ancestry, Social Conventions, Mental Habits and Moral Fiber of Canis Familiaris* (Penguin Books 2000) (exploring the relationship between humans and dogs, including an examination of canine intelligence).

<sup>24</sup> Rawls, *supra* n. 2, at 17, 504–05, 512; Nussbaum, *supra* n. 8, at 331–38.

rection of that ideal world is worthwhile, for it brings society closer to the ideal of justice.

2. *“Justice as Fairness” Means Putting to the Side Attributes We Did Not Choose and Do Not Control*

It is not just Rawls’s idea of insuring against contingency in the original position that counsels the inclusion, behind the veil of ignorance, of consideration of the contingency that one may be a non-human animal in real-world society. It is also Rawls’s fundamental emphasis on moral desert: Our fate, he holds, should ideally not be determined by factors outside our own control. Thus, in addition to Rawls’s core concept of “justice as fairness,” another aspect of his theory also counsels the inclusion of non-human animals.

Rawls emphasizes that in an ethical society, “[t]hose who have been favored by nature, whoever they are . . . are not to gain merely because they are more gifted . . . No one deserves his greater natural capacity nor merits a more favorable starting place in society.”<sup>25</sup> But just as some humans are “favored by nature” with exceptional capacities, humans as a species are generally “favored by nature” with greater capacities than non-human animals. Following Rawls’s own logic, this lucky accident does not entitle humans to a “more favorable starting place” in society than non-human animals. To the contrary, according to Rawls, the favors nature differentially bestows are the very traits to be abstracted away behind the “veil of ignorance.”<sup>26</sup> In Rawls’s view, it is the antithesis of justice to be treated differently because of a quality that is neither rationally relevant, nor of one’s own choice.<sup>27</sup> Rawls is even more succinct when he says simply, “no one deserves his place in the distribution of native endowments.”<sup>28</sup> But does a human “deserve” to be able to speak or use tools, such that moral superiority flows from such “desert”? Does a non-human animal, in contrast, “deserve” to lack these abilities?

Species is not a relevant difference; we do not choose it and cannot control it. The species line—the division biologists recognize between one species and another—is based not on moral desert, but on the simple evolutionary fact of who can reproduce with whom and produce fertile offspring. It is thus a terrible line to use as any kind of proxy for moral desert. It is as absurd as saying, for instance, that infertile humans deserve fewer rights than fertile humans do.

*B. The Original Position: Hypotheticals Upon Hypotheticals*

The reason Rawls’s theory *can* include the mentally disabled and young children is the same reason it *ought to* include non-human animals. It postulates not a *real* contract (to which non-human animals

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<sup>25</sup> Rawls, *supra* n. 2, at 101–02.

<sup>26</sup> *Id.* at 137.

<sup>27</sup> *Id.* at 102.

<sup>28</sup> *Id.* at 104.



and mentally disabled persons would be meaningfully unable to assent) but a *hypothetical* one. As Rawls describes it, the hypothetical contract represents “the principles which free and equal persons would assent to under circumstances that are fair.”<sup>29</sup> To add to the abstract nature of the contract, it is entered into by hypothetical, rather than actual, persons. These imagined persons, moreover, are different from real persons in profoundly significant ways. For example, such persons are assumed to be “rational and mutually disinterested.”<sup>30</sup> Yet, real persons are often much more emotional than rational and are often connected to each other by complex bonds that are themselves more emotional than rational.<sup>31</sup> However, Rawls categorically excludes emotions from the original position, claiming, for example, that judgments “given when we are upset or frightened” are less reliable.<sup>32</sup>

Additionally, the imagined persons behind Rawls’s veil of ignorance are in a “purely hypothetical situation”—the “original position.”<sup>33</sup> In that position, these persons have no idea what characteristics they will have or into what social position they will be born. This plainly enhances the fairness of the rules they will settle upon, recalling the basic legal principle that one may not be the judge in his or her own case. When one lacks knowledge of the position one will occupy, it is impossible to be self-serving because one does not know what self to serve!

Rawls explains that the object of this abstraction is to rule out consideration of “natural fortune or social circumstance,” for these fortuities are “irrelevant from the standpoint of justice.”<sup>34</sup> One’s degree of intelligence, in particular, is not known, nor are one’s “natural assets and abilities.”<sup>35</sup> And it is behind this veil of ignorance—where no one’s qualities are known to him or herself, or to any other person—that this group of persons must decide upon the rules that will govern society.<sup>36</sup> With so much, and such unrealistic, abstraction occurring here, why is Rawls so resistant to abstracting away another nonessential feature of possible persons—whether they are human or non-human animals? Can anything but pure speciesism justify resistance to this step?

In considering this question, one should think of how much humans and non-human animals have in common, particularly when

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<sup>29</sup> *Id.* at 13.

<sup>30</sup> *Id.*

<sup>31</sup> Rawls, *supra* n. 2, at 14. Consider also that Rawls defines being “rational” to mean “taking the most effective means to given ends.” *Id.* How many people truly fit this definition of “rational” in daily life?

<sup>32</sup> *Id.* at 47. The basic idea that emotion tends to cloud, not clarify, judgment has its problems as well. Is a judgment to extend empathy, to one’s own detriment, truly inferior to a “rational” judgment to maximally protect oneself by punishing another as harshly as possible? Is one who acts out of love or mercy merely the victim of bad judgment?

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* at 18.

<sup>35</sup> *Id.* at 137.

<sup>36</sup> *Id.* at 12–13.

it comes to shared emotions.<sup>37</sup> What really differentiates “them” from “us”? Rawls has a few suggestions, but none are convincing.

1. *The Claim That Only “Moral Persons” Are Owed Justice*

Rawls requires those in the original position to be “creatures having a conception of their good and capable of a sense of justice.”<sup>38</sup> The conception of the good must be long-term, constituting a “rational plan of life,” and the “sense of justice” must consist of a “normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree.”<sup>39</sup> The basic idea is only “[t]hose who can give justice are owed justice.”<sup>40</sup> But this idea itself seems highly suspect. Is an insane criminal defendant, for example, not owed due process? Our very definition of insanity encompasses the inability to tell right from wrong: the very quality that Rawls seems to believe disqualifies non-human animals from being “moral persons.”

Can it really be the case, as Rawls would have it, that the most depraved human being deserves greater justice than does the gentlest non-human animal, simply because he happens to belong to a species that can “give justice,” though he himself cannot? Remember, again, how arbitrary the species line is; it depends on no higher consideration than who can procreate with whom to produce fertile offspring. Moreover, even assuming it is correct to say that non-human animals cannot choose moral action, it would also be correct to say that neither can they choose against it. It is far more accurate to characterize them as innocents, to the extent they truly do lack a moral sense. Thus, the parallel to an infant, who no one would deny enjoys a claim to justice, is much closer than the parallel to a serial killer.

However, the claim that non-human animals lack a moral sense is becoming increasingly tenuous. Non-human animals are now thought to experience many emotions that are inextricably connected with morality and moral choice.<sup>41</sup> As Jeffrey Moussaieff Masson and Susan McCarthy document, non-human animals “love and suffer, cry and laugh; their hearts rise up in anticipation and fall in despair. They are lonely, in love, disappointed, or curious; they look back with nostalgia and anticipate future happiness.”<sup>42</sup> Masson and McCarthy point out that “[t]he prejudice has long existed that only humans think and feel because only humans can communicate thoughts and feelings in words, whether written or spoken.”<sup>43</sup> Yet, communication can occur

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<sup>37</sup> See e.g. *Non-Human Animal Cognition and Emotions*, supra n. 11 (several texts discussing scientific research regarding non-human animals’ emotions).

<sup>38</sup> Rawls, supra n. 2, at 19.

<sup>39</sup> *Id.* at 505.

<sup>40</sup> *Id.* at 510.

<sup>41</sup> See e.g. *Non-Human Animal Cognition and Emotions*, supra n. 11 (several texts discussing morality in non-human animals).

<sup>42</sup> Masson & McCarthy, supra n. 11, at xxiii.

<sup>43</sup> *Id.* at 17.

without language and emotions can be displayed rather than communicated.

Additionally, non-human animals often make choices that would be called altruistic if done by humans.<sup>44</sup> Consider, for example, situations in which non-human animals take in non-human animals of other species, adopting them as their own children.<sup>45</sup> Surely, such non-human animals recognize that the non-human animals are not of their kind; after all, it is highly evolutionarily advantageous to hew to the species line. But they take care of them anyway. Granted, altruism may confer some evolutionary advantage, but evolution affected human beings' development of altruism too. This raises a key question. Why do humans get moral points for being altruistic, whereas non-human animals do not? To discount the good done by non-human animals, and their self-sacrificing choices, as ascribable to "instinct" is to use shorthand to obscure what otherwise would strongly seem like a moral choice. Is a human family that takes in an orphan operating on "instinct" alone? Non-human animals are hardly robots; as with humans, different individuals differ greatly in temperament and in the choices they make.

Insistence on avoiding anthropomorphism in research at any cost has blinded us to the genuine parallels between the emotions and behavior of humans and non-human animals.<sup>46</sup> Researchers were themselves psychologically invested in maintaining such blindness, so that they could continue to conduct the vastly cruel experiments that have been performed on non-human animals as developed as apes,<sup>47</sup> beagles,<sup>48</sup> and dolphins.<sup>49</sup>

Given extremely strong biological similarities, it seems quite logical to presume, until evidence rebuts the presumption, that the moral qualities non-human animals seem to display *are exactly that*. After all, that is the charitable presumption typically made about human beings.

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<sup>44</sup> See e.g. Associated Press, *Valiant Russell Terrier Dies Protecting 5 Kids*, <http://www.azstarnet.com/allheadlines/181259> (May 3, 2007) (discussing a terrier so "severely mauled" in fight to protect children against pit bulls that he had to be euthanized).

<sup>45</sup> Masson & McCarthy, *supra* n. 11, at 154–78 (citing interspecies adoption as an example of "the flexibility of parental love" in non-human animals); *Id.* (on "Compassion, Rescue, and the Altruism Debate"); E.g. Jennifer Ludden, *A Hippo and Tortoise Tale*, National Public Radio, <http://www.npr.org/templates/story/story.php?storyId=4754996> (July 17, 2005) (describing the story of Mzee the hippopotamus, who adopted Owen the baby tortoise).

<sup>46</sup> See *Non-Human Animal Cognition and Emotions*, *supra* n. 11.

<sup>47</sup> Goodall, *supra* n. 11, at 121.

<sup>48</sup> E.g. Kristen Von Kriesler, *For Bea: The Story of the Beagle Who Changed My Life* (Penguin Group 2003) (describing the story of author's adoption and rehabilitation of her dog Bea and the plight of other beagles used in lab research).

<sup>49</sup> Masson & McCarthy, *supra* n. 11, at 236. No wonder, as Masson notes, dolphin scientist John Lilly stopped working with dolphins when he came to the moral realization that he "didn't want to run a concentration camp for highly developed beings." *Id.*

## 2. *The Claim That Only Intentional Cooperators Are Owed Justice*

Another reason Rawls excludes non-human animals from his theory is his stipulation that a society that enjoys the “circumstances of justice” must be one in which all individuals are capable of engaging in “cooperation.”<sup>50</sup> There are three problems with using the cooperation requirement to exclude non-human animals.

First, even in human societies, not all members can truly cooperate. Members may be mentally incompetent, still in childhood, afflicted by an addiction that regularly overcomes their rational capacities, or so prone to outbursts of rage and violence that they are imprisoned. Nevertheless, behind the veil of ignorance, the contingency that one may be any of these kinds of individuals is still taken into account and insured against.

Second, many non-human animals can be trained to cooperate with the subset of social rules that actually apply to them, from simple toilet training to non-aggression.

Third, in a mixed society of humans and non-human animals, a description that characterizes virtually every human society,<sup>51</sup> the ability of humans, and some non-human animals, to cooperate, combined with humans’ ability to enforce rules, can allow the critical mass of effective law to exist and the society to function. This is true even if the ability of some humans and many non-human animals to cooperate is limited, and non-human animals typically cannot enforce rules.<sup>52</sup>

In sum, not every member of a society must be a rational cooperator for the society to function. Only those responsible for compliance need to fulfill this condition. Not every ordinary American, for example, need know the ins and outs of antitrust law, as long as the persons tasked with its enforcement and adjudication do. Leaving out those who are incapable of cooperating is especially dangerous, for these may well be the same populations who are incapable of protecting themselves against the more capable.

### III. NUSSBAUM’S VIEWS ON RAWLS AND NON-HUMAN ANIMALS

Martha Nussbaum argues for “recognizing the extent of intelligence in many nonhuman animals,” citing recent research revealing non-human animals’ capacities to be much greater than previously thought.<sup>53</sup> Despite this recognition, Nussbaum, like Rawls, continues to deny non-human animals a place behind the veil of ignorance,

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<sup>50</sup> Rawls, *supra* n. 2, at 126.

<sup>51</sup> See Adrian Franklin, *Animals and Modern Culture: A Sociology of Human-Animal Relations in Modernity* (Sage Publications Ltd. 1999) (highlighting the changes in human and animal relationships in the modern world).

<sup>52</sup> There are a few examples of animals enforcing rules, such as a sheepdog enforcing rules upon sheep as to where they can graze.

<sup>53</sup> Nussbaum, *supra* n. 8, at 327.

where the social rules that will affect human and non-human animals alike are set down. In Nussbaum's view, as in Rawls's, although those behind the veil of ignorance must consider and devise rules in light of the chance that they may be of any possible race, ethnicity, gender, or degree of wealth and with any possible human disability or health issue, they still need not consider the possibility that they might be even a non-human animal closely related, evolutionarily, to humans. With all other arbitrary distinctions erased, this one persists for Nussbaum and Rawls—simply because of a speciesist reluctance to erase it.

Nussbaum claims simply, and in a conclusory fashion, that “the whole idea of a contract involving both humans and nonhuman animals is fantastic, suggesting no clear scenario that would assist our thinking.”<sup>54</sup> Nussbaum does not see this idea as presenting a “coherent fiction that can help us think well.”<sup>55</sup> But this is merely a failure of imagination. A young child can imagine what it would be like to be a non-human animal, and fantasy and science fiction writers do it all the time. Moreover, contemporary research on non-human animals' capacities and natures, which Nussbaum herself notes is relevant, can enhance the accuracy of that imagination by educating humans about how non-human animals experience their lives.

However, even if a gulf remains, does it matter? Empathic gulfs and failures exist between humans too, and do not stop those behind the veil of ignorance from being asked to imagine themselves in any human state. It is immensely difficult to accurately imagine what it is like to be schizophrenic or psychotic—perhaps more so than to imagine oneself a gorilla, for instance. Moreover, that amount of imagination may not actually be required. Mark Rowlands makes the interesting point that, in this context, it ought to be sufficient to “imagine” that one is a non-human animal, in the sense of taking this point as an assumption for further analysis—not to actually imagine “what it is like” to be such a non-human animal.<sup>56</sup> After all, he adds, men need not fully imagine themselves post-sex-change, in every respect, to imagine that they have the vantage point of women.<sup>57</sup>

Similarly, recall that Rawls's system can be seen, metaphysically, as a kind of insurance scheme designed to avoid worst-case scenarios and protect against bad fortune. Surely when buying insurance, it is not necessary to be able to fully and accurately imagine oneself in the unfortunate positions to be insured against, including a position in which one is dead, one's will is being read in one's absence, and one's property is distributed to heirs!

The kind of empathic gulf Nussbaum experiences when thinking about non-human animals is a prime reason for considering the stances of such non-human animals when choosing society's rules. By

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<sup>54</sup> *Id.* at 333.

<sup>55</sup> *Id.*

<sup>56</sup> Rowlands, *Animals Like Us*, *supra* n. 5, at 68.

<sup>57</sup> *Id.*

comparison, part of the reason John Hart Ely argued for special protections for discrete and insular minorities was not just that they have lesser access to the political process, but also that society tends to lack empathy toward them due to prejudice, or simply due to the lack of accurate knowledge that arises from discreteness and insularity.<sup>58</sup> If we find alien those on the “other side of the tracks” or in the “gay neighborhood” or the “black neighborhood” in our own towns, how much more alien will we find those who make their homes in our forests and mountains, whom we rarely see and may have been taught to fear? Can we ever expect to give justice to wolves, if we refuse to even include the possibility of our imagining being them—or empathizing with them, which is much the same thing—in the context in which we frame our rules of justice? In gaining ethical and legal protection, surely a seat at the table—which is what consideration behind the veil of ignorance amounts to—is far more effective than mere paternalism. Yet, in the end, paternalism is all that Rawls and Nussbaum—who explicitly offer this alternative as a sort of consolation prize for non-human animals—can offer.<sup>59</sup>

Nussbaum, like Rawls, sees the analogy between mentally disabled humans and non-human animals, but fails to follow that analogy to its logical conclusion.<sup>60</sup> If the contingency of being a mentally disabled human must be considered behind the veil of ignorance, why not also the contingency of being a non-human animal? Nussbaum claims that non-human “animals cannot be primary subjects of justice, because they cannot be framers of contracts.”<sup>61</sup> This is just Rawls’s “cooperation/moral agency” argument all over again. And again, mentally disabled humans and children cannot enter into valid contracts either. Yet Nussbaum, a species loyalist, refuses to leave these humans out of the insurance scheme devised behind the veil of ignorance.

Nussbaum also claims that “the asymmetry of power between humans and nonhuman animals is too great to imagine any contract we might make with them as a real contract.”<sup>62</sup> However, what about the profound asymmetry of power between severely mentally disabled and non-mentally disabled humans, or between adults and children? Moreover, the modern asymmetry of power between humans and non-human animals should hardly be counted in humans’ favor morally because that asymmetry is largely of modern humans’ own making.<sup>63</sup> More generally, selectively endowing creatures with rights, depending on their capabilities and the degree of power they happen to wield or

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<sup>58</sup> See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U. Press 2006) (expanding the dialogue beyond political participation).

<sup>59</sup> Nussbaum, *supra* n. 8, at 378.

<sup>60</sup> *Id.* at 350–51.

<sup>61</sup> *Id.* at 335.

<sup>62</sup> *Id.* at 334.

<sup>63</sup> By comparison, a cave person may not have been so deeply confident as Nussbaum that the asymmetry of power between humans and tigers favored the humans’ side.

lack within a given society, is a very dangerous game. As Laurence Tribe has noted:

. . . [W]hen we insist that rights depend on the individual's possession of certain measurable traits such as self-awareness or the ability to form complex mental representations or to engage in moral reasoning, and when we treat it as a mere matter of grace or optional beneficence whenever a simulacrum of such rights is awarded as a privilege to human beings who lack all of those qualifying traits (like infants or the severely mentally retarded or the profoundly comatose), then it follows that it would be entirely permissible *not* to award those basic legal protections to such beings.<sup>64</sup>

As Tribe suggests, this is a slippery slope upon which one truly can slip. Valuing and categorizing beings based on capacities easily leads to the flip side of devaluing them based on capacities—and then treating them as if they lack inherent value. A “capabilities” approach is not only unfair, but leads to ugly slippery slopes in which individuals—not only non-human animals, but subgroups of humans too—could be deprived of rights.

#### IV. INSURING AGAINST THE CONTINGENCY OF BEING A NON-HUMAN ANIMAL: SPECIFIC LEGAL MEASURES THAT WOULD BE CHOSEN BEHIND THE VEIL OF IGNORANCE

If those behind the veil of ignorance included in their consideration the contingency that one might be a non-human animal, and had the choice to insure against that contingency by tailoring social rules to mitigate related risks and dangers, what consequences would follow? In answer to this key question, I will suggest that certain specific legal rules appear likely to be chosen.

##### A. *Considering Non-human Animals as Persons, Not Property*

Rawls concludes that someone behind the veil of ignorance would favor a social safety net of sorts, in which any inequality, to be just, must raise the general societal “floor.”<sup>65</sup> This, once again, is the “difference principle,” which prescribes the allowance of “[s]ocial and economic inequalities . . . only if they work as part of a scheme which improves the expectations of the least advantaged members of society.”<sup>66</sup> Presumably, this principle would still apply if, behind the veil of ignorance, it was necessary to insure not only against being a human of modest or limited capabilities, but also to insure against being a nonhuman animal. By this measure, current laws regarding non-human animals that deem them to be items of property, not persons, would *never* be chosen by those who might chance to be non-human animals themselves. For humans, slavery would plainly be rejected,

<sup>64</sup> Laurence Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 *Animal L.* 1, 7 (2001).

<sup>65</sup> Rawls, *supra* n. 2, at 65, 72, 87.

<sup>66</sup> *Id.* at 65.

Rawls argues, in the original position (unless, in certain bizarre and rarefied circumstances, the alternative were to be even more unjust).<sup>67</sup> Surely, the slavery of non-human animals would be ruled out too, if those deciding the rules actually risked *being* such non-human animals themselves. Having a two-tier society where some are persons, and some are not, is a cardinal violation of the “difference principle.” This caste society damages the lowest caste tremendously, with no accompanying benefit to its members that could ever overcome that damage. Thus, non-human animals’ status as property would surely be abolished, if the contingency that one might be such a non-human animal were to be considered behind the veil of ignorance.

Interestingly, in the United States, the property status of non-human animals could, in theory, be adjusted on the state, city, or local level. After all, property law has been seen as a deeply local concern, hence the existence of town-based, not city-based zoning boards. Thus, if states enact laws that specifically take non-human animals out of the category of property, who is to say that they are not within their traditional powers when they do so? Granted, the Constitution has its own implicit definition of personhood with respect to the rights it protects. However, it is arguable that the states are free to count additional entities as “persons” with respect to their own laws when to do so does not contradict federal law, and thus, the Supremacy Clause. States frequently add to federal constitutional protections via state constitutions or statutes. For example, protection against discrimination may be much broader in a given state or city, than through federal anti-discrimination law, reaching categories of people that federal law excludes.<sup>68</sup> Here, too, federal animal law can hardly be said to “occupy the field,” to borrow a concept from Commerce Clause jurisprudence. Federal law pertaining to animals is dramatically limited.<sup>69</sup> Moreover, it largely concentrates on preserving endangered species for the sake of biological diversity and species preservation—not for the sake of the individual animals themselves.<sup>70</sup>

Accordingly, there is a great deal of room left for states—or even cities and towns—to regulate the status of non-human animals, whether by deeming them persons outright or by simply protecting them in a manner closer to the manner in which humans are protected. For example, declarations that non-human animals are not within the category of “property,” if made by localities, cities, or states, could have concrete positive legal ramifications for non-human animals. Ironically, then, a movement that many see as liberal could be

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<sup>67</sup> *Id.* at 137, 218, 286.

<sup>68</sup> The Legal Aid Society, *Disability Discrimination in the Workplace: State versus Federal Law Protections*, <http://www.las-elc.org/00021798.PDF> (accessed Nov. 18, 2007).

<sup>69</sup> Institute for Animal Rights Law, *Summary Critique of Federal Animal Protection Statutes*, [http://www.instituteforanimalrightslaw.org/federal\\_summary\\_critique\\_animal\\_protection.htm](http://www.instituteforanimalrightslaw.org/federal_summary_critique_animal_protection.htm) (accessed Nov. 18, 2007).

<sup>70</sup> *Id.*



significantly aided by the “conservative” tactic of pushing forward, legally, on the state and local level. Of course, this has happened, with considerable success, in the gay marriage movement.

However, this theory is not for liberals alone. Far from it. Conservatives who adhere to the idea of neutral principles should also be attracted to the neutral ideal of fairness that decisionmaking behind the veil of ignorance represents.

*B. Abolishing Irrational Distinctions between Humans and Non-human Animals within the Law*

In addition, from a perspective behind the veil of ignorance in which one would need to insure against the possibility of becoming a non-human animal within society, *irrational* distinctions in the law between humans and non-human animals would more generally be abolished. Of course, *rational* distinctions would remain. There is no need, for example, for state colleges to admit resident dolphins or bears, who would not benefit at all from the education they offer. Although human and non-human animals ought not to be simply *equated* under the law, current law is unjust in that it effectively equates non-human animals with chairs and cars, denying them the subset of rights and benefits that logic counsels they are just as entitled as humans to receive.

For example, in the tax code, exemptions for dependents should logically cover everyone in a household who is legitimately dependent on others for his or her sustenance—including non-human companion animals. Such exemptions attempt to recognize the reality that a household with dependents must use some of its income to care for them—and that reality is no less genuine when it comes to non-human companion animals than when it comes to children. Though the two groups have very different needs, both have needs that require money to satisfy. Of course, the current tax code is not a model of analytical consistency and has been profoundly affected by political bargaining. But, again, society should strive for an ideal—and an ideally just tax code would include non-human animals as dependents.

To give another example, non-human animals—like people who cannot themselves vindicate their own rights directly, such as children or the mentally disabled—would enjoy the right to have a court-appointed guardian protect their interests in important cases involving conflicts over their lives or their health. As represented by such guardians, non-human animals would also have the right to become plaintiffs in lawsuits over matters imperiling them.

Moreover, humans’ relationships with non-human animals would be deemed not “ownership,” but “custody.” Thus, custody could be taken away from humans who mistreated non-human animals in ways that fell short of being so severe as to be criminal, but were highly detrimental to the non-human animals’ welfare nonetheless. Interestingly, while this would be a major reconceptualization, it would not

change the status quo that much in practice, since informally, animal welfare officers often take non-human animals away from their “owners” when they are mistreated.<sup>71</sup> Here, the person-like qualities of non-human animals are implicitly recognized in the law; no one goes to jail for grossly mistreating his or her own couch or personal computer.

In addition, current state animal welfare statutes that treat serious forms of cruelty as mere misdemeanors, and otherwise underpunish cruelty to non-human animals, would be brought into conformity with parallel statutes criminalizing similar offenses committed against humans. It is impossible to believe that, behind the veil of ignorance, a person considering the chance that she might be born a non-human animal, would not extend to non-human animals meaningful protection against the worst kinds of criminal conduct.<sup>72</sup> As with humans, these torts could give rise not only to criminal penalties, but also to civil damages in suits brought in the name of non-human animal plaintiffs. Under current law, even the killing of dogs and cats from tainted pet food may end up resulting in the payment of minimal damages by those responsible.<sup>73</sup> Higher damages verdicts could deter negligence, especially gross negligence, that jeopardizes non-human animals’ lives. Suppose non-human animals could be plaintiffs and their lives could be valued in a way more similar to the way human lives are valued, not via purchase price, which can be negligible for a shelter animal, but by contribution to one’s family (loss of consortium) and to society (compensatory damages). If so, verdicts would rightly be higher, and companies would be forced to internalize the true costs of the harms they cause.

Finally, as a result of decisionmaking behind the veil of ignorance, “entitlement” laws, i.e., the general social safety net, would be extended beyond humans to encompass non-human animals as well, providing the basics of food, shelter and health care. If that sounds ridiculous, or simply too burdensome or costly, one only has to consider the contingency of being born into society as a non-human animal. Suddenly, from this perspective, the cost and burden become managea-

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<sup>71</sup> See e.g. Alaska Stat. § 11.61.140(f) (2004) (The court may require forfeiture of the animal affected and may prohibit or limit the defendant’s ownership, possession, or custody of animals for up to ten years); Ark. Code Ann. § 5-62-101(d) (2001) (Upon conviction, “the court may assign custody of the abused animal or animals to a society which is incorporated for the prevention of cruelty to animals”); Or. Rev. Stat. § 167.350(1), (2) (2005) (Upon conviction, the court may order forfeiture of the mistreated animal).

<sup>72</sup> Whether criminal sentences should be similar triggers a question that I address below: whether the value of a human’s life can ever be compared with the value of the life of a non-human animal. As with other issues raised in this essay, I want to stress that debating about what is ideal should not stop us from immediately moving toward points on which most of us can agree; the best should not be the enemy of the good. For example, I hope that many will agree with me that treating the worst kind of non-human animal torture as a misdemeanor, which still reflects the legal status quo in a few states, unduly devalues the lives and suffering of non-human animals.

<sup>73</sup> Robin Cheryl Miller, *Damages for Killing or Injuring Dog*, 61 Am.L.Reports 5th 635 (1998); *Nichols v. Sukaro Kennels*, 555 N.W.2d 689 (Iowa 1996).

ble after all, and these “safety net” services seem to be required, not optional.

C. *Equality in the Assignment of Rights: Non-human Animals’ Right to Life*

In addition to arguing that those behind the veil of ignorance would adopt the “difference principle,” Rawls also claims that those behind the veil of ignorance will choose a rule of “equality in the assignment of basic rights and duties.”<sup>74</sup> Obviously, non-human animals, like mentally disabled humans, might be exempted from a number of duties as a matter of necessity, for they would be unable to comply. However, behind the veil of ignorance, it would be rational to accord non-human animals rights essentially equal to those humans enjoy, to the extent that they could benefit from them.

The first right chosen behind the veil of ignorance, for all within society, must be the simple right to life. Recognizing this right alone would have profound consequences for the way the law treats non-human animals. To begin, non-human animals could not be killed for food. As Mark Rowlands has argued at length, the atrocious endemic cruelty that is routine in both farming (especially “factory farming”) and experimentation, would also rationally be banned behind the veil of ignorance.<sup>75</sup> After all, as Rowlands argues, no one making the choice behind the veil of ignorance would rationally risk enduring a life of unremitting suffering, concluded by a brutal and painful execution, in exchange merely for the chance of enjoying another life with somewhat more attractive food choices.<sup>76</sup>

Nor would anyone rationally choose to countenance non-human animal sacrifice if he or she might have to risk being the one sacrificed. The anomaly in the conjunction of two Supreme Court Free Exercise precedents allowing non-human animal sacrifice in *Church of the Lukumi Babalu Aye v. City of Hialeah*,<sup>77</sup> but forbidding the mere use of peyote in *Employment Division v. Smith*,<sup>78</sup> would thus be nullified. Behind the veil of ignorance, *Lukumi Babalu Aye* would have to be decided the other way, just as surely as if it had involved *human* sacrifice purportedly done for religious purposes. Somehow, barbarism no

<sup>74</sup> Rawls, *supra* n. 2, at 13.

<sup>75</sup> Rowlands, *Animals Like Us*, *supra* n. 5, at 101–04, 110 (chickens are subjected to “a guillotine-like device with a red-hot blade,” suffocation, brutally close confinement triggering “peck[ing] to death,” a “severe form of osteoporosis,” a near lightless existence, 160 million male offspring of laying chickens in the U.S. are gassed, suffocated, or ground up alive); *id.* at 104–07 (pigs are castrated and have their tails removed without anesthesia, are so closely confined it often leads to death by cannibalism, are chained and put in an “iron maiden” frame precluding movement); *id.* at 108, 110, 114 (cattle are closely confined, leading to anemia in veal calves, are dehorned, branded and castrated without anesthesia and are slaughtered by a process of stabbing and being left to bleed to death).

<sup>76</sup> *Id.* at 100.

<sup>77</sup> 508 U.S. 520 (1993).

<sup>78</sup> 485 U.S. 660 (1988).

longer seems barbaric when done to a non-human animal; behind the veil of ignorance, this would immediately change.

Finally, in the case of contagious disease, non-human animals should arguably be treated much as are humans. They would not be killed (or, in the euphemism currently used with regard to killings of non-human animals feared to be exposed to bird flu, “culled”) but could be quarantined—just as humans, too, may legally be quarantined in situations of extreme contagion. This last proposition, which has gathered some support when household pets are the ones potentially infected,<sup>79</sup> touches on the difficult topic of comparing the value of human and non-human animal life from a point of view behind the veil of ignorance, as discussed below.

*D. Compensated Labor for Non-human Animals Might Be Permissible, but within Strict Limits*

Interestingly, one law that vegans would oppose, a law allowing chickens’ eggs, and cows’ milk, to be taken by humans to be consumed, might still be approved behind the veil of ignorance. As noted above, factory farming would be outlawed behind the veil of ignorance, as would killing non-human animals. But if non-human animals are given food and shelter in *compensation* for their eggs or milk, that might be an option those behind the veil of ignorance would consider. After all, current society allows for compensation of “wet nurses” and egg donors, rather than outlawing such practices.<sup>80</sup> And more generally, of course, bartering is allowed in human societies. The complication is that unlike humans, non-human animals cannot assent to such arrangements. However, proxies or guardians might do so on their behalf, looking to whether particular non-human animals’ lives might be improved by such arrangements, or other work arrangements such as those of carriage horses, racehorses, and the like. Alternatively, statutes might legalize these arrangements, but condition them on specific guarantees regarding the non-human animals’ living conditions.<sup>81</sup>

Certain kinds of work that are extremely hard on non-human animals, with scant benefit to them, would be disapproved. Recently, dolphins have been employed by the military in various capacities to

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<sup>79</sup> See Randy Dottinga, *When Fluffy Catches the Bird Flu*, *Wired*, <http://www.wired.com/medtech/health/news/2006/06/71199/> (June 26, 2006) (noting veterinarians’ argument “that health officials and veterinarians need to develop quarantine protocols for house pets in case of an epidemic,” rather than killing them).

<sup>80</sup> MSNBC, *Would You Pay Someone to Nurse Your Baby?*, <http://www.msnbc.msn.com/id/18313552/> (last updated Apr. 26, 2007); Jim Hopkins, *Egg-Donor Business Booms on Campuses*, *USA Today*, available at [http://www.usatoday.com/money/industries/health/2006-3-15-egg-donors-usat\\_x.htm](http://www.usatoday.com/money/industries/health/2006-3-15-egg-donors-usat_x.htm) (Mar. 15, 2006).

<sup>81</sup> Guardian arrangements might be preferable to statutory schemes, as guardians would be specifically tasked with protecting non-human animals’ interests, while legislators have little incentive to take those interests into account, especially where farm animals, not pets, are concerned.

avoid the loss of human lives.<sup>82</sup> Behind the veil of ignorance, that practice would be rejected. (One could argue otherwise, however, that non-human animals who benefit from being under the umbrella of human society owe a military duty to that society, just as humans do.<sup>83</sup>) Many may object to that result on the ground that a human life is simply more valuable than the life of a dolphin—thus raising the crucial and highly controversial point mentioned above. Indeed, even pro-animal rights philosopher Mark Rowlands contends that “the human loses more in dying than does the dog,”<sup>84</sup> because the human has likely invested more in planning for, and investing in, his future; “[t]he more you have invested in the future, judged in terms of the organization, orientation, disciplining, and regimentation of your present behavior and desires, then the more you lose when you lose that future.”<sup>85</sup> But is this view as correct as it is common? The problem with this argument is that its logical extension would also counsel valuing one human life over another—the life of a careful planner over that of a devil-may-care free spirit. And few humans would agree with the correctness of that view.

Moreover, the non-human animal is, if anything, in a superior moral position to that of the human free-spirit, from the point of view of those who value, and give moral credit to a particular being for, investment in the future. While the free spirit *chose not to* plan, toil, and invest, the non-human animal *had no choice* in the matter. Finally, even if one does contend that human lives are more valuable than non-human animal lives—and that this conclusion comes from rational analysis and not just the kind of species bias that would be eliminated behind the veil of ignorance—it is still necessary to settle on a multiplier. Arguably, few would contend that saving a single human life would justify killing all the world’s non-human animals. Yet many might argue that saving a single human life would justify killing some number of non-human animals. We are arguing, then, not over principle, but over price.

Much of the cruel medical experimentation currently conducted on non-human animals, supposedly designed to save human life, would also be off-limits behind the veil of ignorance. As Mark Rowlands discusses at length, much of this experimentation is wasteful, at any rate, either because it is unnecessary,<sup>86</sup> because the results do not reliably

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<sup>82</sup> Steve Liewer, *Day of the Dolphins: Sea Mammals Hunt for Targets*, S.D. Union-Trib., available at <http://www.signonsandiego.com/news/metro/20070413-9999-1m13mammals.html> (April 13, 2007) (describing the training of sea lions and dolphins in tasks such as “guarding military ports against saboteurs or learning to spot and notify handlers of undersea mines”).

<sup>83</sup> It is unclear, however, whether dolphins really benefit from being under the umbrella of human society in anything like the sense that, say, dogs and cats do.

<sup>84</sup> Rowlands, *Animals Like Us*, *supra* n. 5, at 56.

<sup>85</sup> *Id.* at 83.

<sup>86</sup> Such unnecessary experiments include those done in the development of cosmetics or to support new variations of established products.

carry over to humans, or because the results have no practical application.<sup>87</sup> Often, Rowlands notes, experiments are also redundant and needlessly replicated, despite their cruelty.<sup>88</sup> Here again, states and localities could get into the picture when it comes to regulations, for this is the kind of property law issue that the U.S. system relegates to the states. Modifying state trade secret law to provide an exception for the results of non-human animal testing would lead to less redundancy, as even the results of tests done in proprietary contexts would legally have to be shared. If the result of such an exception were a shift toward computer modeling (which, in contrast, would remain entirely proprietary), that would be all to the good—with the lure of secrecy acting to significantly decrease the incidence of cruelty.

What about the hard case—non-human animal experiments that actually *would* predictably lead to saving human life? Many people might have the instinct that these experiments ought to be done. But that is an instinct of which one should be wary. Imagining oneself behind the veil of ignorance, and recognizing that potentially oneself or one's family members might be the subject of these experiments, is an excellent curative for all the biases people typically carry. These biases are very human, but they are not part of justice. It is understandable to prefer one's family members and other loved ones over other persons, even though that is not just. But these understandable preferences, shaped by evolution, have nothing to do with justice any more than, say, evolutionarily-driven preferences for same-race people would. In drawing up a Constitution and seeking to be just, one would not give one's own family members preference.<sup>89</sup> In contrast, in drawing up a will, seeking specifically to enforce one's own emotional commitments and preferences, of course family members would be the beneficiaries. In sum, the choices people make *in their private lives* are rightly and profoundly informed by love of family and friends, or even of "the human family." But the choices society makes *in public laws* should not be.

Those behind the veil of ignorance, lacking knowledge as to whether each of them will be a human or a non-human animal, would choose a rule that would allow non-human animals to participate in experiments only where human volunteers with no vested interest (such as a connection through family or friendship with a person who is ill) would do the same. For example, suppose humans with a special blood type commonly volunteer to give blood. In that case, one could surely require non-human animals to do the same for other non-human animals or, if feasible, for humans as well.

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<sup>87</sup> Rowlands, *Animals Like Us*, *supra* n. 5, at 127–51.

<sup>88</sup> *Id.*

<sup>89</sup> Indeed, in rejecting the "corruption of blood" (which had forbidden the family of one accused of treason from inheriting his property) the Constitution rejected the option of enshrining family hatreds and feuds in the law.

In contrast, where legal rules allow humans to be selfish— to decline to be bone marrow donors even when there is a match, for example—and when, in fact, humans largely *are* selfish in this regard, it would be unfair to ask more of non-human animals.<sup>90</sup> Granted, it seems likely those in the original position behind the veil of ignorance would opt for mandatory bone marrow donation for humans when there is a match. Would not the small chance of having to be a bone marrow donor be outweighed by the equally small chance of desperately needing a bone marrow donation to live? If there were such a rule for humans, then it ought to apply to non-human animals, as well. However, that would mean humans would be obligated to donate bone marrow to dying non-human animals, too.

In sum, whenever society asks non-human animals to do something most people would be horrified to ask of humans, whether it is to serve as the subjects of involuntary experiments, to be killed for food, or to risk their lives in a war in which they have no true stake, one should consider very seriously whether invidious species bias is at work. One can continue to prefer one's own species personally and privately, as one can prefer one's own family members. Yet, when it comes to law, the question should become, instead, whether that preference would still be chosen behind the veil of ignorance if one were faced with the possibility of being a non-human animal, and wanted to insure against that possibility.

#### *E. The Possibility of Non-human Animals as Property Owners*

It is possible that those behind the veil of ignorance would not only free non-human animals from *being* property, but also consider them able to *own* property. Just as Native American tribes arguably should have been recognized as owning the lands they roved, so too should non-human animals arguably be considered the owners of the land they rove. Surely, without any other workable mechanism for property ownership by non-human animals, this one would be likely to be chosen behind the veil of ignorance, by those insuring against the possibility they might be non-human animals. Rendering that land off-limits to others would thus be a matter of right, and of ownership, not a matter of grace or "preservation." In addition, our national parks would be rightly regarded as belonging not primarily to the humans who occasionally visit there, but primarily to the non-human animals for whom they constitute a sole home, and park conservation policy would be adjusted accordingly.

This conclusion, like that of a legally mandated social "safety net" for non-human animals, might seem bizarre and extreme; but to someone behind the veil of ignorance, considering the system that would best protect non-human animals—a group the decisionmaker might soon join in real-world society—it would not seem bizarre at all. What

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<sup>90</sup> Here, I am assuming, again counterfactually, that non-human animal bone marrow could typically function well within the human body.

would seem bizarre and extreme, instead, behind the veil of ignorance, would be to create a legal system that leaves some creatures without *any* legally recognized foothold in the world, able to lose their longtime homes in an instant with no remedy or recourse. It might be a very long journey from the legally blessed murder of non-human animals through hunting, to a world in which that act is punished not only as killing, but also as trespassing on the land that belongs to the non-human animals. But it is not an impossible journey. Moreover, if such a world is to be created, the impetus could effectively begin at a state and local grassroots level, where the system of federalism holds that property rights are best defined, and thus can best be altered and redefined.

Beginning with declarations that non-human animals are or should be treated like persons, and extending into every area of non-human animals' lives, state and local law can reframe the basic legal status of non-human animals in a way that can truly be described as embodying "justice as fairness."

## V. CONCLUSION

This essay describes an ideal of justice; an ideal to which society can aspire, and toward which society can take concrete, practical legal steps through town councils and state legislatures, or someday, perhaps, even in Congress. The current legal system's designation of non-human animals as mere "property" is an anachronism made increasingly archaic and obsolete by the pace of current research and knowledge. With every step taken away from this legally enforced lie about the nature of non-human animals and how their rights should be analyzed, society moves closer to an ideal that would recognize what is known and devise legal rules that reflect the truth—that non-human animals are far closer to persons than they are to property. In Austria, the question of a chimp's personhood has already been raised.<sup>91</sup> Soon, U.S. courts must be asked to address similar questions.

Rawls's contractarianism provides an excellent method for deriving these rules in fair ways that take the interests of both humans and non-human animals fully into account. It is a way to effectively filter out the species bias that pervades current law, insofar as it applies to non-human animals, and to introduce true fairness into an area of law that has always been, not only notably cruel, but profoundly unfair and unjust.

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<sup>91</sup> See William J. Kole, Associated Press, *Activists Want Chimp Declared a Person*, [http://www.breitbart.com/article.php?id=D8OTLSUG0&show\\_article=1](http://www.breitbart.com/article.php?id=D8OTLSUG0&show_article=1) (May 4, 2007) (noting Austrian activists' argument for the personhood of a chimp who "indulges a weakness for pastry, likes to paint and enjoys chilling out watching TV").