

Grounding Animal Rights in Mutual Advantage Contractarianism

Matthew Taylor

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Article abstract

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GROUNDING ANIMAL RIGHTS IN MUTUAL ADVANTAGE CONTRACTARIANISM

MATTHEW TAYLOR

PHD CANDIDATE IN PHILOSOPHY, QUEEN'S UNIVERSITY

ABSTRACT:

Contrary to critics and advocates of contractarianism alike, I argue that mutual advantage contractarianism entails rights and protections for animals. In section one I outline the criteria that must be met in order for an individual to qualify for moral rights on the contractarian view. I then introduce an alternative form of 'rights,' which I call 'protectorate status,' from which an individual can receive protections indirectly. In section two I suggest guidelines for assigning animal rights based on two ways of categorizing animals. On the basis of the categorization according to benefit derived, I argue that animals used for companionship, security, hunting assistance, transportation, entertainment, medical service, nourishment, or clothing will tend to qualify for basic rights against starvation, predation, and disease. On the basis of the categorization according to species, I argue that, on top of the basic rights above, dogs tend to qualify for rights against abuse, and against frivolous medical experimentation, as well as further negotiated rights. Cows have the basic rights against starvation, predation, and disease, but squirrels and bears have no rights. In section three I argue that some animals qualify for protectorate status, which would establish various protections for different animals, but would also generally prohibit cruelty towards animals.

RÉSUMÉ :

Contrairement à certains critiques ou défenseurs du contractualisme, j'affirme que le contractualisme à avantages réciproques peut assurer droits et protections aux animaux. Dans la première section, je décris les critères que, d'un point de vue contractualiste, un individu doit satisfaire pour pouvoir bénéficier de droits moraux. J'introduis ensuite une autre forme de « droits », que j'appelle « protectorat », qui permet à un individu de bénéficier indirectement de certaines protections. Dans la deuxième section, je propose des directives pour accorder des droits aux animaux en fonction d'un double mode de catégorisation. La première catégorisation serait établie d'après les avantages procurés par l'animal; ainsi les animaux de compagnie, de garde, de chasse, de transport, de divertissement, ou assurant des services de santé, d'alimentation ou d'habillement devraient se voir accorder des droits fondamentaux contre la famine, la prédation et la maladie. Selon la seconde catégorisation, établie d'après l'espèce, les chiens devraient bénéficier de droits les protégeant des mauvais traitements et des expérimentations médicales inutiles, ainsi que d'autres droits négociés. Les vaches jouissent ainsi des droits fondamentaux qui les protègent de la famine, de la prédation et de la maladie, mais les écureuils et les ours n'ont pas de droits. Dans la troisième section, j'explique que certains animaux devraient bénéficier d'un statut de protectorat, qui accorderait des protections diverses à différents animaux, mais qui défendrait de façon générale toute cruauté envers les animaux.

Many animal rights theorists exclude contractarian theories of rights by straightforward *reductio ad absurdum*: animals lack the cognitive abilities needed to engage in contracts, so they are excluded from moral consideration/rights by contractarian theories, so contractarianism provides an insufficient or absurd basis for moral consideration/rights.¹ This leads many animal rights advocates to shop for alternative theoretical foundations for moral consideration/rights, looking to utilitarianism, capability theory, and deontology. Moreover, the claim that contractarianism excludes animals from rights is confirmed by most contractarians, who disagree only with the claim that such exclusion is problematic.² Contrary to both the contractarians and the animal rights theorists in question, this article will demonstrate that mutual advantage contractarianism does lead to at least some rights for some animals. In particular, I argue that some pets and some farm animals qualify directly for rights against abuse, starvation, predation, and disease, and that most animals will qualify for what I call ‘protectorate status,’ which establishes various protections depending on the specific circumstances of the animal, but also generally prohibits cruelty to animals.

This paper will proceed in three parts. The first part will give a brief explanation of the kind of contractarianism that will be examined in the rest of the paper, and will detail the criteria for membership in the moral community on this view. The second part will argue that animals used for companionship, security, hunting assistance, transportation, entertainment, medical service, nourishment, or clothing will tend to qualify for rights against starvation, predation, and disease. I also consider four representative species, and argue that dogs will tend to qualify for the basic rights listed above, plus rights against mental and physical abuse, and against frivolous experimentation. And while cows tend to qualify for rights against starvation, predation, and disease, squirrels and bears tend not to qualify for any rights. These guidelines merely identify ‘tendencies’ because the considerable level of variation in abilities among different individual animals used for the same purpose, and among different members of the same species, will lead to different rights for different individual animals. The third part will argue that most animals, though they do not qualify for membership in the moral community, nevertheless qualify for protectorate status indirectly justified by reference to the interests of members in the moral community. This protectorate status yields different ‘protections’ based on humans’ interests in preserving an environment that supports human life, their aesthetic interests concerning animals, and their attitudes towards animal cruelty. Thus, contrary to the opinion of both critics and advocates of mutual advantage contractarianism, such contractarian theories do entail some animal rights.

1. MUTUAL ADVANTAGE CONTRACTARIANISM

This article focuses on mutual advantage contractarianism, a theory found in naïve form in Plato’s *Republic*; in more complete form in Hobbes, Spinoza, and Hume; and recently examined by David Gauthier, Jean Hampton, and Jan Narveson.³ According to this view, if we are to have any moral obligations, they must be grounded in our prudential interests. The view begins with a rejection of nat-

ural moral or evaluative properties: moral goodness, categorical imperatives, virtues, etc., are not *out there* naturally in the world. To get individuals⁴ to behave in a purportedly moral manner, we must examine prudential/practical rationality (and perhaps the desires with which it works⁵) to find grounds for persuading everyone that it is rational to act in that manner. Every individual has a host of desires ranging from the basic desire for continued existence to the desire to sip fine wine on a warm summer's evening. Some of these desires are stronger and more central while others are weaker and peripheral. Prudentially rational individuals choose to act so as to best satisfy as many of their most central desires as possible. Provided that others are willing to do the same, such individuals will find it rational to cooperate with one another on the basis of certain principles so long as certain conditions obtain: that resources are not so abundant that we could all easily satisfy all of our desires, nor so scarce that only few of us could meet our basic needs; that individuals desire their own continued well-being more than they desire to harm or kill other people;⁶ that the things individuals desire are vulnerable to theft and destruction at the hands of other individuals, and thus that each individual's well-being can be augmented and diminished by the actions of other individuals; and that individuals are so equal in physical and mental abilities that the weakest could still significantly diminish the well-being of the strongest. Thus, for instance, I may really want some item of yours, and be somewhat inclined to attack and perhaps kill you so as to steal that item. Moreover, I may have some reasonable confidence that I would be successful in this attack, given that I am a very big strong and violent person, and (forgive me) you are not. Nevertheless, I may be reasonably confident that there are individuals stronger than me in my vicinity who desire possessions of mine who could successfully stage similar attacks on me. Moreover, a number of weaker parties, recognizing me as a threat, could get together to kill or imprison me pre-emptively. Thus, insofar as everyone else is willing to do the same, it would be in my interest to recognize a right of all to their continued lives and property. So long as other individuals are willing to be similarly restrained, and actually recognize that restraint in practice, it would be better for me to leave you be with that nice possession of yours than to attack you. In broad strokes, this is the basis for morality according to mutual advantage contractarianism.⁷

1.1 Mutual Advantage Contractarianism and Rights

What does it take to qualify directly for rights according to mutual advantage contractarianism? Before answering this question, I should like to say that my answer is not novel, except perhaps in its detail, and is the same as that of Narveson, who is a prominent mutual advantage contractarian and a fierce critic of animal rights. I do not take myself to be disagreeing with Narveson on any point about the logic of contractarianism: I think that the contractarian logic that Narveson endorses is largely correct and ought to have led him to endorse some animal rights.⁸

Returning to the question, I claim that, because rights and duties, on the contractarian view, are grounded in rational mutual advantage, the question of what

it takes to have rights must be answered from the perspective of the agent whose behaviour is to be restrained by the rights in question: with respect to whom would it be in the agent's interest to restrain his or her behaviour? To be in the agent's interest here requires that the costs of unrestrained behaviour outweigh the benefits—that the agent finds his or her own desires best met by restrained behaviour rather than by unrestrained behaviour. Thus two values need to be compared: the value to the actor of a certain unrestrained behaviour, and the cost to the actor of that unrestrained behaviour. Let us begin with the latter.

In order to qualify directly for a right, (a) one must be capable of imposing some cost on those who would violate one's purported rights, and (b) one must do so in response to that violation. The relevant sense of "cost" here is that of "opportunity cost," which includes not only the ability to impose some harm on the actor, but also the ability to withhold some benefit from the actor. For example, a small cat may be incapable of causing a strong human adult serious harm, but may be able to refuse to allow the human to pet it and to avoid being near the human: the cat's affection would be a foregone benefit. If the human is a cat-lover who craves some sort of affectionate interactions with the cat, then the cat's ability to withdraw itself from voluntary interaction could impose a cost on the human. If, however, the individual in question lacked the ability to impose any cost on the agent in question, and there was any positive value at all to be gained from acting without restraint towards that individual, then such an individual could not qualify for rights. For in such a case, it could never be to the advantage of the agent to act with restraint towards the individual: there would be advantage to be had from acting unrestrainedly and no comparable disadvantage to such behaviour. Thus, the ability to impose a cost on the purported duty-bearer is requisite for an individual to qualify as a rights-holder.

However, the ability to impose cost, on its own, is insufficient to qualify one as a rights-holder. It is also necessary that one be capable of modifying one's behaviour in response to the actions of others. One must be capable of imposing a cost in response to unrestrained behaviour, and refraining from imposing a cost in response to restrained behaviour. For instance, consider mosquitoes: mosquitoes have the ability to be severe annoyances to humans. I, for one, would be happy to refrain from killing mosquitoes, and to supply them with a constant stream of alternate sources of nourishment, if they would all stop biting me. But the mosquitoes cannot refrain from harming in exchange for restraint. Thus, I have no reason to observe restraint towards the mosquitoes. If the individual in question lacks the ability to modify its behaviour in response to mine, then any cost that it is capable of imposing on me is as likely to follow from my restrained behaviour as it is to follow from my unrestrained behaviour, and this ability to impose cost would fail to count in favour of my restrained behaviour.

Yet it may be the case that an individual is capable of responding to the unrestrained behaviour of another by imposing some cost on that other, and yet that the individual fails to qualify for rights. A further requirement is that the cost that the individual can impose on the other outweigh the benefits to the other of his

or her unrestrained behaviour. Thus, ladybugs of the appropriate variety may often decide to bite my young nephew for his curious handling of them, yet that bite is never sufficient to dissuade him from picking them up and playing with them. This requires a certain contingent relationship between the purported rights-bearer and the purported duty-bearer that is subject to change: perhaps bees' stings were sufficient to dissuade humans from invading their hives for honey at one point, but technological advances have allowed humans to avoid the bees' stings, divesting the bees of any rights they could have had. Once humans find themselves without the relevant technology, they revert to respecting bees' hives.

To sum up the discussion up to this point, in order to qualify directly for moral rights on the mutual advantage contractarian view, (a) one must be capable of responding appropriately to the behaviour of others, (b) one must be capable of imposing costs in response to their unrestrained behaviour, and (c) those costs must outweigh the benefits to others of their unrestrained behaviour. These criteria are individually necessary and jointly sufficient to guarantee direct moral rights, on the contractarian view.

1.2 Rights vs. Protectorate Status

Up to this point I have been focusing on the criteria for direct moral rights, and I have been rather vague about what "qualification for direct moral rights" entailed. I would now like to clarify what I mean, and to contrast direct qualification for moral rights with what I will call "protectorate status." To qualify directly for rights is to pose sufficient threat to others that it is in their interest to take your interests into account when trying to find mutually advantageous principles. Such principles need to be to the advantage of all individuals who qualify directly for rights; whatever principles of restraint such individuals find mutually advantageous will determine their rights. To qualify for protectorate status does not entitle one to have one's interest considered directly; rather, protectorate status arises when those who qualify directly for rights decide that it is to their mutual advantage to impose restraint on their behaviour towards other groups who do not qualify directly for rights.

Another way to explain the distinction between direct moral rights and protectorate status is to draw attention to the individual to whom the duty-bearers owe their duties. On the one hand, individual J has a direct right against individual K for X to happen if and only if K has a correlative duty owed to J not to interfere with the occurrence of X. On the other hand, individual L has a protection guaranteeing the happening of X, stemming from L's protectorate status, if and only if individual M has a duty to individual N not to interfere with the happening of X. In the case of direct rights, the duty-holder owes a duty directly to the right-holder, and that duty is owed based on the abilities of the right-holder relative to the abilities of the duty-holder, as explained above. In the case of protectorate status, the duty not to interfere with the protected individual is owed to some other individual who has the requisite relative abilities. In this case, the

protectorate status is parasitic on the direct right of the other individual: should the direct right-holder perish or lose the requisite relative abilities, the protectorate status would disappear.

1.3 Protectorate Status

“Protectorate status” arises when one individual has certain interests but does not qualify directly for rights, and at least one other individual who does qualify for rights decides to advance claims to secure the protected individual’s interests. Thus, the set of protectorates could be viewed as a subset of the things that a rights-holder would endeavour to “protect”: the subset of those things that take an interest in their own well-being. A right-holder would attempt to defend his or her inanimate property, imposing duties on others not to damage or otherwise interfere with it, but inanimate property cannot take an interest in its own well-being and such protection cannot be said to be in the interest of the property. By contrast, a protectorate is a living individual that takes an interest in its own well-being, and whose interests the protector endeavours to protect.

The concept of protectorate status is thus close to being encompassed in the concept of property, but there are certain important and subtle differences between protectorate and property status other than the difference of taking an interest in one’s own well-being. Firstly, when one claims property rights to something, one generally claims the exclusive rights to do a host of things to or with that property. When I claim a property right to my car, I claim to be the only one who can destroy that car, the only one who can drive that car, the only one who can sell that car, etc. Thus a property right to X is generally a bundle of exclusive rights to do things with X. Moreover, claims to a property right are generally grounded in a historical transaction: I have a property right to X because I acquired X legitimately. Thus a property right is only indirectly grounded in mutual advantage: the rules for acquiring and exchanging property, and for respecting the property of others, will be grounded in mutual advantage, and it is through those rules that one asserts a right to a particular piece of property. By contrast, a claim to protectorate status for X need not be grounded in any historical transaction: I can claim that my infant, or any other infant for that matter, has protectorate status without needing to claim that I acquired that infant in any way. My claim of protectorate status will be grounded directly in mutual advantage: I claim that I will punish violations of the interests of the infants so thoroughly that whatever benefit others would receive from those violations would be outweighed by the consequences of the punishment. Moreover, when I claim protectorate status for X, I do not claim the host of exclusive rights typically associated with property rights. Firstly, I do not claim the exclusive right to violate the interests of X; I claim that no one should violate the interests of X. Secondly, by advancing a protectorate claim for X, I need not claim the exclusive rights to control the whereabouts of X, or to play with X, etc. I may also choose to advance a property right to X, perhaps feeling that this is the best way to guarantee the protection of X’s interests, but I need not do so. Thus, if I claimed protectorate status for some remaining herd of an endangered species,

I would not be asserting any exclusive rights to treat that herd in any given way, such that anyone wanting to study, observe, or interact with the herd in a beneficial manner would need my authorization. I would simply be claiming that others are forbidden from violating the interests of the herd.

This “protectorate status” may have many of the same drawbacks as property status, and may be open to many of the same objections; however, the concept is subtly and importantly different from property status, and I hope to have cleared up those differences. If this way of talking about protectorate status sounds too strange, then one can translate protectorate status claims to claims about the indirect duties of others: “individual X is protected in the doing of Y” translates to “others have a duty to some individual (or set of individuals) Z not to disrupt X’s doing of Y.” Perhaps my claims will sound less peculiar presented in this manner.

To have protectorate status does not require any ability to respond appropriately to the behaviour of others, or to impose sufficient costs on others. Because protectorate status is parasitic on actual rights, one must examine the direct rights-holders and the kinds of principles that they would find mutually advantageous to determine who would qualify for protectorate status, and what protections would follow from that status. Rights-holders may find it mutually advantageous to refrain from cruelty towards animals, for instance, but may find that the drawbacks from refraining from eating animals are too considerable to be mutually advantageous. In order for some J to have a protectorate status, it would have to be that the agents found it rational—viz., the means to best fulfill their desires—to treat J with the appropriate restraint. This requires that there be some individual (or set of individuals) K with the abilities requisite for direct rights who cares enough that J be treated with restraint to threaten retaliation against any unrestrained behaviour. So the indirect duty-holders must find that the benefits of unrestrained treatment of J are outweighed by the costs K would impose combined with any potential benefits that the duty-holders could reap from a convention protecting individuals like J from unrestrained treatment. And K must find that the costs of threatening retaliation, and of carrying out that retaliation, are outweighed by the benefits of having J treated with restraint. The more that the purported indirect duty-holders found that they would stand to gain from a convention recognizing such protectorate status, the lower the costs that K would need to be capable and willing to impose in retaliation for unrestrained behaviour, and the less inclined K would need to be to do so. Should all duty-holders find that they stand to benefit from recognizing the protectorate status in question—that the benefits they reap from such restraint on each duty-holder’s part outweigh any gains they stand to reap from unrestrained behaviour, whether or not anyone retaliates—then there is no need for anyone to be capable and willing to carry out threats of retaliation against unrestrained behaviour for such protectorate status to come about.

The paradigmatic case of a protectorate status requiring no threat is that of protecting humans with disabilities. All right-holders may decide that it is in their

interest to observe restraint with respect to humans with disabilities insofar as each right-holder faces a very high probability of being disabled for some portion of his or her life, and thus a very high probability of benefiting significantly from such restraint in the future. On the other hand, the paradigmatic case of a protectorate status that requires threat is that protecting children too young to qualify for rights directly. Parents strongly desire that their young defenceless children not be subject to any abuse or attack. If they were strongly motivated to retaliate by imposing severe costs against anyone who should fail to act with restraint towards their children, and if the costs they imposed outweighed the potential benefits that the purported indirect duty-holders would reap from unrestrained treatment of the children in question combined with the potential benefits that the purported indirect duty holders would reap from the general recognition of such protectorate status, then the protectorate status of these children would be established.

1.4 Protectorate Status and Liberalism

One concern that many may have with protectorate status is that it sounds quite illiberal: as soon as some sufficiently large group feels sufficiently strongly about the way others ought to live, those others will be morally obliged, insofar as it is in their interest, to yield to the will of this group.⁹ If a sufficient group of us felt sufficiently strongly that homosexual acts are perverse and harmful to those who engage in them, and that people should not be harmed in that manner, we would threaten homosexuals, making it their duty to cease engaging in homosexual acts with others.

It is true that, unchecked, this assertion of protectorate status would be illiberal, and it is also true that there is a contractarian rationale for limiting attempts to assert protectorate status. Assertions of protectorate status are a subset of cases where one group feels strongly about the way others ought to behave, and threatens those others with retaliation unless they behave appropriately. We are all vulnerable to such threats, and we will all find ourselves in the minority on some issues. So while I may be part of the majority who would like to threaten xenophobes and racists, I may also be in the minority who wants the freedom to be atheistic, facing a majority of Christians or, more broadly, theists who would like to threaten atheists. Because we all find ourselves part of minorities facing the threats of majorities for a range of issues, we all stand to gain from limits on such threat games. Thus something like the principle that individuals should generally be as free as possible from the threats and impositions of others would be endorsed by mutual advantage contractarianism. This is, very roughly, the contractarian rationale for liberalism.¹⁰

Nevertheless, it would seem that this rationale for limiting our use of threats to create protectorates becomes weaker the nearer a population comes to holding the motivating desire unanimously and the stronger those people feel about that desire. Historically, contractarians have relied heavily in their theories on the desires for continued life, for less pain and more pleasure, and for the well-being

of one's descendants. Most of these desires are nearly unanimously held and are generally strongly preferred, though not always. To then reject appeals to near-unanimous desires, like the desire that animals not suffer needlessly, or any other strong and near-unanimous desires, risks being arbitrary. It is beyond the scope of this article to determine precisely when the kinds of threats that underlie protectorate status would be legitimate and liberal, as such a determination would require a much more careful examination of social contract theory.¹¹ In order to make some practical headway without yet having determined all of the theoretical details, I will limit my discussion of protectorate status to desires that are relevantly similar in their strength and unanimity to the desires for life, for more pleasure and less pain, and for peace that form the core of historical social contract theories. By doing so, I hope to make my assertions regarding protectorate status as secure and as uncontroversial as possible, though until all of the theoretical problems are adequately addressed, some controversy will inevitably remain. This should be acknowledged as a weakness of assertions of protectorate status compared to assertions of rights.

Some liberals might object to any pretention on the part of mutual advantage contractarianism to being a liberal theory. Indeed, the contractarian argument for toleration presented above, centring on our vulnerability to the threats of others, may strike many liberals as unfair, cruel, simplistic, or simply irrelevant. It is better, they would say, to show that liberalism is conducive to some objective value like fairness, equality, autonomy, or utility. If there is anything it takes to be a liberal, it must be a commitment to some value like fairness, etc. Such a move is not available to the kind of contractarian theory that I have been articulating, which starts with a rejection of any objective account of values, and which aims to build a moral theory from people's various desires and preferences. Though such theories refuse to appeal to objective values, and though their reasoning may strike many liberals as offensive, these theories nevertheless call on us to respect equal spheres of liberty for all equals. And most proponents of such contractarian theories take them to be liberal because of these conclusions.¹² Indeed, one might claim that because mutual advantage contractarian accounts forego appeal to objective value, they are therefore more embracing of diverse conceptions of the good, and thus more liberal in at least one regard than other typical liberal theories. Ultimately, because most mutual advantage contractarians take themselves to be liberals, the prospect of protectorate status being illiberal will trouble them. My response, though it may offend other liberals, should not stand out to contractarians as inapt.

1.5 Summary

To sum up this section, then, an individual qualifies directly for rights if and only if (a) the individual has the ability to respond appropriately to the actions of others, (b) the individual has the ability to impose opportunity costs on others, and (c) the opportunity costs that the individual can impose on others outweigh the benefits those others derive from acting without restraint towards the individual in question. Alternately, an individual qualifies for protectorate sta-

tus if and only if either both (a) someone else qualifies directly for rights, and (b) that person would be happier threatening and perhaps carrying out threats of retaliation against others who would act without restraint towards the individual in question than that person would be allowing others to act without restraint towards that individual, or else (c) all purported duty-bearers find that the benefits of general restraint towards such individuals outweigh the benefits of unrestrained behaviour towards such individuals. However, because further theoretical questions concerning the legitimacy of protectorate status remain unanswered, this article will limit itself to assertions of protectorate status where the vast majority of rights-holders very strongly desire to coerce others to act with restraint towards the protectorate in question. For one to qualify directly for rights is for one to pose sufficient threat to others to make it in their interest to take one's interests into account when they are deciding how to act. For one to qualify for protectorate status, those who qualify directly for rights must decide that it is in their interest to act with restraint towards the individual in question.

2. DIRECT MORAL RIGHTS FOR ANIMALS

Given the criteria above, do any animals qualify directly for moral rights? In order to determine whether any animals qualify directly for rights, we need to know (a) whether the animals respond appropriately to the behaviour of others, (b) whether they can impose costs on agents, and (c) whether the costs they can impose outweigh the benefits that agents derive from unrestrained behaviour. The "agents" in question are those individuals who qualify directly for rights. From the outset we know that able humans will qualify directly for moral rights, and it is human behaviour that we are trying to modify by asserting animal rights, so we must identify the benefits and harms that animals can give to, or withhold from, able humans.

Even with the required abilities laid clearly before us, it is difficult to determine in more than a suggestive way which animals are entitled to rights because of the massive amounts of information required to make such a determination: one must take into account, and balance against one another, the prevalence and strength in humans of various desires involving animals, the various desires that a given animal is capable of fulfilling, the levels of harm that animals can impose on humans, and the abilities of animals both to withhold those benefits in retaliation for ill treatment and to withhold those harms in response to restrained treatment. And insofar as different individual members of given species will take an interest in different things, we need to know about the desires of individual animals.¹³ Thus a vast knowledge of human and animal natures is required to decide precisely which animals are entitled to precisely which rights, and individual variability entails that this examination is best carried out individual by individual. To offer general guidelines for animal rights, we must attempt to categorize individual animals in ways that focus on their possession of the abilities relevant for rights.

There are two different ways to categorize animals to this end, neither of which is completely satisfactory, but which, when combined, offer a more complete

picture of what animal rights are called for by mutual advantage contractarianism. The first way to categorize animals is by the benefits that humans derive from the animals, and the second is by species. Neither is fully satisfactory because the categories conceal great variation in the relevant abilities among individual category members: while a German shepherd might have all of the abilities relevant for rights, a chihuahua, though equally a member of the species “dog,” and a hamster, though equally a member of the category “companionship animals,” may not. By combining these two categorizations, we can offer more accurate guidance on the rights owed to a certain individual animal, though this guidance will always need to be supplemented with further information about the individual in question and attention to the principles detailed in the first section of this paper. Section 2.1 will begin by categorizing animals according to the benefits that humans derive from them and examining the rights entailed by each category. Section 2.2 will then examine some animal species and the rights owed to them.¹⁴

2.1 Benefits

There are at least nine different benefits that humans derive from animals: (1) companionship, (2) security, (3) hunting assistance, (4) transportation, (5) entertainment/aesthetics, (6) medical/testing, (7) nourishment, (8) clothing and other products, and (9) hunting.¹⁵ Some of these categories may overlap slightly, and many animals are capable of providing several of the benefits listed. As we will see, these benefits are listed on a spectrum from those benefits that count most strongly in favour of the broadest set of rights to those benefits that count most strongly against rights. In the middle are benefits that count for basic rights, and may count for or against further rights depending on the specifics of the case. I will examine all of these benefits below, but due to structural similarities, hunting assistance, transportation, and entertainment will be addressed together under the heading “service.”

Before examining each of these benefits, it must be noted that not all humans may desire such purported benefits from animals—some humans may not want animal companionship, and other humans may prefer to starve than to eat animals. Thus, each of these purported benefits will count for or against rights *only in proportion* to the strength and prevalence of the desire for that benefit among humans. The greater the number of humans who want companionship from animals, and the stronger that desire relative to their desires for whatever benefits they could obtain through unrestrained behaviour, the stronger the case for rights for animals capable of offering companionship. Inversely, the greater the number of humans who want to eat animals, and the stronger their desire to do so, the stronger the case against rights for tasty animals. This qualification is assumed to apply to all of the benefits discussed below. Moreover, animals belong to these categories only so long as they continue to provide the benefit in question.

2.1.1 Companionship

Many humans seek out the companionship of domesticated animals, desiring their affection. But we do not just want the animal to *feel* affection for us—we

want that affection to be communicated, which is accomplished by certain behaviours: purring, licking, allowing to be petted, playing, etc. How many humans would identify companionship as a benefit that they derive from animals? This is up for debate. Nussbaum feels that the ability to share the companionship of animals is a basic component of human dignity and flourishing, and that a society that fails to guarantee the capability for humans to establish these relations with animals fails to be minimally just.¹⁶ Yet perhaps some people do not feel any strong desire to relate to animals in this way.¹⁷ Again, the more widespread this desire is, and the stronger it is, the more considerable are the benefits that companionship animals can offer, and the stronger the foundation it offers for direct rights claims by those animals if they can withhold that benefit in retaliation for ill treatment.

It would seem that many companionship animals are capable of withholding their manifestations of affection in response to what they consider to be ill treatment. Most pet owners can recount some time when their pet took exception to something the owner did, and proceeded to withdraw from the owner, or to engage in some other form of retaliation.¹⁸ Whenever my parents travel and leave our dog in someone's care, upon my parents' return, our dog will avoid my parents in the house as much as possible for a time. It is unlikely that all animals who serve as companions can withhold their affection in this manner, but the more capable they are of withholding their affections, the stronger is their claim to rights.

Insofar as (a) humans value the manifestation of affection from companion animals, (b) those animals are capable of withholding that value to retaliate against ill treatment, and (c) the withheld benefits outweigh the benefits of the ill treatment, those animals will qualify directly for some rights. These rights vary from the basic rights to adequate nutrition, housing, and health care to more complex rights that must be negotiated between the animal in question and its owner(s). Should a companionship animal care greatly about something—so much so that it will withdraw its affection unless it gets what it wants—and should the owners find it more in their interest to comply with the animal's wishes than to resist, then that animal will have a right to the object in question. While the particular set of rights varies based on individual interests and abilities, companionship will count in favour of animal rights whenever an animal is capable of withholding its affections in response to ill treatment.

2.1.2 Security

Some humans seek out animals for the sake of security. People who live alone, or who live in the country, may find it beneficial to keep the company of large dogs who will alert to any intruders, and who may indeed frighten or attack any intruders. Moreover, some people simply feel an increased *sense* of security at having a friendly animal present, whether or not that animal would be of any practical use in the presence of some intruder, though such a sense of security fits better with companionship than the kind of security discussed here.

There would seem to be at least two ways to persuade an animal to provide one with security: either by earning its loyalty through kindness or by so impressing it with one's superior physical and mental strength, through beatings or other punishments, that the animal obeys one's commands out of fear. These strategies may not be equally effective: security earned through punishment will last only as long as one's superiority is maintained. Should one fall ill, one might face a revolt on the part of the security animal. Moreover, there must be limits to the extent to which security is purchased through cruelty: unless the animal is provided with the conditions necessary for it to thrive physically, it will not maintain the strength and health necessary to provide the desired security.

Thus, regardless of the relative effectiveness of the two strategies, animals used for security should have basic rights to sufficient nutrition, housing, and health care to provide the desired security. Should the latter strategy of cruelty prove more effective than the former strategy of earning an animal's loyalty through kindness, security would count against further rights. Should the two strategies prove equal, security would count neither for nor against further rights: the benefit could be obtained through kindness or through ill-treatment. Should security be better purchased through kindness than cruelty, it would count in favour of further animal rights: security animals would then provide a benefit only in response to favourable treatment. One would need to negotiate with those animals for their continued service, providing whatever benefits they demanded in exchange for providing security, so long as the costs of providing those benefits were outweighed by the benefits.

2.1.3 *Service*

Under this heading I will address hunting assistance, transportation, and entertainment. Some humans use animals to help hunt: my brother was recently looking for a low-budget apartment and was told by a potential landlord that she preferred her tenants to have cats to keep the mice away. More typical examples of animals helping humans to hunt might be foxhounds and other scent hounds, retrievers, and pointers. Likewise, humans benefit from predators who hunt pests or other undesirable insects or animals. Sometimes these predators are native to the human environment in question, and other times the predators are deliberately introduced by humans to control other populations.¹⁹

Animals can also be used for transportation, from horse-drawn buggies to dog sleds. Finally, some animals can be used for entertainment, such as animals in zoos and circuses. There are also other aesthetic benefits that humans derive from animals: people generally find at least some of the animals living around them aesthetically pleasing: squirrels, birds, raccoons, foxes, etc. But these latter aesthetic values do not count in favour of animal rights insofar as the animals cannot withhold these benefits, and they are distinct from other forms of animal service insofar as they do not depend on any particular behaviour. These aesthetic values may count in favour of certain protections, and for that reason we will set these aesthetic values aside until section 3.

The three benefits addressed here—hunting assistance, transportation, and entertainment—share a structural feature, which is that they require the animals to act in certain ways for the benefits to be derived—namely, we need the animals to hunt for us or to transport us or to perform for us. Insofar as these benefits rely on animals *doing* certain things, they count in favour of certain basic rights: service animals have rights to the nutrition, housing, health care, and security necessary for them to perform the relevant service. If these needs are not met, the animals cannot perform the services in question.

Like security, service can count for or against further rights, depending on precisely what treatment the animals require to persuade them to perform the desired service. If punishment proves the most effective means to persuade an animal to hunt for you, to transport you safely where you please, or to entertain you or others in the desired way, the service in question counts against further rights for the animal. In that case, you can get what you want without needing to respect the interests of the animal in any given way. If, on the other hand, kindness is needed to persuade an animal to perform the desired service reliably and safely, then to that extent the benefits from that service count in favour of rights.²⁰ Once more, a process of negotiation between the owners or handlers and the animals in question will be needed to determine precisely what further rights will be needed in order for the animals to perform the desired service.

2.1.4 Medical/Testing

The various ways in which we use animals for roughly “medical” ends can be divided into two groups: “medical service” requires the animal to behave in certain ways to fulfill the function, while “medical testing” does not require any specific behaviour on the part of the animal. To identify examples of medical service, consider our use of seeing-eye dogs to conduct the visually impaired safely about their environments, and of various companionship animals to help treat some mental conditions like depression or autism. To identify examples of medical testing, consider our use of a host of animals in the testing of drugs, treatments, and cosmetics.

The category of medical service is essentially a sub-category of service and thus shares the same governing principle: such a benefit counts in favour of basic rights to the conditions needed for the animals to perform any service at all. The benefit may count for or against further rights depending on the kind of treatment needed to get the animals to perform the desired service. If punishment and intimidation are the best ways to bring about the desired benefit, then medical service counts against further rights. On the other hand, if the animals withhold their service unless further rights are recognized, then medical service counts in favour of whatever further rights the animals and their owners or handlers agree upon.

The category of medical testing counts against rights: often no kindness is needed to get the benefit from the animals, and the benefit can often be derived only by confining the animals in controlled environments and causing them serious pain or death.

2.1.5 Nourishment

We use animals for nourishment in two different ways, either by eating the animals, or by eating something that the animals produce, like eggs or milk. For the animals we eat, the benefit of nourishment may count in favour of minimal rights: the benefit of nourishment will only be derived if the animals receive sufficient food, health care, and protection from the elements and predators. Thus, animals used for nourishment are entitled to the conditions necessary for them to provide the benefit in question while they are alive. Their natures are such that, without sufficient food, protection, and health care, they will not grow to be optimal sources of nourishment, so, although they cannot *deliberately* withhold benefits in retaliation for ill treatment, they are bound to do so by their natures. But the nourishment derived from animals we eat necessarily counts against a right to life: if we were forbidden from killing them, the benefit of nourishment would dissolve and it would no longer ground any rights for the animals in question.

Animals who produce something that we eat are in a similar situation: they have rights to the conditions needed for them to provide the desired produce. Often, this will entail the same rights to adequate food, health care, and protection.

2.1.6 Clothing and Other Products

Many animals are used in the making of clothes and a variety of other products. In a small number of cases, these products do not require the killing of the animal in question, as in the case of sheep's wool. But in most cases, the animals must die for humans to get the products they want. This category is similar to nourishment: animals used for clothing or other products are entitled to the conditions needed for the benefit to be derived, and often that will involve rights to adequate food, health care, and protection from predators and the elements. But a right to life is ruled out insofar as the benefit in question requires the death of the animal.

2.1.7 Hunting

Some humans hunt wild animals, whether for sport, nourishment, or both. The benefit humans reap from these activities comes directly at the expense of animals, and no human restraint can enhance the benefit derived. Thus, these benefits count against rights for animals.

2.2 Species

Section 2.2 categorizes animals by use and details the rights entailed by each use. Section 2.3 will categorize animals by species, and detail the rights owed to various species. Of course, it is impossible to examine *each and every* species in this section; I will focus instead on dogs, cows, bears, and squirrels as species representative of the larger classes of, respectively, domesticated animals, farm animals, wild animals, and "liminal" animals.²¹ But, once again, generalizations, whether based on species or on use, will not be completely satisfactory, as they

are vulnerable to the many variations at the individual level; generalizing from these examples requires careful attention to the principles outlined in the first section.

2.2.1 *Dogs*

Dogs, in general, are capable of benefiting humans by providing companionship and security; by helping to hunt, transport, and entertain humans; by serving as subjects in medical experiments; and by providing medical services like guiding the blind. But to be certain, no one dog is capable of providing all of these benefits, and any given dog's rights will depend on the benefits it provides. Most dogs are also capable of causing rather serious harms to humans. Certainly, well-armed humans need not fear dogs, but most of us are not well-armed. Depending on the dog, it could pose a lethal, moderate, or negligible threat to an adult human, and most dogs could pose a moderate or lethal threat to a human child or infant. While human children and infants likely do not qualify for rights for reasons discussed in the first section, those humans who do qualify for rights generally desire that their children should not come to harm. Thus, harm to human children or infants will cause harm to able adult humans. Moreover, most dogs are capable of withholding benefits in response to ill treatment, and of withholding harms in response to good treatment. They are also capable of communicating their interests to humans, and cooperating with humans.²²

Given this combination of abilities, dogs used for companionship, security, hunting assistance, transportation, entertainment, and medical service should qualify directly for some moral rights. Should one treat a dog without restraint, it would be capable of withholding significant benefits, and perhaps of imposing moderate harms. Thus, the benefits one would have to derive from disregarding the interests of the dog would have to be significant to make that course of action advantageous. Of course, not all of the dog's interests will call for respect: our interests in confining dogs, for instance, may be rather great, and a dog may not feel that this confinement is so offensive as to retaliate. So while a full list of dog rights will be quite controversial, and unlikely to hold for all dogs, certain basic rights should be rather uncontroversial. Dogs should have rights against physical and mental abuse, and rights to adequate nourishment, health care, and protection. To deprive a dog of nourishment, or to abuse it, is to turn that dog into a threat to all humans: dogs will not retaliate against their abusers alone, but will often be violent to all humans. Given that human adults care greatly about their children, and that dogs could pose lethal threats to their children, humans should find it advantageous to require that no dogs be abused or starved. We could eliminate these potential threats by simply killing all dogs, but that would deprive all humans of the chance at any of the benefits that dogs are capable of giving. And without adequate health care, food, and protection, we will be unable to derive the benefits desired from dogs. Thus, it would be in everyone's interests to observe these restraints to ensure that dogs do not become threats.

What about the use of dogs in medical experiments? Foreseeable benefits of experimentation may count against rights for dogs used for that purpose. In order for it to do so, the benefits to be derived from medical experimentation on dogs would have to outweigh all of the foregone benefits and the accompanying increased risk of harm caused by the dog. Perhaps the benefits of medical experiments can outweigh these foregone benefits, and perhaps the increased risk of harm can be neutralized by effectively confining the dog, and in that case there would be no way to justify a duty against testing on the dog. But the benefits of each particular experiment must outweigh the costs, so while dogs may not have a right against all medical testing, they should have a right against testing that does not have expected benefits sufficient to outweigh the costs. And because some medical experiments may require abuse or starvation, dogs used for medical experiments lack rights against such treatment.

Thus, dogs not used for medical testing would have a basic set of rights: the right not to be physically or mentally abused and the rights to adequate nourishment, protection, and health care. All dogs would have the right not to be used in medical tests whose expected costs outweigh its expected benefits. But dogs used for appropriate medical tests would have no rights. Some dogs could have more rights on top of this, but those rights would vary more with the particular circumstances of the dog.

2.2.2 Cows

Cows are capable both of providing nourishment—both by being eaten and by providing their milk—and of providing clothing and other accessories. While cows are incapable of deliberately withholding benefits, their natures are such that, to provide some of the benefits we desire, they must be treated in certain ways. For instance, cows require adequate nutrition to yield milk or to be of use for eating. Moreover, they are highly dependent on human protection from predators and disease. Thus cows, and most farm animals, would only qualify for rights to those conditions needed for them to provide any benefit to humans: adequate nourishment, protection from predators, and health care. However, these rights are conditional: should circumstances make the benefits of violating one of these rights outweigh the costs, then the right in question no longer holds. For instance, in a drought or famine, resources and energies might be better spent otherwise than by raising animals for food, in which case the rights of farm animals to adequate nutrition would no longer hold. Thus, farm animals would have rights to the conditions needed for them to provide the benefits we desire, yet those rights would be conditional on the benefits outweighing the costs of guaranteeing the rights in question.²³

2.2.3 Bears

Humans derive benefits from bears by hunting them or by using them to make clothing or other accessories. Unlike animals who are farmed for clothing or other accessories, bears fend for themselves in the wild, and thus do not get rights to adequate food, protection, and health care from that benefit. Moreover,

because bears are capable of imposing considerable harm on humans, and are incapable of refraining from harming humans in exchange for restrained treatment, they can be considered a threat and thus inadmissible for rights. So bears, and most wild animals, would not qualify for rights.

2.2.4 *Squirrels*

Squirrels belong to a class of animals that Donaldson and Kymlicka call “liminal animals.”²⁴ They are not domesticated animals, but they seek out human societies in which to live, in contrast to wild animals. Squirrels, and liminal animals in general, provide no benefits to humans, and what minor harms they cause humans they cannot avoid causing. Thus, such animals would not qualify for rights directly.

2.3. Summary

This section has applied the criteria from section 1 to animals categorized by use and by species. On the basis of the first set of categories, animals used for companionship, security, hunting assistance, transportation, entertainment, medical service, nourishment, and clothing or other accessories are owed basic rights to adequate food, health care, and protection from predators and the elements. Animals used for companionship are owed further rights, which must be negotiated on a case-by-case basis between the animals and their owners. Animals used for security, hunting assistance, transportation, entertainment, and medical service may be owed further rights if they withhold the benefit in question unless certain additional conditions are met, and if those conditions are not more costly than the benefit derived. Animals used for medical testing or hunting have no rights: the benefit derived requires that the animals’ interests be disregarded. All of these rights are conditional on the animal continuing to provide the benefit in question: should the animal be transferred from one category to another, or cease to provide benefit altogether, the rights of that animal may change or cease to exist entirely.

On the basis of the categorization according to species, dogs should have rights against mental and physical abuse and against use in “frivolous” medical experiments, and rights to adequate nourishment, health care, and protection from predators and the elements, unless they are serving in medical experiments. Dogs may also receive further rights, as negotiated between dogs and their owners. Cows should have rights to adequate food, health care, and protection, but bears and squirrels do not receive any rights. From these species, we may, with caution, generalize from dogs to domesticated animals, from cows to farm animals, from bears to wild animals, and from squirrels to liminal animals.

These two sets of categorizations help to offer guidance on the rights owed to general categories of animals, but because there is great variation in the abilities of individual animals within each category, these guidelines must be adjusted in light of the principles detailed in section 1 and further information about the abilities and interests of individual animals.

3. PROTECTORATE STATUS

For an individual to qualify indirectly for protectorate status, either some set of people who qualify directly for rights must feel strongly enough that the individual in question ought not to be treated in certain ways that they would be willing to carry out threats against anyone who treats the individual in that way, or else all those who qualify for rights must decide that it is in their interest to obey certain restraints that protect the individual in question. Because of unanswered theoretical questions, this article limits itself to cases where a vast majority of rights-holders strongly desire certain protections for the protectorates in question; otherwise, the assertion of protectorate status risks being illiberal. Protectorate status yields “protections” for the protectorate, which correlate to indirect duties not to violate the protectorate in the specified ways. Any account of protectorate status will have to rely heavily on an account of human preferences. Should preferences change dramatically, the account of protectorate status will need to be revised. Thus, protectorate status is much less stable than rights, and may indeed vary drastically in different places at different times.

Given the dependence of protectorate status claims on human preferences, I will limit my discussion of protectorate status to present-day North American society. In this society, many people enjoy keeping animals as pets, and find themselves in a similar situation towards their pets as they would be towards their infant children: they take a deep interest in the well-being of their pets, and any harm to their pets harms them.²⁵ And I think it is rather safe to say that the vast majority of North Americans stand to gain little from harming others’ pets. Insofar as pet owners would likely carry out some retaliation against anyone who harmed their pets, and no one really has a strong reason to abuse another’s pet anyway, a convention recognizing that pets should not be harmed would be mutually advantageous in this society. But it is important to qualify this convention: the purported duties not to harm would apply to all but the pet’s owner. It says nothing about a pet’s owner abusing it. This protection is akin to the protections extended to a person’s property: no one is permitted to destroy my car, but I am free to do so.

Would any protectorate status be recognized that included protections for animals against their owners or should the animals be un-owned, against all humans? Here we would have to make reference to the preferences that people have over wild animals, liminal animals, and domesticated animals that are not owned by the people in question. A considerable majority of people feel rather disgusted when they are made aware of any cruelty inflicted on animals, where cruelty is understood as violence that is disproportional to, or unnecessary for, whatever aim is thereby achieved. And there is a growing trend towards vegetarianism and veganism, involving disgust at any harm to animals, or even use of animals as mere means towards human ends. Nevertheless, it seems that the strong majority of North Americans are fine with the killing and harming of farm animals, wild animals, and liminal animals, so long as some benefit is thereby obtained and the harm is necessary to obtain the benefit. Thus all ani-

mals could have protections against cruelty, or harm that is disproportional or unnecessary to any benefit thereby obtained, but they would lack stronger protections against any harm or against being used as mere means. Should the vast majority of North Americans adopt vegan attitudes, and thus strongly prefer that no one harm an animal or use it as a mere means, and should they be willing to back up this preference with threats against anyone who harms or uses animals in this way, a much stronger set of protections for animals can obtain.

Aside from our love of pets and our discomfort with animal cruelty, many of us also have aesthetic preferences regarding nature: we want natural environments to be preserved, and we want the natural diversity of species preserved for our appreciation and for the appreciation of future generations. The strength and prevalence of this preference will determine the extent to which some wild animals might receive protections from any harmful or disruptive human interaction in their habitats. These preferences may not protect all wild animals, however: the preference might be satisfied by maintaining a certain number of natural habitats and animals, while allowing others to be destroyed. It will depend upon the specifics of the preference, whether people prefer that all wild animals be allowed to thrive in their current environments, perhaps with positive human interventions to correct for the detriments already imposed by human development, or whether they simply want a sufficient diversity of wild habitats to be preserved for human enjoyment. Either way, it seems safe to say that in North America some wild animals could receive strong protections against harmful human interference in their lives based on such aesthetic preferences.

Thus far I have been discussing attitudes that vary across societies, and I have focused on North American society, but there is one universal preference that might lead to strong protections for some wild animals worldwide. Nearly all humans strongly prefer to take actions today to secure their future well-being, and to avoid actions that would imperil their futures. Moreover, most humans care strongly about the future well-being of their offspring. As such, climate change should be of great concern to all humans, and more generally, all humans should strongly desire to preserve the ecosystems necessary to support and promote human life.²⁶ Insofar as the disruption of certain ecosystems threatens the ability of the earth to support human life, strong protections for the animals requisite for the health of those ecosystems will be generated, and these protections should hold universally. Again, not all wild animals will be protected equally, but at the very least some wild animals will receive rather strong protections from negative human interference in their lives and habitats, and will perhaps even be owed positive assistance from humans, such as inoculation against disease.

To sum up, rather strong and universal protections can be generated to protect those wild animals required for the continuation of human life, including those animals and ecosystems whose destruction would contribute to climate change. These protections would include protections against negative human interference, and likely an entitlement to beneficial human intervention. Perhaps only a bit less universally, protections for all animals against cruelty, or harm dis-

proportional to whatever benefit is to be gained thereby, are likely to arise from human discomfort at the thought of cruelty to animals. Less universally still, protections for pets against harm at the hands of anyone other than their owners are generated by humans' love of their pets. And likely the least universal and the least strong of all, aesthetic preferences for the preservation of certain wild spaces and species would lead to protections against negative human intervention and perhaps even entitlements to beneficial human intervention for some wild animals. I say least "strong" because our aesthetic preferences are generally rather weak, and we can be compelled to ignore our aesthetic preferences for the sake of some stronger preferences. Thus, poorer societies, while they may have the same aesthetic preferences for natural preservation, are likely to be driven to exploit their natural resources in whatever way they can to fulfill their stronger preferences for adequate food, shelter, and medical resources. Aesthetic preferences may generate protections in wealthy societies where natural preservation can be achieved without sacrificing more urgent needs, but will fail to do so elsewhere. The same is true of all of protections: should the human desires that these protections satisfy be overwhelmed by more urgent desires, the fulfillment of which required the violation of those purported protections, then those protections will cease to hold.

4. CONCLUSION

I hope to have shown that social contract theories rooted in mutual advantage do indeed have the resources to generate moral rights and protections for animals, contrary to the views of both critics and advocates of social contract theory. According to mutual advantage contractarianism, animals used for companionship, security, hunting assistance, transportation, entertainment, medical service, nourishment, or clothing tend to qualify for rights against starvation, predation, and disease. Dogs tend to qualify for rights against abuse and frivolous experimentation. Cows tend to qualify for rights against starvation, predation, and disease, but squirrels and bears tend not to qualify for rights. These tendencies offer us guidance with respect to our treatment of animals, but this guidance often needs to be supplemented with information about the individual animal in question. Mutual advantage contractarianism also recognizes potential "protectorate" status for various animals. All animals have certain protections against cruelty stemming from protectorate status. Moreover, pets and those animals needed for the environment to support human life or to fulfill our aesthetic preferences would also receive such moral protections.

These rights and protections are certainly not as comprehensive as most animal rights advocates would like, but they are moral protections nonetheless. The standard quick dismissal of such social contract theories as inadequate to the task of animal rights is thus mistaken; social contract theories deserve a fair hearing. We must compare the strengths and weaknesses of social contract theory with those of the alternative theories preferred by animal rights theorists, who ground their claims in capabilities theory, deontology, and utilitarianism. Social contract theory may not generate all of the protections that animal rights theorists really desire, but it may offer a stronger and more persuasive foundation for rights claims than the alternative accounts.

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NOTES

- ¹ See, for example, DeGrazia, David, *Animal Rights: A Very Short Introduction*, Oxford, Oxford University Press, 2002, pp. 25-26; Palmer, Clare, *Animal Ethics in Context*, New York, NY, Columbia University Press, 2010, p. 22.
- ² See, for example, Gauthier, David, *Morals by Agreement*, Oxford, Clarendon Press, 1986, p. 17; Hobbes, Thomas, *Leviathan: With Selected Variants from the Latin Edition of 1668*, in Edwin Curley (ed.), Indianapolis, Hackett Publishing Company, 1994, p. 85; Hume, David, *An Inquiry Concerning the Principles of Morals*, in Charles W. Hendel, (ed.), New York, The Liberal Arts Press, 1957, pp. 21-22; Narveson, Jan, "Animal Rights", *Canadian Journal of Philosophy*, vol. 7, no. 1, March 1977, pp. 161-178; Narveson, Jan "Animal Rights Revisited", in Harlan B. Miller and William H. Williams (eds.), *Ethics and Animals*, Clifton, NJ, Humana Press, 1983, pp. 45-59; Narveson, Jan, "On a Case for Animal Rights", *The Monist*, vol. 70, no. 1, Jan. 1987, pp. 31-48.
- ³ The passage that follows draws heavily on the ideas of these authors without referencing them explicitly. See Plato, Book II, *The Republic of Plato*, Francis Macdonald Cornford, trans., Oxford, Oxford University Press, 1945; Hobbes, *Leviathan*, *op. cit.*; Spinoza, Baruch, "Chapter 16. On the foundations of the state, on the natural and civil right of each person, and on the authority of sovereign powers", *Theological-Political Treatise*, Michael Silverthorne, trans., and Jonathan Israel, ed. and trans., Cambridge, Cambridge University Press, 2007, pp. 195-207; Hume, David, *A Treatise of Human Nature*, L.A. Selby-Bigge (ed.), Oxford, Clarendon Press, 1967; Hume, *An Inquiry Concerning the Principles of Morals*, *op. cit.*; Gauthier, *Morals By Agreement*, *op. cit.*; Hampton, Jean, *Hobbes and the Social Contract Tradition*, Cambridge, Cambridge University Press, 1995; Narveson, Jan, *The Libertarian Idea*, Peterborough, Ontario, Broadview Press, 2001. See also the discussion of justice as mutual advantage in Barry, Brian, *A Treatise on Social Justice, Vol. 1: Theories of Justice*, Los Angeles, University of California Press, 1989.
- ⁴ "Individual" here is intended to be vague as to whether all humans are individuals, and whether any animals are individuals, but it is generally intended to designate at least most humans.
- ⁵ Earlier mutual advantage contractarians like Hobbes and Hume appealed to a theory of human nature and desires when determining the dictates of contractarian morality, whereas later contractarians have tended to prefer to minimize the role that a substantive account of human nature and human desires plays, relying instead on a formal account of maximizing one's desire-fulfillment, whatever those desires may be.
- ⁶ Here I follow Barry's correction of Hume's "limited generosity" claim. See Barry, *A Treatise on Social Justice, Vol. 1: Theories of Justice*, *op. cit.*, p. 158.
- ⁷ I have ignored many of the nuances of plausible mutual advantage contract theories, as well as many difficulties, all of which are interesting and crucial to an evaluation of the strength of mutual advantage contract theories, but which are not essential to the question of whether or not such theories lead to moral protections for animals.
- ⁸ See Narveson, "Animal Rights", *op. cit.*, p. 177; Narveson, "Animal Rights Revisited", *op. cit.*, p. 57; Narveson, "On a Case for Animal Rights", *op. cit.*, p. 42. See also Morris, Christopher W., "Moral standing and rational-choice contractarianism" in Peter Vallentyne (ed.), *Contractarianism and Rational Choice: Essays on David Gauthier's Morals By Agreement*, Cambridge, Cambridge University Press, 1991, pp. 76-95. Morris's article, which I came across after completing this paper, articulates an account of moral standing that is essentially the same as my account of what is required to qualify for rights, including a distinc-

tion between rights and “protectorate” status (though Morris uses different terms). I am reassured to discover this agreement, and will develop this insight into a more complete contractual account of animal rights in the rest of this paper.

⁹ I would like to thank Will Kymlicka for drawing my attention to this issue in personal correspondence.

¹⁰ This argument is essentially the same as Hobbes’s argument for the second law of nature, which directs us to lay down our unlimited natural rights insofar as others are willing to do the same. Hobbes, *Leviathan*, *op. cit.*, chapter 14, pp. 79-89. See also Buchanan, James M., *The Limits of Liberty: Between Anarchy and Leviathan*, Indianapolis, Liberty Fund, 2000, p. 6.

¹¹ I believe that this issue has been under-examined because of the shift that has occurred in social contract theory from those theories that appeal to a substantive account of human nature and human desires, like those of Hobbes and Hume, to those theories that rely much more heavily on a formal account of rationality without an accompanying account of human nature and desires, like that of Gauthier. While the latter strategy may be more parsimonious, it seems impossible to derive rights from a social contract without appeal to a substantive account of human desires. And such an appeal to human desires requires attention to the criteria for determining under what conditions a preference can legitimately be incorporated into the contract without violating the liberal principle.

¹² See, for instance, Buchanan, *The Limits of Liberty*, *op. cit.*; Gauthier, *Morals by Agreement*, *op. cit.*; Narveson, *The Libertarian Idea*, *op. cit.*.

¹³ Donaldson, Sue and Kymlicka, Will, *Zoopolis: A Political Theory of Animal Rights*, Oxford, Oxford University Press, 2011, p. 111, discussing Thomas, Elizabeth Marshall, *The Hidden Life of Dogs*, Boston, Houghton Mifflin, 1993.

¹⁴ One could also categorize animals according to the kinds of harms they can impose on humans; however, such a categorization offers much less useful guidance insofar as, for the most part, the animals capable of imposing severe harms on humans are incapable of withholding those harms in response for appropriate treatment. Most of the relevant costs that animals can impose on humans come from withheld benefits, not from positive harms. For that reason, I forego categorization based on harms.

¹⁵ Donaldson and Kymlicka identify a number of the items in this list in *Zoopolis*, *op. cit.*, p. 73.

¹⁶ Nussbaum, Martha, *Frontiers of Justice: Disability, Nationality, Species Membership*, Cambridge, Mass, The Belknap Press, 2006, pp. 75-77.

¹⁷ See Fran Liebowitz’s view, discussed in Donaldson and Kymlicka, *Zoopolis*, *op. cit.*, pp. 211-212.

¹⁸ For examples, see Donaldson and Kymlicka, *Zoopolis*, *op. cit.*, pp. 108-112, 115, 117-118, 120. Indeed, Donaldson and Kymlicka point out that domestication presupposes and reinforces animals’ abilities to have and communicate a subjective good, to cooperate, and to “participate in the co-authoring of laws,” pp. 103-105.

¹⁹ *Ibid.*, pp. 222-226.

²⁰ Indeed, there is anecdotal evidence that the horses used for transportation purposes would go on strike in protest at their working conditions, showing that they require more than just punishment in exchange for the benefit of transportation. See Hibral, Jason, “Animals, Agency, and Class: Writing the History of Animals from Below,” *Human Ecology Review*, vol. 14, no. 1, pp. 101-112, discussed in Donaldson and Kymlicka, *Zoopolis*, *op. cit.*, p. 115.

²¹ While I am not following their categorizations precisely with these examples, the examples were chosen in light of Donaldson and Kymlicka’s categorization of animals into three groups: domesticated, wild, and liminal. My examination could not stay at such a general level, requiring particular examples and a further subdivision of the domestic category. See Donaldson and Kymlicka, *Zoopolis*, *op. cit.*.

²² See *Ibid.*, pp. 104-105, 108-112.

²³ One interesting corollary of this approach is that, were we all stop eating farm animals and their produce, the direct rights of cows and other farm animals would dissolve, as we would no longer reap a benefit from them that was conditional on certain treatment. Recognition of such rights could no longer be mutually advantageous.

²⁴ *Ibid.*, pp. 210-251.

²⁵ Narveson, "On a Case for Animal Rights", *op. cit.*, p. 44.

²⁶ *Ibid.*, pp. 45-46.