

ESCAPE ROUTES: THE POSSIBILITY OF HABEAS CORPUS PROTECTION FOR ANIMALS UNDER MODERN SOCIAL CONTRACT THEORY

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INTRODUCTION

What was old is new again, not by choice but by necessity. In championing the legal rights of nonhuman animals (hereinafter animals), the Nonhuman Rights Project (NhRP) has decided that moving forward means looking backward, to common-law principles articulated centuries earlier.¹ Under the leadership of Steven M. Wise, the NhRP has argued that at common law, “certain nonhuman animals—specifically great apes, dolphins, and elephants—are entitled to such basic legal rights as bodily liberty and integrity.”² The NhRP used this common-law approach in the New York State courts to argue that chimpanzees should be entitled to habeas corpus protection.³ The Appellate Division rejected this argument and lower State Supreme courts followed suit, denying writs to four chimpanzees: Tommy,⁴ Kiko,⁵ Hercules, and Leo.⁶ The NhRP’s tack

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1. See *Why We Work Through Common Law*, THE NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrightsproject.org/why-we-work-through-the-common-law/> (last visited Sept. 18, 2016) (“The Nonhuman Rights Project will focus on establishing fundamental rights that can be achieved through the common law, since a common law court can do what it believes justice requires . . .”).

2. *Q&A about the Nonhuman Rights Project*, THE NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrightsproject.org/qa-about-the-nonhuman-rights-project/> (last visited Sept. 18, 2016).

3. See *infra* Part I.

4. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150 (N.Y. App. Div. 2014), *appeal denied*, 26 N.Y.3d 902 (N.Y. 2015) [hereinafter *Tommy*].

inadvertently embroiled the judges in an obscure political theory question: whether early modern social contract theory insists that in order to possess “rights,” one must assume “duties.”⁷ The courts, exclusively relying on recent scholarship to understand the issue, said yes. This Article argues that the courts erred in relying on scholarship that was itself mistaken.

Undoubtedly, modern social contract theory has paid scant attention to the role of animals as rights-bearing subjects.⁸ Political theory and political philosophy have traditionally focused on what distinguishes human beings from other animals.⁹ In the modern period, political theorists have typically viewed humankind as a transformative species, one that moves on its own trajectory,¹⁰ not

5. Nonhuman Rights Project, Inc., *ex rel.* Kiko v. Presti, 124 A.D.3d 1334, 1335 (N.Y. App. Div. 2015), *appeal denied*, 126 A.D.3d 1430 (N.Y. App. Div. 2015) [hereinafter *Kiko*].

6. Nonhuman Rights Project, Inc. *ex rel.* Hercules & Leo v. Stanley, 49 Misc. 3d 746, 773 (N.Y. Sup. Ct. 2015) [hereinafter *Hercules & Leo*].

7. *See Tommy*, 124 A.D.3d at 150–51.

8. *See* ALASDAIR COCHRANE, AN INTRODUCTION TO ANIMALS AND POLITICAL THEORY 4–5, 56–77 (2010). While I disagree with Cochrane’s reading of important canonical sources, he provides a good overview of the marginalization of animals in modern social contract theory.

9. *See generally* HANNAH ARENDT, THE HUMAN CONDITION, chs. I–III (2nd ed. 1958) (arguing, for example, that humans distinguish ourselves from other animals by being able to partake in work—the interaction between the natural world and human artisanship—as opposed to mere labor, the production of necessities) [hereinafter ARENDT, HUMAN CONDITION]; COCHRANE, *supra* note 8, ch. 2 (surveying the history of thinking on the relationship between justice and animals).

10. Early modern political thought focuses on how humankind embarks on a historical pathway that diverges from the regular cycles of nature that bind the lives of animals. In a secularized version of the “fall of man,” humankind, lacking the instincts of animals but possessing reason and free will, is said to have an inharmonious relationship with nature and must struggle to find a place for itself via the process of history. By contrast, animals, lacking reason and free will but possessing strong instincts, have a harmonious relationship with nature. As anonymous members of a species, they are born, die, and are born again repeatedly. *See, e.g.*, JEAN-JACQUES ROUSSEAU, THE DISCOURSES AND OTHER EARLY POLITICAL WRITINGS 141 (Victor Gourevitch ed. and trans., 1997) (“[T]he faculty of perfecting oneself . . . with the aid of circumstances, successively develops all the others, and resides in us, in the species as well as in the individual, whereas an animal is at the end of several months what it will be for the rest of its life, and its species is after a thousand years what it was in the first year of those thousand.”); IMMANUEL KANT, POLITICAL WRITINGS 43 (Hans Reiss ed., H. B. Nisbett trans., 1991) (“Nature has willed that man should produce

bound by the cycles of nature that seem to bind other species.¹¹ These traditions also tend to focus on humans' unique capacity for speech and reason, our broader temporal horizons, and our ability to think in abstractions, such as principles and laws.¹²

This sharp human-animal distinction can distort how contemporary interpreters view the implications of broader philosophical arguments in classical texts. An author's observations on differences between humans and animals can bleed together with his treatment of other topics, short-circuiting textual arguments so that readers draw conclusions from what they perceive an author to mean rather than on what he actually wrote. This distortion is amplified by the fact that, for the past thirty years or more, theorists

entirely by his own initiative everything what goes beyond the mechanical ordering of his animal existence, and that he should not partake of any other happiness or perfection than that which he has procured for himself without instinct and by his own reason.”); FREDERICK ENGLES & KARL MARX, *ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844 75* (Martin Milligan trans., 2007) (“Conscious life-activity directly distinguishes man from animal life-activity. . . . In creating an objective world by his practical activity, in working-up inorganic nature, man proves himself a conscious species being. . . . Admittedly animals also produce. They build themselves nests, swellings, like the bees, beavers, ants, etc. But an animal only produces what it immediately needs for itself or its young. It produces one-sidedly, whilst man produces universally.”). In the twentieth century, one group of thinkers saw human history ending not with self-destruction, but with the “animalization of man.” See, e.g., ALEXANDRE KOJÈVE, *INTRODUCTION TO THE READING OF HEGEL* 158–59 (James H. Nichols, Jr. trans., 1980) (stating that at the end of human history, “men would construct their edifices and works of art as birds build their nests and spiders spin their webs, would perform musical concerts after the fashion of frogs and cicadas, would play like young animals, and would indulge in love like adult beasts.”).

11. As Hannah Arendt writes, “The mortality of man lies in the fact that individual life . . . with a recognizable life-story from birth to death, rises out of biological life . . . This individual life is distinguished from all other things by the rectilinear course of its movement, which, so to speak, cuts through the circular movements of biological life. This is mortality: to move along a rectilinear line in a universe where everything, if it moves at all, moves in a cyclical order.” HANNAH ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 42 (1977) (foreign terms omitted).

12. See generally ARENDT, *HUMAN CONDITION*, *supra* note 9, at 27 (discussing, for example, Aristotle's definition of man as “a living being capable of speech,” whose highest capacity was the capacity of contemplation); *POLITICAL THEORY AND ANIMAL RIGHTS* xiii–xx (Paul A.B. Clarke & Andrew Linzey eds., 1990) (outlining various philosophers' attempts to explain what distinguishes humans from animals).

have frequently relied on “the constitutive other” or “othering” as a way to make sense of canonical texts.¹³ By looking at an author’s prejudices—especially prejudices based on race, sex, or national origin—one can often find ways that an excluded identity plays some part in structuring the author’s argument. While providing instructive insights, this approach should be viewed as suspect if used to avoid engaging with an author’s argument in all of its complexity.

This methodological predisposition toward seeing prejudicial assumptions baked into the tradition of western political thought is especially problematic when it comes to biases against animals. With regard to prejudices against human beings, reform-oriented commentators can direct their insights to help fuel popular outrage or energize political interest groups. The idea that our legal and governmental structures are fundamentally unjust and must be overhauled can inspire political action. On the other hand, animals are relatively politically powerless. They do not have comparably powerful lobbies to advocate for change on their behalf. So not only does the prejudice-oriented reading of classical sources not help animals politically, but it also does animal rights advocates a disservice in the courts, where doctrinal traditionalism and *stare decisis* make radical change anathema to most judges. If a judge reads that classical sources agree that animals must be denied legal protections or rights, then typically she will not be inclined to remedy this wrong through an innovative ruling. On the contrary, she will be inclined to defer to tradition.

This problem is compounded by the academic nature of the project of developing a philosophical basis for animal rights. Since social contract theory has served animals poorly in the past, there is an understandable inclination to emphasize the limitations of this tradition and to find alternative bases for an animal rights regime going forward. Thus, one finds that among animal rights theorists, canonical sources are treated summarily, in stark contrast to the

13. While this approach has become ubiquitous in the humanities and certain social sciences, two of the most influential examples are Judith Butler’s *Gender Trouble: Feminism and the Subversion of Identity* and Edward W. Said’s *Orientalism: Western Conceptions of the Orient*. Butler argues that “the other” is a category necessary to all ontological structuring of identity, whereas Said looks at othering in the specific context of the West defining itself in opposition to the East. Compare JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 59 (1990), with EDWARD W. SAID, *ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT* 26 (1978).

rigorous and detail-oriented approach they take toward contemporary debates among their peers.¹⁴

While we have no control over whether an author's prejudices have misinformed her argument, we can actively try to prevent our prejudices from affecting our interpretation of her writings so that they appear to validate our commonsensical assumptions. An order of the New York State Appellate Division, Third Judicial Department denying a writ of habeas corpus to remove Tommy from the squalid living conditions provided by his owner provides a striking example of the effects of this interpretive taint. The Third Department provided a doctrinal justification for its denial, stating that,

[T]he ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights."¹⁵

The idea that rights are assigned only to those who assume societal duties could pass for common sense. After all, is it not the case that most citizens have both societal rights and duties? It seems sensible to see a conditional relationship between the two concepts: if we have rights, then we must have duties; if we do not have duties, then we cannot have rights. However, the court did not claim to make

14. See, e.g., COCHRANE, *supra* note 8, at 22, 52, 116, 148 n.33–34 (providing an overview of Hobbes, Locke, and Rousseau without engaging with the concrete language of their writings or the details of their arguments); see also ROBERT GARNER, A THEORY OF JUSTICE FOR ANIMALS: ANIMAL RIGHTS IN A NONIDEAL WORLD 33 n.3 (2013) (describing contemporary debates about Hobbes). Both authors provide excellent, detailed accounts of contemporary debates, but with regard to Hobbes, make only passing references to passages in *De Cive* that require much deeper analysis to be fully understood. For my analysis of these passages, see *infra* Part III.A.

15. *Tommy*, 124 A.D.3d 148, 151 (N.Y. App. Div. 2014) (quoting Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments from "Marginal Cases"*, 45 ARIZ. ST. L.J. 1, 12–14 (2013) [hereinafter Cupp, *Children, Chimps, and Rights*]).

a normative judgment about how rights and duties *should* be assigned. Rather, it claimed to identify a historical connection between the two concepts, one that underlies our commitment to “freedom and democracy.”¹⁶

Many political theorists and people who pay attention to the news will probably feel uneasy about affirming this pronouncement. After all, what duties could Lakhdar Boumediene, an Algerian-born citizen of Bosnia and Herzegovina and enemy combatant held at Guantánamo Bay, have assumed to the United States that entitled him to a writ of habeas corpus in *Boumediene v. Bush*?¹⁷ Is it the case that habeas corpus was granted to African Americans after the Civil War because there was a change in opinion regarding whether they could assume duties?¹⁸ And turning to canonical sources, did not Thomas Hobbes say that the sovereign, erected by a social contract or conquest, could establish legal protections and the parameters of legal personhood however it thought best?¹⁹ Did not John Locke say that human beings had inalienable rights under natural law by virtue of our *humanity*, not because of some tit-for-tat?²⁰ If social contract theory presupposes that nature is the source of unconditional rights, then how does this interact with the assertion that rights are granted conditionally through conventional agreements?

As a historical matter, recent scholarship on habeas corpus has underscored the political aspects of the writ and its appropriation by different regimes, thereby emphasizing its chameleon-like quality. Looking at its application at different times in American history, one sees that “coalitions, or political regimes, sought to undo the political and legal legacies of the past through strategic changes to habeas corpus in order to establish and then enforce their own vision of constitutional governance in the United States.”²¹ As Professor Justin J. Wert argues, even though “[h]abeas corpus is indeed a deeply legal concept, with a rich pedigree of doctrinal case law in British and

16. *Id.*

17. *Boumediene v. Bush*, 553 U.S. 723, 723 (2008).

18. Wert argues that the writ of habeas corpus has been used as a political tool by various political coalitions “to enforce their preferred vision of constitutional governance.” He goes as far as to claim that “[T]he use of habeas to vindicate fundamental individual rights in ways we imagine today was only ever an ephemeral by-product of this larger political reality.” JUSTIN J. WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 74 (2011).

19. *See infra* Part III.A.

20. *See infra* Part III.B.

21. WERT, *supra* note 18, at 3.

American history,” it would be a mistake to see the writ “primarily” or “solely” as a legal concept.²²

I do not argue that modern social contract theory positively supports granting legal rights to animals, although I do think that other commentators have been ungenerous in their view that traditional sources cannot support a theory of animal rights.²³ Rather, I argue that the New York State Appellate Division, and the authorities relied on by the court, were wrong in claiming that modern social contract theory *precludes* granting legal rights to animals because the capacity for assuming duties is a precondition for being granted rights. Modern social contract theory provides a rationale for why certain natural rights of natural persons cannot be compromised by the governments to which we consent; it does not argue that governments cannot grant additional rights or create other forms of legal personhood when, otherwise, the natural rights of natural persons are preserved. In sum, to the extent that social contract theory makes ontological assumptions about human beings and animals, these assumptions do not prohibit extending the writ of habeas to animals.

This Article is laid out in four Parts. Part I recounts the decisions of the New York courts to deny habeas corpus protections to chimpanzees. Part II analyzes the legal and academic authorities the courts relied on to make their decisions. Part III examines three major figures in modern social contract theory—Thomas Hobbes, John Locke, and John Rawls—and argues that their theories do not preclude animal rights by insisting on the reciprocity of rights and duties. In the Conclusion, I argue for an alternative form of “freedom”—different from the notions of freedom normally used to conceptualize the social contract—as a basis of contractarian rights for humans and animals alike. Franz Kafka called this alternative the “way out.”²⁴ He distinguished it from freedom in a conventional sense because he saw that, in societies, beings are always compelled to navigate a maze of relationships that they never choose to form but

22. *Id.* at 2.

23. *See, e.g.*, ROBERT GARNER, *THE POLITICAL THEORY OF ANIMAL RIGHTS* 13 (2005) (stating that under the social contract theory of Thomas Hobbes and John Locke, “ill-treating an animal does not infringe any morally important animal interests directly, but we may infringe the interests of other humans in the process”). I will challenge this claim in Part III.

24. FRANZ KAFKA, *A Report to an Academy*, in *SELECTED SHORT STORIES OF FRANZ KAFKA* 182 (Willa Muir & Edwin Muir eds. and trans., 1993); *see also infra* Conclusion.

can never completely abandon. I use this concept to argue that humans and animals alike share a cognizable legal interest in moving from worse to better situations. I further argue that it would be consistent with modern social contract theory to impute this interest to animals, even if they are unable to express it themselves, because the same rational self-interest is imputed to human beings in order to claim that they have tacitly consented to be governed.

I. DECISIONS OF THE THIRD AND FOURTH JUDICIAL DEPARTMENTS

The New York Appellate Division, Third and Fourth Departments, have denied NhRP's application for writs of habeas corpus for chimpanzees Tommy²⁵ and Kiko,²⁶ respectively. The Third Department decided the threshold question of whether chimpanzees were legal persons, holding that "a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus."²⁷ This decision in turn decided the fates of two more chimpanzees, Hercules and Leo, for whom the NhRP had also petitioned a lower New York State Supreme Court.²⁸ Hercules and Leo had been held at the State University of New York at Stony Brook (SUNY Stony Brook) since 2010 and used as research subjects to study primate locomotion.²⁹ As Judge Barbara Jaffe noted in the lower court decision, the NhRP did not claim that SUNY Stony Brook was "violating any federal, state or local laws by holding Hercules and Leo, nor does it 'seek improved welfare for Hercules or Leo,' or otherwise 'to reform animal welfare legislation.' Rather . . . the sole issue is whether Hercules and Leo may be legally detained at all."³⁰ The Fourth Department dealt with the issue of whether a writ of habeas corpus could be issued for the purpose of transferring a person from one form of captivity to another, holding that "habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself."³¹

25. *Tommy*, 124 A.D.3d 148, 150 (N.Y. App. Div. 2014).

26. *Kiko*, 124 A.D.3d 1334, 1335 (N.Y. App. Div. 2015).

27. *Tommy*, 124 A.D.3d at 150.

28. *Hercules & Leo*, 49 Misc. 3d 746, 751–52 (N.Y. Sup. Ct. 2015).

29. *Id.* at 749.

30. *Id.* at 749 (internal citations omitted).

31. *Kiko*, 124 A.D.3d at 1335.

Both Tommy and Kiko are owned by private individuals.³² As of February 2016, it is reported Tommy had been sold to a roadside zoo in Michigan.³³ The case of Hercules and Leo ended more happily. After SUNY Stony Brook transferred the pair to the University of Louisiana's New Iberia Research Center (NIRC) for further experimentation, the NIRC agreed to transfer all 220 chimpanzees in its possession to the Project Chimps Sanctuary in Brunswick, Georgia.³⁴

Because the Third Judicial Department decided the threshold question of whether chimpanzees might qualify for legal personhood, I will focus on this issue, not the Fourth Department's holding. I touch upon the latter holding only in my Conclusion.³⁵ In the Third Judicial Department case, there was no dispute that "animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons"³⁶ Rather, the question was whether the "great flexibility and vague scope" of the writ could be used to reach chimpanzees.³⁷ The court reasoned that the writ could not reach chimpanzees because, under our social contract tradition, "society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities."³⁸

II. AUTHORITIES RELIED ON BY THE THIRD JUDICIAL DEPARTMENT

The court relied on the following authorities to claim that historically one must have duties in order to be granted rights³⁹: the Supreme Court's decision in *In re Gault*,⁴⁰ the Ninth Circuit's decision

32. Michael Mountain, *Bios on the Chimpanzees in the New York Lawsuits*, NONHUMAN RIGHTS PROJECT, (Nov. 30, 2013), <http://www.nonhumanrightsproject.org/2013/11/30/bios-on-the-chimpanzees-in-new-york-lawsuits/>.

33. Lauren Choplin, *Update: Tommy*, NONHUMAN RIGHTS PROJECT (Feb. 12, 2016), <http://www.nonhumanrightsproject.org/2016/02/12/update-tommy/>.

34. Lauren Choplin, *Nonhuman Rights Project Chimpanzee Clients Hercules and Leo to Be Sent to Sanctuary*, NONHUMAN RIGHTS PROJECT (May 3, 2016), <http://www.nonhumanrightsproject.org/2016/05/03/nonhuman-rights-project-chimpanzee-clients-hercules-and-leo-to-be-sent-to-sanctuary/>.

35. *See infra* note 178 and accompanying text.

36. *Tommy*, 124 A.D.3d 148, 150 (N.Y. App. Div. 2014).

37. *Id.* at 151 (citing *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (N.Y. 1966)).

38. *Tommy*, 124 A.D.3d at 151–52.

39. *Id.* at 151.

40. *In re Gault*, 387 U.S. 1, 20–21 (1967).

in *United States v. Barona*,⁴¹ and Richard L. Cupp Jr.'s articles *Children, Chimps, and Rights: Arguments From "Marginal" Cases*⁴² and *Moving Beyond Animal Rights: A Legal/Contractualist Critique*.⁴³

Gault does not even provide facial support for the court's claim: it addresses neither the relationship between rights and duties nor the limitations of the meaning of legal personhood for the purposes of habeas corpus. Indeed, *Gault*, which reversed the Arizona state courts' denial of a writ of habeas corpus to a juvenile who was sentenced to a correctional facility, cuts against the Third Department's ruling by insisting that juvenile court hearings comport with the "Due Process Clause of the Fourteenth Amendment of our Constitution."⁴⁴ *Barona* also does not support this claim, but it requires more analysis to understand why. The Cupp articles do state this claim; however, his articles do not provide support from primary source materials. On most occasions, Cupp cites unsupportive passages in secondary sources. On rarer occasions, when locating support, he cites a secondary source which in turn cites another secondary source, which in turn either provides no evidence from primary source material or inaccurately interprets the primary source material.⁴⁵

A. Application of *Gault*

At the age of fifteen, Gerry Gault was arrested for making an obscene telephone call.⁴⁶ He was arrested and taken to a juvenile detention facility while his parents were at work.⁴⁷ The arresting officer made no attempt to notify his parents.⁴⁸ An informal hearing was held the day after his arrest.⁴⁹ His parents were never notified of the petition for his trial, nor was there any record made of the

41. *United States v. Barona*, 56 F.3d 1087, 1093–94 (9th Cir. 1995).

42. Cupp, *Children, Chimps, and Rights*, *supra* note 15, at 12–14.

43. Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 69–70 (2009) [hereinafter Cupp, *Moving Beyond Animal Rights*].

44. *Gault*, 387 U.S. at 31.

45. While I disagree strongly with Cupp's conclusions, it is understandable how he would reach these conclusions, given the imperfect treatment of canonical sources in contemporary animal rights literature. *See supra* note 14 and accompanying text.

46. *Gault*, 387 U.S. at 4.

47. *Id.* at 5.

48. *Id.*

49. *Id.*

hearing.⁵⁰ He was detained for several days, released, and then returned for another trial from which his mother was excluded and for which, again, no record was produced.⁵¹ He was sentenced to five years in a juvenile correctional facility for a crime for which an adult could only have been fined fifty dollars and sentenced to two months in prison.⁵² Gault's parents petitioned for a writ of habeas corpus to remove him from the facility, but the Arizona State Superior Court and the Arizona State Supreme Court denied the petitions.⁵³

However, on review, the U.S. Supreme Court concluded that

[T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.⁵⁴

For this reason, it "reverse[d] the Supreme Court of Arizona's affirmance of the dismissal of the writ of habeas corpus."⁵⁵

In rejecting the idea that "[t]he parent and the probation officer may be relied upon to protect the infant's interests"⁵⁶ and insisting that minors be given legal counsel despite the fact that they have not yet reached the age of majority,⁵⁷ the court acknowledged that even those without the maturity of adult legal persons are still entitled to legal representation to protect their rights. If anything, this decision, recognizing the rights of a person lacking full maturity, seems to cut in favor of, rather than against, the possibility of animal rights. Further, it provides no evidence whatsoever for the reciprocal relationship between rights and duties.

50. *Id.* at 6.

51. *Id.* at 7.

52. *Id.* at 8–9.

53. *Id.* at 9–10.

54. *Id.* at 41.

55. *Id.* at 58.

56. *Id.* at 35.

57. *Id.* at 36–37.

B. United States v. Barona

In *United States v. Barona*, six individuals, none of whom were U.S. citizens, were indicted on twenty-eight counts and convicted of drug-related crimes, including conspiracy.⁵⁸ For two years, the Drug Enforcement Administration and the Los Angeles Police Department investigated the conspirators. While the conspirators were in Denmark and Italy, Danish or Italian authorities monitored their phone conversations on public telephones. The recordings of these calls were played to the jury and relied on to convict all six.⁵⁹

In deciding whether the evidence gathered through the joint law enforcement venture should be excluded on Fourth Amendment grounds, the *Barona* court stated that the appellants must first show that they are among the class of persons that the Fourth Amendment was meant to protect.⁶⁰ The court held:

Unlike the Due Process Clause of the Fifth Amendment, which protects all “persons,” the Fourth Amendment protects only “the People of the United States.” This term “refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.” The Fourth Amendment therefore protects a much narrower class of individuals than the Fifth Amendment.⁶¹

However, *Boumediene v. Bush*⁶² makes clear that, while different Constitutional rights have different scopes of inclusion, the question of whether the Fourth Amendment applies to all “persons” or “the People of the United States” is irrelevant to an analysis of the reach of the writ of habeas corpus under Article I, Section 9, Clause 2 of the Constitution. The *Boumediene* Court affirmed that the writ applies to all persons,⁶³ not just “the People,” and this includes non-

58. *United States v. Barona*, 56 F.3d 1087, 1089–90 (9th Cir. 1995).

59. *Id.* at 1090.

60. *Id.* at 1093.

61. *Id.* (internal citation omitted).

62. *Boumediene v. Bush*, 553 U.S. 723, 743 (2008).

63. *Id.*

citizen enemy combatants at Guantánamo Bay who have fulfilled no duties to the United States whatsoever.⁶⁴

In dicta, the *Barona* court quoted a Ninth Circuit case, *United States v. Verdugo-Urquidez*.⁶⁵ The wording of *Verdugo-Urquidez*, as communicated by *Barona*, formed the basis of the *Tommy* court's claim that legal rights are predicated on the assumption of legal duties.⁶⁶ *Barona* summarized the rights-duties issue as follows:

Because our constitutional theory is premised in large measure on the conception that our Constitution is a "social contract," "the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." "Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Constitution."⁶⁷

In *United States v. Verdugo-Urquidez*, the Supreme Court reversed the Ninth Circuit decision quoted by the *Barona* court.⁶⁸ In the reversal, both the Rehnquist majority opinion and the Brennan and Marshall dissent agree on at least one point: if there is a relationship between duties and rights, then an assumption of duties should entitle one to rights. Justice Rehnquist denied Fourth Amendment protection to a non-resident alien who led a drug-smuggling ring and whose property in Mexico was searched and seized. But he also suggested that if the respondent had been an illegal alien *in* the United States, he might count as a member of "the people" entitled to Fourth Amendment protections because "presumably [he would have] accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among 'the people' of the United States."⁶⁹ In dissent, Justices Brennan and Marshall argued that the United States had

64. *Id.* at 771.

65. *United States v. Verdugo-Urquidez* 856 F.2d 1214, 1236 (9th Cir. 1988), *rev'd*, 494 U.S. 259 (1990).

66. *Tommy*, 124 A.D.3d 148, 150 (N.Y. App. Div. 2014).

67. *United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995) (quoting *Verdugo-Urquidez*, 856 F.2d at 1231–32).

68. *Verdugo-Urquidez*, 494 U.S. at 275.

69. *Id.* at 273.

already imposed obligations on the respondent by finding him liable under U.S. criminal law. This obligation, in turn, should have entitled the respondent to the right to Fourth Amendment protections:

Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose “societal obligations,” . . . such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.⁷⁰

Even if we read this line of cases as sympathetically as possible, searching for support for the Third Judicial Department’s position in dicta, it is clear that the Third Judicial Department made an argument that was the *converse* of the argument made by the Supreme Court. The Third Judicial Department argued that if one has rights, then one must have duties, and if you do not have duties, then you do not have rights. The Supreme Court suggested that if you have duties, then you must have rights, and if you do not have rights, then you must not have duties. These are different arguments.

C. Cupp on the Reciprocity of Rights and Duties

The Third Judicial Department relies most heavily on Cupp’s two recent articles, which claim that there is a necessary reciprocity of rights and duties. In *Children, Chimps, and Rights*, Cupp claims that “[c]ontractualism promotes the notion of the social contract, in which societally imposed responsibilities are accepted in exchange for individual rights owed by society.”⁷¹ Cupp in turn relies on an article by Peter de Marneffe titled *Contractualism, Liberty, and Democracy* to make this claim.⁷² It is strange for Cupp to rely on this work, since

70. *Id.* at 284 (Brennan, J., Marshall, J. dissenting).

71. Cupp, *Children, Chimps, and Rights*, *supra* note 15, at 13.

72. Peter de Marneffe, *Contractualism, Liberty, and Democracy*, 104 ETHICS 764, 764–83 (1994).

de Marneffe's article is not a historical treatment of contractualism, nor does de Marneffe even once claim in this piece that individual rights are exchanged for responsibilities. Indeed, throughout the entire piece, the author never once uses the words duty, responsibility, reciprocate, exchange, or synonymous terms.⁷³ De Marneffe examines the tension between "[t]he *liberal principle of liberty* . . . that individual liberty may not be limited by legislation enacted through a democratic process unless this is necessary in order to protect equal basic liberty, to promote fair equality of opportunity, or to maintain an adequate material minimum for each person,"⁷⁴ and "[t]he *democratic principle of liberty* . . . that individual liberty may be limited by legislation enacted through a democratic process if this is compatible with protecting equal basic liberty, promoting fair equality of opportunity, or maintaining an adequate material minimum for each person."⁷⁵

Being a student of John Rawls, de Marneffe is interested in exploring Rawls's theory about the operation of his two principles of justice behind the "veil of ignorance,"⁷⁶ as discussed in Part III.C. De Marneffe concludes "parties in the Original Position [behind the veil of ignorance regarding their lot in life] would have no reason to choose the liberal principle of liberty over the democratic principle."⁷⁷ The implication of this conclusion is that it would not be irrational to choose to live in a society that can establish strong animal rights protections, rather than in a society that preemptively favors the individual right to treat animals as one pleases. If one's conception of the good is unknown in advance, then it would make sense to allow for a democratic process that can potentially forward a conception of the good that includes concern for animals:

The interest of the animal rights activist in protecting animals, for example, may be as important to her as the recreational hunter's interest in hunting animals is to him, and it is no less worthy of respect. Thus, if contractualism warrants protection of individual liberty because people have legitimate interests in being free from interference, it would also seem to warrant some protection of the legislative opportunity

73. *Id.*

74. *Id.* at 768.

75. *Id.* at 769.

76. *Id.* at 770–73.

77. *Id.* at 770.

to interfere with liberty because people have legitimate interests in interfering as well.⁷⁸

In sum, de Marneffe's work contradicts Cupp's claim. It states that the establishment of animal rights is an aim that is compatible with modern social contract theory. The only reason I can see for why Cupp would refer to it is that de Marneffe repeatedly makes reference to animal rights and welfare in his discussion of social contract theory.⁷⁹ Otherwise, Cupp and de Marneffe are far apart.⁸⁰

Cupp also cites the work of Mark Bernstein for the proposition that "applying a rights paradigm for animals does not fare well under most views of contractualism, because no animals, either as a species or individually, are viewed as capable of bearing significant moral responsibility."⁸¹ Yet Cupp cites only the first sentence of Bernstein's article ("Contractualism . . . has been unfriendly toward non-human animals"⁸²), an article that actually asserts, "contractualism is compatible with according full moral standing to non-human animals"⁸³ The purpose of Bernstein's opening statement was to frame his critique of a line of social contract thinking from Kant to Rawls. His critique is much more qualified than Cupp would lead us to believe. Bernstein states that Rawls's theory "imped[es] . . . conferring full moral status onto non-human animals" because his conception of morality "seems to hinge on the notion of reciprocity," although this is "never explicit."⁸⁴ In short, Cupp presents Bernstein's inferential claim about Rawls as though it were an explicit feature of all social contract theory. Yet Bernstein

78. De Marneffe, *supra* note 72, at 765.

79. *Id.* at 765, 772, 774, 778.

80. For example, Cupp cites de Marneffe for the proposition that "Contractualism views rights as connected to moral agency and the ability to accept societal responsibility in exchange for rights." Cupp, *Children, Chimps, and Rights*, *supra* note 15, at 13 n.51. Yet the page in de Marneffe that he cites merely states that "[th]e contractualist principle . . . requires that the exercise of political power respect both the freedom of the individual and the freedom of the people to make law." De Marneffe, *supra* note 72, at 764. In other words, de Marneffe states that a just political system must protect both individual liberties and democratic processes, not that an individual must assume democratic duties as a condition precedent to be granted rights.

81. Cupp, *Children, Chimps, and Rights*, *supra* note 15, at 13 n.53 (citing Mark Bernstein, *Contractualism and Animals*, 86 PHIL. STUD. 49, 49 (1997)).

82. Bernstein, *supra* note 81, at 49.

83. *Id.* at 66.

84. *Id.* at 58.

goes on to argue that contractualism is perfectly compatible with a conception of justice that “grants membership to all those who have interests that can be either positively or negatively affected by the actions of others,” for “there are some perfectly rational people who would gladly exchange their privacy and autonomy for a widespread recognition of non-human animals as moral patients.”⁸⁵ If one harbored altruistic motivations to include non-human animals’ interests in our considerations of the good, it would be paradoxical to limit those “accorded full moral status” only to those who “either act altruistically themselves, or even have the capacity for altruistic behavior”⁸⁶ Insisting that only beings who can act altruistically themselves should benefit from altruism, would “mistake[] the nature of altruism by conflating it with a disguised egoism.”⁸⁷

The Third Department also cites Cupp’s *Moving Beyond Animal Rights* article. Cupp again asserts that, “[a]lthough several variants of social contract theory have been articulated, general reciprocity between rights and responsibilities is a basic tenet.”⁸⁸ Cupp cites Gary Francione to support this point.⁸⁹ In his *Introduction to Animal Rights*, Francione asserts that the reciprocity theory has two forms, both of which can be traced back to the ancients.⁹⁰ For support for this claim, he in turn cites Richard Sorabji’s *Animal Minds and Human Morals*.⁹¹ In his footnote, Francione states that Sorabji treats “the Greek and Roman views of animal minds, and the relationships between those views and theories about the moral status of animals”⁹² This qualified statement, however, is not the same as saying that Sorabji provides evidence that the reciprocity theories at work in modern political philosophy can be traced back to the ancients. In short, Francione cites Sorabji for the proposition that modern reciprocity theory is beholden to preconceptions about animals developed in ancient reciprocity theory, but Sorabji does not establish this proposition.

85. *Id.* at 66–67.

86. *Id.* at 67.

87. *Id.*

88. Cupp, *Moving Beyond Animal Rights*, *supra* note 43, at 66 n.219.

89. *Id.* at 66 n.219 (citing Gary L. Francione, *The Use of Nonhuman Animals in Biomedical Research: Necessity and Justification*, 35 J.L. MED. & ETHICS 241, 247 (2007)) [hereinafter Francione, *Use of Nonhuman Animals*].

90. GARY FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 122 (2000) [hereinafter FRANCIONE, INTRODUCTION].

91. *Id.* at 122 n.48 (citing RICHARD SORABJI, ANIMAL MINDS AND HUMAN MORALS: THE ORIGINS OF THE WESTERN DEBATE (1993)).

92. FRANCIONE, INTRODUCTION, *supra* note 90, at 122 n.48.

What does Sorabji say? That “for Epicurus, as for Hobbes who read him, justice extends only to those who are capable of making contracts, and hence, at least according to his followers, only to rational animals.”⁹³ In his longest passage about Hobbes and Epicurus, he continues:

Several features of Epicurean theory reappear in the seventeenth century in Thomas Hobbes’ defence [sic.] of sovereignty. Without a covenant there is no such thing as injustice, which is the non-performance of covenant. Expediency is also relevant: obligations to the sovereign, whom men have set up by covenant with each other, lapse when the sovereign cannot fulfil the original purpose of providing protection. Covenants with animals are said to be impossible. At most it is conceded that the ants and bees discussed by Aristotle, which lack reason and speech, have a natural agreement with each other. But this (as Aristotle would again agree) is not a covenant, since a covenant is something artificial. At least one modern proponent of contract theory has drawn out the implications for animals more explicitly. Because they cannot make agreements to restrict behaviour and enforce them, they have no rights and we owe them no protection from suffering, unless that happens to suit our own interests. It has rightly been objected that such a theory is likely to threaten some humans as well.⁹⁴

For this reading of Hobbes, Sorabji cites no particular passage in Hobbes’s writings, but rather eight chapters of *Leviathan*.⁹⁵ Again and again, authors play the game of telephone, never providing the reader with direct textual evidence from primary sources. But what is important is Sorabji’s inferential claim: because animals cannot make or enforce agreements to restrict behavior, they cannot have rights or protections unless those rights and protections suit our interests.

In the next Part, I will argue that this is incorrect. Interpreters of this tradition come to this conclusion because they

93. SORABJI, *supra* note 91, at 8.

94. *Id.* at 164–65 (footnotes omitted).

95. *Id.* at 164 n.60 (citing chapters 14 to 21 of *Leviathan*.) See THOMAS HOBBS, *LEVIATHAN: REVISED STUDENT EDITION* 91–154 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) [hereinafter HOBBS, *LEVIATHAN*].

either: (1) fail to distinguish the human capacities required to form a social contract from those that are required for recognizable legal personhood after its formation; or (2) wrongly assume that “natural rights” are conditioned on reciprocal duties. I will focus on the three classic contract theorists that are referenced in the material related to the cases at hand: Thomas Hobbes, John Locke, and John Rawls.

III. THE MODERN SOCIAL CONTRACT TRADITION

What does Sorabji mean when he writes that, according to Hobbes, “justice extends only to those who are capable of making contracts, and hence, at least according to his followers, only to rational animals”?⁹⁶ The word “extends” is ambiguous. If he means that only those capable of making agreements can be held to the standards of justice, then he is correct, for according to Hobbes an injustice is synonymous with a breach of an agreement,⁹⁷ and animals cannot enter into agreements.⁹⁸ If he means that animals can never be granted rights under a Hobbesian social contract, then he is wrong. For after the establishment of a sovereign to whose authority individuals are said to have consented, the sovereign alone has the power to determine what is just or unjust as defined by its laws,⁹⁹ and it has the absolute power to grant legal personhood—and hence rights—to whatever entities it chooses.¹⁰⁰ If an individual were to violate a law established to protect animals, then the sovereign would operate within the scope of its authority to punish the transgressor or allow another to stand in the place of the animal to assert whatever rights it has under law.¹⁰¹

96. SORABJI, *supra* note 91, at 8.

97. HOBBS, *LEVIATHAN*, *supra* note 95, at 100.

98. *Id.* at 187 (“Over naturall fooles, children, or mad-men there is no Law, no more than over brute beasts; nor are they capable of the title just, or unjust; because they had never power to make any covenant . . .”).

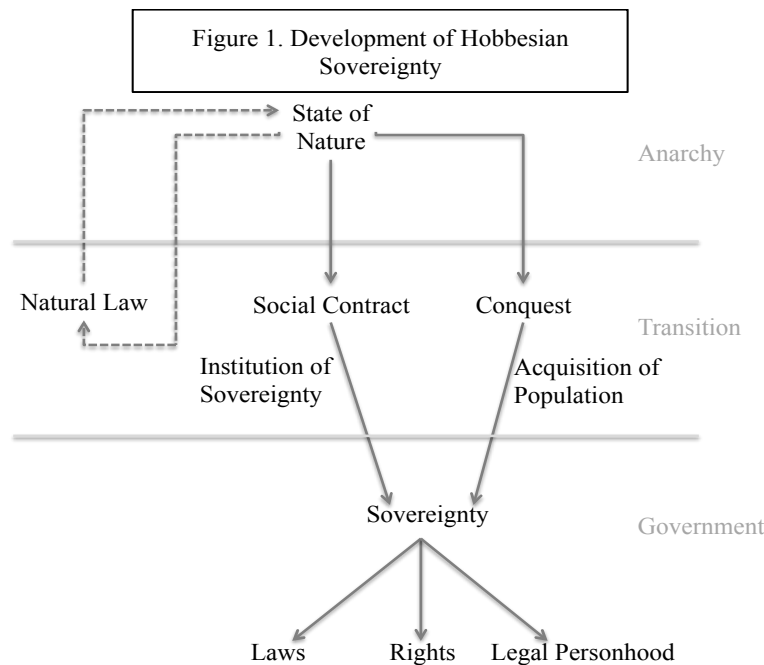
99. *Id.* at 184.

100. *See id.* at 113.

101. *See id.* According to Hobbes, even “[i]nanimate things,” like churches, hospitals, and bridges, as well as “[c]hildren, [f]ooles, and [m]ad-men” may be “[p]ersonated.”

A. Hobbes

Hobbes's account of the development of political authority is summarized in Figure 1. Cupp and Francione claim that because animals are unable to participate in the formation of contracts—including the social contract—they could not be granted rights or legal personhood after the establishment of sovereignty. Francione explicitly states that “Hobbes . . . maintained that there can be no injustice in the absence of a social covenant or contract, and that because animals do not have language, they cannot make covenants with humans and there can be no such thing as injustice to animals.”¹⁰² The source that Francione cites for this proposition, chapter 10 of *De Homine*, does not address whether there can be injustice toward animals. The closest Hobbes comes to saying something to this effect in this context is that “before covenants and laws were drawn up, neither justice nor injustice, neither public good



102. FRANCIONE, INTRODUCTION, *supra* note 90, at 123 (citing Thomas Hobbes, *Animals Have No Language*, in POLITICAL THEORY AND ANIMAL RIGHTS 17–21 (Paul A. B. Clarke & Andrew Linzey eds., 1990) (1658) [hereinafter Hobbes, *Animals Have No Language*]). This anthology excerpts chapter 10 of *De Homine*, titled “On Speech and Sciences.”

nor public evil, was natural among men any more than it was among beasts.”¹⁰³ In any case, it is incorrect to claim that there cannot be injustice toward animals after the creation of the social contract because injustice is whatever the sovereign prohibits. After the institution of sovereignty, it would be squarely within the sovereign’s power to create various forms of legal personhood and grant those persons whatever rights it deemed appropriate. This includes rights of fictitious persons *against* natural persons, so long as the fictitious person is granted a representative, and its rights do not interfere with natural persons’ right to self-defense.

1. The State of Nature

For Hobbes, the pre-political “state of nature” is a realm of absolute freedom, where every individual has an equal right to all things. As is well known, this condition is anarchic (without government) and chaotic (individuals are not able to establish order privately) and so mutual suspicion, competition, and vainglory give rise to a war of all against all, resulting in a life that is “solitary, poore, nasty, brutish, and short.”¹⁰⁴ The only norm operating in this environment is the “right of nature,” or

“the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgment, and Reason, hee shall conceive to be the aptest means thereunto.”¹⁰⁵

Despite using the word “man,” Hobbes believes that this right belongs to all animate creatures. He states in *De Cive* that every being is equally entitled to defend itself, “[f]orasmuch . . . as it proceeds from the right of nature, that a beast may kill a man, it is also by the same right that a man may slay a beast.”¹⁰⁶ To have power over a being by natural right simply means that one has the ability to

103. Hobbes, *Animals Have No Language*, *supra* note 102, at 21.

104. HOBBS, *LEVIATHAN*, *supra* note 95, at 89.

105. *Id.* at 91.

106. THOMAS HOBBS, *MAN AND CITIZEN (DE HOMINE AND DE CIVE)* 210 (Bernard Gert ed., Bernard Gert et al. trans., Hackett Publ’g Co. 1991) (1642) [hereinafter *HOBBS, MAN AND CITIZEN*].

subordinate it. On this view, an able human being has a right to subordinate less able animals and human beings alike:

We get a right over irrational creatures, in the same manner that we do over the persons of men; to wit, by force and natural strength. For if in the state of nature it is lawful for every one, by reason of that war which is of all against all, to subdue and also to kill men as oft as it shall seem to conduce unto their good; much more will the same be lawful against brutes; namely, at their own discretion to reduce those to servitude, which by art may be tamed and fitted for use, and to persecute and destroy the rest by a perpetual war as dangerous and noxious.¹⁰⁷

Most importantly, the right to subordinate those less powerful than ourselves is grounded solely on the principle of “might makes right,” without requiring support from scripture. A lion has just as much of a right to kill a man as a man has to kill a lion. No higher power determines that one or the other *should* win out:

Our dominion therefore over beasts, hath its original from the right of nature, *not* from divine positive right. For if such a right had not been before the publishing of the Sacred Scriptures, no man by right might have killed a beast for his food, but he to whom the divine pleasure was made manifest by holy writ; a most hard condition for men indeed, whom the beasts might devour without injury, and yet they might not destroy them.¹⁰⁸

Because of our superior intellect, human beings will normally subordinate animals. But this should not be read to exaggerate the differences between them. It is true that in *De Homine*, Hobbes wrote that “other animals . . . lack understanding. For understanding is a kind of imagination, but one that ariseth from the signification constituted by words.”¹⁰⁹ But this statement occurs in a chapter on

107. *Id.* at 209.

108. *Id.* at 209–10 (emphasis omitted and added).

109. HOBBS, MAN AND CITIZEN, *supra* note 106, at 38; *see also* THOMAS HOBBS, OPERA PHILOSOPHICA 89 (Sir William Molesworth ed., 1839) (“*Itaque*

speech and science. Hobbes's point is that while non-speaking animals may understand words as signs (in the way the word "apple" represents a physical apple), human beings understand words as having meaning in the context of other words (so that it can be used as a noun or adjective—as in apple pie—or figuratively—as in "the apple of my eye" or "the Big Apple"). In *De Homine*, the term "understanding" is a translation of the Latin "*intellectus*," which Hobbes uses in the narrow sense of reading comprehension.¹¹⁰ In *Leviathan*, Hobbes provides clarification on the nature of animal understanding, this time in unambiguous English:

The imagination that is rayseed in man, (or any other creature indued with the faculty of imagining) by words, or other voluntary signes, is that we generally call *Understanding*; and is common to Man and Beast. For a dogge by custome will understand the call, or the rating of his Master; and so will many other Beasts. That Understanding which is peculiar to man, is the Understanding not onely his will; but his conceptions and thoughts, by the sequell and contexture of the names of things into Affirmations, Negations, and other formes of Speech¹¹¹

Both humans and animals possess understanding, but only humans possess "reason," by which Hobbes means the ability to calculate the outcomes of symbolic processes like the syllogistic relationship between statements or sums of numbers added together.¹¹² This kind of thinking relies on formal language to hold the train of thought together because it often leads to conclusions we have never imagined before. For example, it is easy for a human being to conclude that adding together eighty-six and thirty-nine makes 125, even if she has never seen or imagined such a

caetera animalia etiam intellectu carent. Est enim intellectus imaginatio quidem, sed quae oritur ex verborum significatione constituta.")

110. See HOBBS, MAN AND CITIZEN, *supra* note 106, at 37 ("For even if some brute animals, taught by practice, grasp what we wish and command in words, they do so not through words as words, but as signs; for animals do not know that words are constituted by the will of men for the purpose of signification.")

111. HOBBS, LEVIATHAN, *supra* note 95, at 19.

112. See *id.* at 32.

combination of things in those quantities. Reason forms the basis of *sapientia*, which is the ability to think from effect to unforeseen consequences.¹¹³

By contrast, both humans and animals can form associations between signs by thinking from the present to the past. They can come to understand that storm clouds precede rain or that the sound of a bell precedes the presentation of food, because this association of ideas is held together by past experience. As Hobbes puts it:

The Trayn of regulated Thoughts is of two kinds; One, when of an effect imagined, wee seek the causes, or means that produce it: and this is common to Man and Beast. The other is, when imagining any thing whatsoever, wee seek all the possible effects, that can by it be produced; that is to say, we imagine what we can do with it, when wee have it. Of which I have not at any time seen any signe, but in man onely; for this is a curiosity hardly incident to the nature of any living creature that has no other Passion but sensuall, such as are hunger, thirst, lust, and anger.¹¹⁴

Hobbes calls experiential learning, where we think from observed effects back to their causes, “prudence,” and “it is not Prudence that distinguisheth man from beast. There be beasts, that at a year old observe more, and pursue that which is for their good, more prudently, than a child can do at ten.”¹¹⁵

In the state of nature, reason is severely underdeveloped because the symbolic systems that would support it—math and language—are themselves severely underdeveloped.¹¹⁶ Here, both humans and animals would have to rely on their prudence to survive. They would plan according to past experiences of failure and success, resulting in recurring subsistence and survival strategies that do nothing to alter circumstances for the better. Hobbes is disparaging in his assessment of how much reason human beings actually possess, even after the establishment of political society. We certainly have far more reason than animals.¹¹⁷ But because “[r]eason is

113. *Id.* at 36–37.

114. *Id.* at 21.

115. *Id.* at 23.

116. *See id.* at 89.

117. *Id.* at 34.

not . . . borne with us . . . but attained by Industry,” the common person rarely cultivates it beyond his basic needs.¹¹⁸ Children “are called Reasonable Creatures,” because of their apparent capacity to develop it, but really “are not endued with Reason at all, till they have attained the use of Speech.”¹¹⁹ Even adults are not highly rated in this regard:

[T]he most part of men . . . have the use of Reasoning a little way, as in numbring to some degree; yet it serves them to little use in common life; in which they govern themselves, some better, some worse, according to their differences of experience, quicknesse of memory, and inclinations to severall ends; but specially according to good or evill fortune, and the errors of one another.¹²⁰

This implies that the role of reason in political life for the average person is very limited. Most people obey the laws not because they understand why they should be obeyed, but rather because, as a matter of prudence, they know that they are more likely to get what they want with greater ease if they play by the rules.¹²¹ Hobbes describes one who “foresees what wil become of a Criminal, [he] recons what he has seen follow on the like Crime before; having this order of thoughts, the Crime, the Officer, the Prison, the Judge, and the Gallows. Which kind of thoughts, is called . . . *Prudence* . . .”¹²² In short, most humans obey the law for the same reason that animals obey commands: they have been conditioned to fear punishment.

2. Transition

In the transition out of the state of nature, human reason can play three roles. First, it can cause some to attempt to follow the so-called “laws of nature,” the precepts one would follow to establish peaceful relations between individuals in the absence of the threat of punishment, e.g., keep your promises.¹²³ Paradoxically, the laws of

118. *Id.* at 35, 36.

119. *Id.* at 36.

120. *Id.*

121. *See id.* at 70–71 (stating that individuals are inclined toward obedience from love of ease, leisure, sensual pleasure, and fear of death).

122. *Id.* at 22.

123. *See Id.* at 100–111 (“Other Lawes of Nature”).

nature are silent in the state of nature—rarely followed and never enforced. Because others under these circumstances rarely reciprocate the good intentions of some, attempting to obey the laws of nature quickly proves too dangerous and most individuals revert back to the right of nature, which allows them to seek all the advantages of war. Second, reason can play a role in establishing sovereignty through the social compact. Individuals can conclude that it is in their best interest to agree among themselves to transfer their rights to all things to the sovereign, effectively disarming the population, in return for the state's protection. This is the moment in contract formation that animal rights theorists focus on, for if animals are devoid of speech, they are unable to transfer their rights to the sovereign in return for protection. Third, reason can play a role in the establishment of sovereignty through acquisition.¹²⁴ After an armed group comes to power, the reasonable will conclude that it is in their best interest to submit rather than resist. Of course, after seeing that those who resist are punished or killed, one might also submit out of prudence.

3. Laws, Rights, and Legal Personality After the Establishment of Sovereignty

After assenting to sovereignty, the only right that subjects cannot alienate is the right to self-defense. Hobbes does not mean self-defense figuratively, to include protecting one's broad interests in profit and property. Rather, he means it in the narrowest and most literal sense: the sovereign cannot compel an individual not to defend himself as he is being forced to the gallows or if he is attacked. All rights to anything beyond this are transferred to the ruler, who has no legal obligations toward his subjects, but is expected to "use the strength and means of them all [that have been transferred to the sovereign], as he shall think expedient, for their Peace and Common Defence."¹²⁵ It is not the case that subjects gain rights *because* they have agreed to obey the sovereign, except in the sense that they are presumably permitted to do whatever they are not explicitly forbidden to do. Rather, after the sovereign has been empowered, it might or might not grant rights to whomever it chooses. It can also give personhood to whomever it chooses, in the way that guardians can be appointed to represent children and the mentally ill, and

124. See *Id.* at 138–45 (“Dominion Paternall, and Despotical”).

125. *Id.* at 161.

inanimate things can be appointed representatives to act in their interest.¹²⁶

We are now in a position to understand the implications of Hobbes's statement—often quoted by contemporary animal rights theorists—that “[t]o make covenants with brute beasts, is impossible; because not understanding our speech, they understand not, nor accept of any translation of right; nor can translate any right to another: and without mutual acceptance, there is no covenant.”¹²⁷ This inability does not preclude the possibility of animal rights within the polity, granted by the sovereign. It simply means that animals could not acquire or transfer rights via *private* contract.

Francione cites a passage from *De Homine* regarding the non-political nature of animals as evidence that animals cannot be afforded rights in the social contract tradition.¹²⁸ We have already seen that men and animals have an inviolable right to self-defense, even if they cannot enforce it.¹²⁹ The question remains whether the tradition *excludes* the possibility of animals being granted conventional rights.¹³⁰ In *De Homine*, Hobbes qualifies Aristotle's claim that animals like bees and ants are political by nature. He states that these animals can act concertedly in a way that *appears* to be political, but the incidence of each animal sharing the same purpose with each other is different from the act of creating a single political will. Only the latter is truly political.¹³¹ Hobbes means that human beings, each having desires particular to only that individual and contrary to the desires of others, must erect an artificial will—the sovereign—in order to keep order in this otherwise discordant group. We use artifice to accomplish what animals accomplish naturally. This should not be taken as a denigration of animals, for “on account of the ease of speech . . . what he [man] says, he believes to be true, and he can deceive himself; a beast cannot deceive itself. Therefore by speech man is not made better, but only given greater possibilities.”¹³²

126. See *id.* at 111–15 (“Persons, Authors, and things Personated”).

127. *Id.* at 97.

128. Francione, *Use of Nonhuman Animals*, *supra* note 89, at 241 n.51.

129. See notes 108–110 and accompanying text.

130. For a discussion of the difference between animal rights stemming from a welfarist perspective, versus inviolable rights, see generally SUE DONALDSON & WILL KYMLIKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* 19 (2011) (discussing animals' “right to humane treatment” versus the concept of inviolable rights).

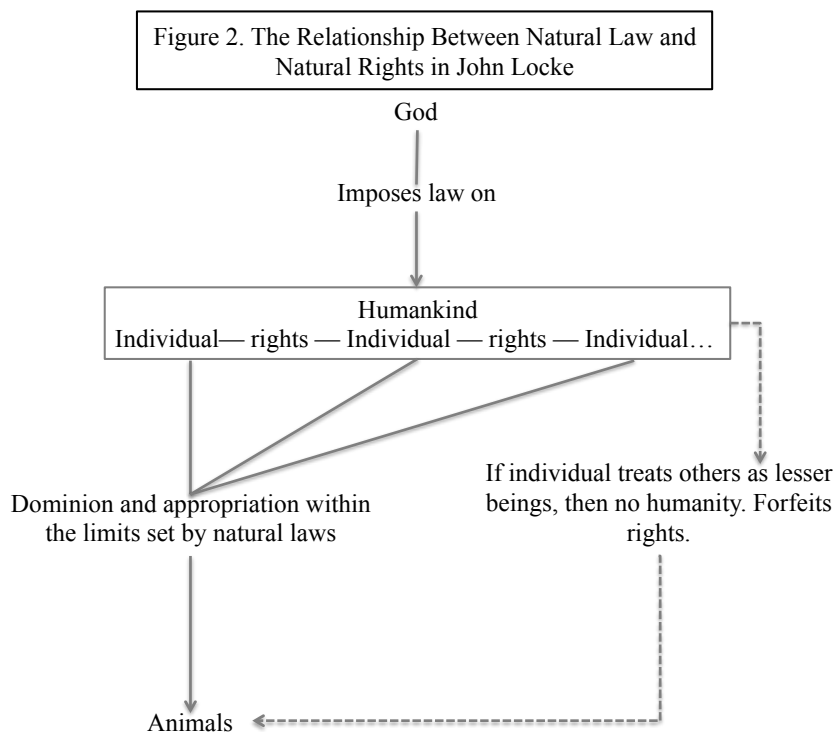
131. HOBBS, *MAN AND CITIZEN*, *supra* note 106, at 167–68.

132. *Id.* at 41.

Politics is unique to human beings because it addresses our unique problem. Language creates different evaluations and opinions, resulting in constant fighting.¹³³ These disruptions can only be reined in by establishing the singular, authoritative voice of the sovereign. Animals do not need such an artificial will to govern themselves, but this does not mean that they cannot benefit from one.

B. Locke

The basic operation of Lockean natural law and natural right is diagrammed in Figure 2. The most obvious difference between the Hobbesian and Lockean frameworks is that the sovereign is on equal footing with other human beings under natural law. In the



133. *Id.* at 118 (“For being distracted in opinions concerning the best use and application of their strength, they do not help, but hinder one another, and reduce their strength by mutuall opposition to nothing; whereby they are easily, not onely subdued by a very few that agree together; but also when there is no common enemy, they make warre upon each other, for their particular interests.”).

architecture of being, God imposes law on humankind and nature as a whole.¹³⁴ Below God, on the next tier of being, God has endowed all of humanity with “right reason,” which allows them to recognize the formal equality of all individuals. One’s humanity entitles one to the right of self-determination within the limits of the law. Lack of humanity is manifest when a human being tries to establish dominion over another human being as if she were an animal or thing. This perverse behavior means that, lacking right reason, the offender should be placed under the dominion of rational human beings, in the same category as animals or other beings that can be owned as property. This is the basis for the right of rebellion, for if a sovereign demonstrates that he intends to subordinate his subjects to his will, he thereby shows that he lacks right reason, the hallmark of humanity. However, natural law operates from the top to bottom of the natural world, restricting how humans may treat things and animals even if they are owned as property.

According to Lockean theory, legitimate political authority must protect the natural rights of humankind, which belong to us by virtue of our humanity.¹³⁵ The equality of all men in the eyes of God means that every individual has an equal right “to order their Actions, and dispose of their Possessions and Persons, as they think fit . . . without asking leave, or depending upon the Will of any other Man.”¹³⁶ While our decisions cannot be bound by the will of another human being, we must always act “within the bounds of the Law of Nature. . . .”¹³⁷ Animals are part of God’s creation, and so natural law declares that a person “has not Liberty to destroy . . . any Creature in his Possession, but where some nobler use, than its bare Preservation calls for it.”¹³⁸ Furthermore, people are entitled to kill animals if they can make good use of them or if it is necessary for self-defense.¹³⁹ However, “[n]othing was made by God for Man to spoil or destroy,”¹⁴⁰ and so if man killed animals without purpose, and their bodies rotted

134. *See generally* KIRSTIE M. MCCLURE, *JUDGING RIGHTS: LOCKEAN POLITICS AND THE LIMITS OF CONSENT* 46 (1996) (explaining that in the Lockean view of natural law, God gives order and “human agents, no less than the tides, the planets, and the rest of the created cosmos, are subject to a law of motion that prescribes their manner of being in the world.”).

135. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 269 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter *LOCKE, TWO TREATISES*].

136. *Id.*

137. *Id.*

138. *Id.* at 271.

139. *See id.* at 273–74, 278–79.

140. *Id.* at 290.

before they could be eaten or fashioned into something useful, “he offended against the common Law of Nature,”¹⁴¹ for “man’s property in the creatures was founded upon the right he had to make use of those things that were necessary or useful to his being.”¹⁴² In other words, the “state of liberty . . . is not a state of license.”¹⁴³

This is not to say that Locke’s theory is not bad for animals in general. Locke believes that animals can be held as property, and the limitation placed on our use of animals is rooted in the idea that to appropriate more than one can make use of is an act of theft against our fellow human beings. For while our own self-preservation takes priority over other concerns, Locke states that man is expected, “as much as he can, to preserve the rest of mankind.”¹⁴⁴ On this reading, it is unclear whether we are permitted to treat animals however we please so long as our behavior has no effect on other human beings. However, it is hard to imagine that when Locke wrote “[n]othing was made by God for man to spoil or destroy,” he meant that it was unobjectionable to subvert God’s purpose so long as other individuals were not affected by it. God’s authorship of nature does not go away once we are behind closed doors, so that private depravity slips through a loophole in natural law.

Based on Locke’s statements in *Some Thoughts Concerning Education*, it is difficult to believe that under natural law we are at liberty to do anything we wish to animals so long as other human beings are not affected. Waste and cruelty are deemed unnatural behavior—in that case, why would unnatural behavior be sanctioned by natural law? Regarding children,

[the] delight they take in doing of mischief (whereby I mean spoiling of any thing to no purpose, but more especially the pleasure they take to put any thing in pain that is capable of it) I cannot persuade myself to be any other than a foreign and introduced disposition, an habit borrowed from custom and conversation.¹⁴⁵

141. *Id.* at 295.

142. *Id.* at 205.

143. *Id.* at 270.

144. *Id.* at 271.

145. JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* 92 (Cambridge Univ. Press 2007) (1693).

This perversion of human nature is part of a larger socialization process where children are taught to appreciate “fighting and killing[] and the honour and renown that is bestowed on conquerors.”¹⁴⁶ In fact, these conquerors are mostly “the great butchers of mankind,” but our culture misleads the young into thinking “slaughter the laudable business of mankind, and the most heroic of virtues.”¹⁴⁷ The biggest problem is that if cruelty to animals goes unchecked, it will blossom into cruelty toward human beings:

One thing I have frequently observed in children, that, when they have got possession of any poor creature, they are apt to use it ill; they often torment and treat very roughly young birds, butterflies, and such other poor animals, which fall into their hands, and that with a seeming kind of pleasure. This, I think, should be watched in them; and if they incline to any such cruelty, they should be taught the contrary usage; for the custom of tormenting and killing of beasts will, by degrees, harden their minds even towards men; and they who delight in the suffering and destruction of inferior creatures, will not be apt to be very compassionate or benign to those of their own kind. Our practice takes notice of this, in the exclusion of butchers from juries of life and death.¹⁴⁸

But Locke also seems to suggest that cruelty to animals is a violation of natural law in its *own right*, and that parents should not tolerate it: “Children should from the beginning be bred up in an abhorrence of killing or tormenting any living creature, and be taught not to spoil or destroy any thing unless it be for the preservation or advantage of some other that is nobler.”¹⁴⁹ The idea that cruelty to animals is a *per se* violation of natural law is also suggested in an anecdote that Locke provides about how to properly teach children to care for animals.

I cannot but commend both the kindness and prudence of a mother I knew, who was wont always to

146. *Id.*

147. *Id.*

148. *Id.* at 90–91.

149. *Id.* at 91.

indulge her daughters, when any of them desired dogs, squirrels, birds, or any such things, as young girls use to be delighted with: but then, when they had them, they must be sure to keep them well, and look diligently after them, that they wanted nothing, or were not ill used; for, if they were negligent in their care of them, it was counted a great fault, which often forfeited their possession; or at least they failed not to be rebuked for it, whereby they were early taught diligence and good-nature. And indeed I think people should be accustomed, from their cradles, to be tender to all sensible creatures, and to spoil or waste nothing at all.¹⁵⁰

Based on these quotes, it seems logical to conclude that natural law *does* afford animals protections against abuse at the hands of man in the same way that it affords men protection from abuse at the hands of other men. The problem is that human beings are in a position to claim and enforce rights themselves, whereas animals are not. Furthermore, the state is not in a good position to regulate violations of natural law in private, against mute victims. The heads of households and parents are in a better position to do so. On this view, the state would not be prohibited from enforcing animal rights, insofar as it regulates animal welfare, but it might be imprudent to do so because it is not a task to which the seventeenth-century state is well suited.

C. Rawls

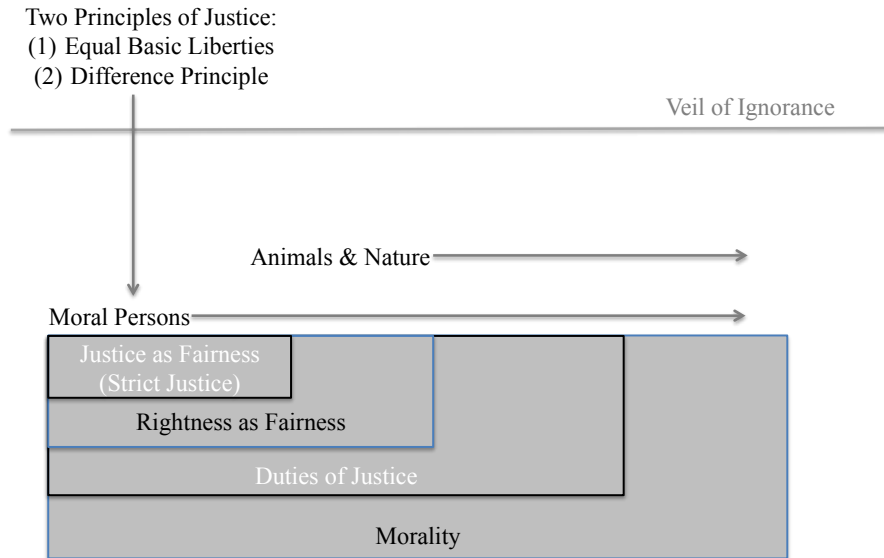
John Rawls acknowledges that justice is “just one part of a moral view”¹⁵¹ and his theory of justice standing alone “is not a complete contract theory.”¹⁵² He does not articulate the rules of “right conduct in regard to animals and the rest of nature”; however, Rawls is clear that animals should be afforded protections through provisions in the social contract or general moral principles. Figure 3 sketches out these relationships. Here, we see that moral persons—which always include human beings—are afforded the full array of protections based on justice, rightness, and morality. Animals may be granted protections based on conceptions of justice different from

150. *Id.*

151. JOHN RAWLS, A THEORY OF JUSTICE 512 (revised ed. 1999) [hereinafter RAWLS, THEORY OF JUSTICE].

152. *Id.* at 15.

Figure 3. Justice in the Context of Rawlsian Moral Theory



Rawls's account of "justice as fairness," because duties owed to moral persons create protections for animals indirectly, on moral grounds.

It is "generally believed" that human conduct toward non-human animals is not regulated by the principles of justice because we do not recognize them as moral persons.¹⁵³ To be deemed a moral person, one must be capable of formulating a conception of the good (a plan for how one would like to live) and having "a sense of justice," or "a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree."¹⁵⁴ Decision makers must possess these two qualities to evaluate principles of justice from what Rawls calls "the original position."¹⁵⁵ From this vantage, we are asked to imagine that we will be reborn, not as we are, but as an arbitrary person whom we cannot choose. We have no knowledge about what the desires, advantages, and disadvantages of this future self will be. We could be rich, attractive, and intelligent; poor, ugly, and stupid; or some combination of qualities. Before stepping into the shoes of this unknown self, we are

153. *Id.* at 504.

154. *Id.* at 505.

155. *Id.* at 15–19.

offered a choice over the principles of justice of the society into which we are born. From behind this “veil of ignorance,” Rawls believes that we will always choose a society where the same basic liberties are available to everyone, and inequality is permitted only insofar as it benefits the least well off. We do not choose these principles for altruistic reasons, but because it is in our self-interest to minimize the risks associated with the lowest positions in society.

In the context of a theory of justice, “moral personhood” refers to a capacity for making a rational choice about principles of justice in the face of radical uncertainty. Because we can conceptualize the good, we recognize the gravity of being arbitrarily assigned new desires and attributes without any choice in the matter. We understand that we might be assigned desires that are contrary to the desires of the majority, or that we might be poorly equipped to pursue our goals, whatever they may be. We then look to principles of justice to mitigate this arbitrary assignment. So moral personhood is not coextensive with morality in the conventional sense. Rawls does not expect moral persons to overcome their selfishness; indeed, he seems to assume abstract human selfishness that transcends any particular self.

It is important to note that after the veil of ignorance is pulled back, all individuals will be assigned the same basic rights regardless of whether they will be able to assume any duties. Forcing individuals to make decisions about justice behind the veil ensures that they will not index rights to *any* ability, let alone the ability to assume duties.

Not being deemed moral persons, animals are presumably excluded from two processes that would provide them with rights and entitlements. First, as mentioned above, they are ineligible to assume the original position, so they are not granted the basic rights and entitlements stemming from the two principles of justice. Second, Rawls states, “the contractarian idea can be extended to the choice of more or less an entire ethical system,” resulting in a theory of how other virtues, beyond justice, should be applied.¹⁵⁶ This broader contractual scope would encompass “rightness as fairness,” which might include things like principles of charity, politeness, and other matters not strictly related to law.¹⁵⁷ Whatever virtues it might entail, again, animals would be excluded from the fruits of this process. This makes sense, for whatever ethical code was put in place

156. *Id.* at 15.

157. *Id.* at 512.

would be hopelessly abstract if it had to set rules for the whole plurality of animal species, with varying degrees of sentience, self-awareness, longevity, etc.

However, animals also might gain protections indirectly, from the duties of justice owed by one moral person to another. Rawls tinkers with the idea that there might be individuals without even a capacity for a sense of justice. They cannot complain that they have been wronged because they have no awareness of it, even if a reasonable third party could clearly appreciate their injury. While Rawls says that this kind of situation falls outside of his theory, in passing he adds that “[i]f . . . others might nevertheless complain, one could say that the duty, if there is one, is owed to them.”¹⁵⁸ In other words, Rawls seems to leave open the possibility that offenders might have duties to third parties who identify the injuries of those who *should* be treated as moral persons, even if they are *not* moral persons in fact.

While moral personhood is sufficient to guarantee that one will receive the same equal basic rights and entitlements as all other human beings, Rawls does not say that moral personhood is necessary for receiving functionally similar or equivalent protections from other deliberative processes. That is, contractualism generates one set of protections, but this set is a part of a broad array of protections based on shared morality. There are limits on what we can do to animals, even if they are outside the formal mechanisms of Rawls’s theory of justice.

[I]t does not follow from a person’s not being owed the duty of justice that he may be treated in any way that one pleases. We do not normally think of ourselves as owing the duty of justice to animals, but it is certainly wrong to be cruel to them. Their capacity for feeling pleasure and pain, for some form of happiness, is enough to establish this. To deny that this capacity is sufficient is not, then, to license everything. Other faults will still be possible, since the principles of humanity and liberality are more extensive in their application. On the other hand, something must account for animals not being owed the duty of justice, and a plausible explanation is their lack of the

158. JOHN RAWLS, COLLECTED PAPERS 115 (1999).

capacity for a sense of justice and the other capacities which this sense presupposed.¹⁵⁹

Animals are entitled to “have some protection certainly.”¹⁶⁰ The question is “what is owed to animals and the rest of nature” and on what basis? Rawls doubts whether these questions can be answered “within the scope of justice as fairness as a political conception.” He raises two possibilities: either our duties to animals lie beyond the scope of justice altogether, or another form of justice other than “justice as fairness” may apply in the case of animals:

[T]he idea of political justice does not cover everything, nor should we expect it to. Or the problem may indeed be one of political justice but justice as fairness is not correct in this case, however well it may do for other cases. How deep a fault this is must wait until the case itself can be examined. Perhaps we simply lack the ingenuity to see how the extension may proceed. In any case, we should not expect justice as fairness, or any account of justice, to cover all cases of right or wrong. Political justice needs always to be complemented by other virtues.¹⁶¹

One can imagine two scenarios playing out from these possibilities. If animals are not afforded any kind of justice, then we would have to consult our moral sense to determine how they should be treated. Even if we did not think about this too hard, at the outer limits, “[c]ertainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case.”¹⁶² This is closely akin to a welfarist perspective, where the well-being and happiness of animals becomes a matter of regulation, not a matter of their inalienable rights.¹⁶³

159. *Id.* at 114.

160. RAWLS, THEORY OF JUSTICE *supra* note 151, at 505.

161. JOHN RAWLS, POLITICAL LIBERALISM: EXPANDED EDITION 21 (2005).

162. RAWLS, THEORY OF JUSTICE *supra* note 151, at 512.

163. *See generally* DONALDSON & KYMLIKA, *supra* note 130 (discussing animals’ “right to humane treatment” versus the concept of inviolable rights).

Alternatively, perhaps animals could be afforded rights under a different theory of justice. One could argue that while animals cannot formulate a rational life plan, we can say with certainty that they would *not* choose a life where they were prohibited from acting on their most basic instincts and natural functions. This would bring the basis for animal rights into line with the other distinctive feature of social contract theory: using avoidance of worst-case scenarios as a proxy for rational consent. This topic is addressed in the Conclusion, below.

CONCLUSION: “FREEDOM” VERSUS A “WAY OUT”

In the preceding Part, I have argued that modern social contract theory does not preclude animal rights by insisting on the reciprocity of rights and duties. While Hobbes, Locke, and Rawls focus almost exclusively on the rights of natural persons, their theories do not lead to the ineluctable conclusion that sovereign powers could not recognize animal rights of some kind because doing so would violate natural law or fundamental justice.

My aim in this Conclusion is to go beyond the finding that contractarianism can merely accommodate animal rights. I hope to demonstrate that another aspect of social contract theory, tacit consent, can provide alternative yet immanent support for animal rights by emphasizing the shared lot of humans and animals alike.

According to the theory of tacit consent, individuals who have never expressly consented to being governed (that is, almost all individuals and certainly all natural citizens), are said to have consented to it nonetheless.¹⁶⁴ The logic of this claim is that it would always be rational for an individual to choose the rule of law—even rule *by* law—rather than to accept the inconveniences and dangers of anarchy or war. Hence, the “choice” to live under government is imputed to all individuals on the assumption that it is always in their best interest to so choose.

Arguably, this choice can be imputed to human beings because from our perspective it is better “in here,” within the protections of government, than “out there,” without those protections. However, as of now, this choice cannot be imputed to animals. For while they are within the political sphere, they are also without protection, despite the fact that their presence in the polity

164. See HOBBS, *LEVIATHAN*, *supra* note 95, at 138; LOCKE, *TWO TREATISES* *supra* note 135, at 331.

brings them into contact with human beings who can and do exploit them for human purposes. But this raises the issue that the contractarian foundations of legal personhood are circular: if it is in a being's best interest to consent to government, then it is said to have done so; and if it is said to have done so, then this is because it is in its best interest to consent to government. On this view, regardless of whether one starts with the chicken or the egg, the legal personhood of animals stems from a decision. Will we first make it better for animals to be within the polity by bringing them into the sphere of protection, and hence their legal personhood will make sense? Will we first recognize their legal personhood, and hence their protection will make sense? Or will it remain the case that, lacking either legal personhood or protection, their exploitation or lack of personhood will continue to "make sense"?

This theoretical exercise—deciding when to impute tacit consent to some beings but not others—occurs under circumstances where the practical decision to consent is no one's to make. In the age of territorial nation states, no human being, and only animals in the *terra nullius* of international waters, can altogether escape the spheres of sovereign power. So focusing on the vast number of beings who find themselves living within the boundaries of sovereign territories, the remaining question is why should human beings grant legal protections to the animals living among them?

In order to provide insight into a potential common basis of legal personhood for humans and animals, which should entitle animals to habeas corpus protection, I propose putting aside, temporarily, contemporary conceptions of "liberty," which evoke anthropocentric or humanistic themes. Already being members of the political community, we have the privilege of evaluating the social contract based on the specific "negative" or "positive" liberties it provides: the negative liberties being the ways that government assures that we are "free from" certain kinds of interference; the positive liberties being the ways that government assure that we are "free to" participate in the political process.¹⁶⁵ These concepts invoke associated ideas—protection of property against trespass, the right to

165. See generally ISAAH BERLIN, TWO CONCEPTS OF LIBERTY (1958) (distinguishing between positive and negative liberty and arguing that while positive liberty has had a tendency to be rhetorically abused, it is still necessary to free society and a genuine, valuable version of liberty so long as it is identified with the autonomy of individuals instead of the achievement of goals that individuals "ought to" rationally desire).

vote or hold office, etc.—that are unique to human experience and hence obscure the interests shared by humans and animals alike.

As discussed above, if we were to step outside of the social contract, our evaluation of the institution would be much less sophisticated: is it “better” in there than out here? Will I experience less pain and hardship inside than I experience outside? The theory of tacit consent stems from the universal drive to “escape,” “take flight,” or “flee” from a bad to a better situation. This drive, after all, is said to be why we agreed to be governed in the first place, and is common to humans and animals alike.

One of the most insightful perspectives on the difference between escape and freedom is elaborated in Franz Kafka’s short story “A Report to an Academy.” Here, Kafka tells the story of an ape—Red Peter—who was shot, castrated by the bullet, then caged aboard the Hagenbeck steamship, which transported him from West Africa to Europe. He was placed inside a cage that was “too low . . . to stand up in and too narrow to sit down in. . . .” so, as Red Peter explains, “I had to squat with my knees bent and trembling all the time.”¹⁶⁶ Red Peter is trapped between two worlds and realizes that he cannot achieve a purely physical escape in this instance because it would only lead to death or recapture:

As I look back now, it seems to me I must have had at least an inkling that I had to find a way out or die, but that my way out could not be reached through flight. I cannot tell now whether escape was possible, but I believe it must have been; for an ape it must always be possible. With my teeth as they are today I have to be careful even in simply cracking nuts, but at that time I could certainly have managed by degrees to bite through the lock of my cage. I did not do it. What good would it have done me? As soon as I had poked out my head I should have been caught again and put in a worse cage; or I might have slipped among the other animals without being noticed, among the pythons, say, who were opposite me, and so breathed out my life in their embrace; or supposing I had actually succeeded in sneaking out as far as the deck and leaping overboard, I should have rocked for a little on the deep sea and then been drowned. Desperate remedies. I did not think it out in this

166. KAFKA, *supra* note 24, at 180.

human way, but under the influence of my surroundings I acted as if I had thought it out.¹⁶⁷

As the fact that the story is narrated in the first person reveals, Red Peter escapes by *becoming human* in some sense, learning to imitate the behaviors, thought, and speech of the people around him. In hindsight, he is emphatic that “there was no attraction for me in imitating human beings; I imitated them because I needed a way out, and for no other reason.”¹⁶⁸ For “as far as Hagenbeck was concerned, the place for apes” was in a cage, and so Red Peter vaguely understood, under those circumstances, that he “had to stop being an ape.”¹⁶⁹

Red Peter emphasizes repeatedly that even though he ultimately acquired a career as a performer, a home, and all the other hallmarks of comfortable human existence, he never acquired freedom. Rather, he credits himself only with having found a “way out”:

I fear that perhaps you do not quite understand what I mean by “way out.” I use the expression in its fullest and most popular sense. I deliberately do not use the word “freedom.” I do not mean the spacious feeling of freedom on all sides. As an ape, perhaps, I knew that, and I have met men who yearn for it. But for my part I desired such freedom neither then nor now. In passing: may I say that all too often men are betrayed by the word freedom. And as freedom is counted among the most sublime feelings, so the corresponding disillusionment can be also sublime. In variety theaters I have often watched, before my turn came on, a couple of acrobats performing on trapezes high in the roof. They swung themselves, they rocked to and fro, they sprang into the air, they floated into each other’s arms, one hung by the hair from the teeth of the other. “And that too is human freedom,” I thought, “self-controlled movement.” What a mockery of holy Mother Nature! Were the apes to see such a

167. *Id.* at 184.

168. *Id.* at 188.

169. *Id.* at 182.

spectacle, no theater walls could stand the shock of their laughter.¹⁷⁰

But what is Red Peter doing outside his cage if he is not truly “free”? Red Peter had to fight his way along the “way of humanity” and he recounts that “[t]here was nothing else for me to do, provided always that freedom was not to be my choice.”¹⁷¹ The narrative structure of the story provides clues about Kafka’s verdict on Red Peter’s new predicament. Red Peter is telling his story only at the request of a learned academy. The academy wants an account of his life as an ape, but Red Peter cannot comply because the trauma of his transformation has destroyed his memory.¹⁷² Yet Red Peter states that “to a lesser extent I can perhaps meet your demand, and indeed I do so with the greatest pleasure.”¹⁷³ He only agrees to tell what he can because his position has become “unassailable.”¹⁷⁴ And at the end of the story, he describes his current state: “With my hands in my trousers pockets, my bottle of wine on the table, I *half lie and half sit* in my rocking chair and gaze out of the window: if a visitor arrives, I receive him with propriety.”¹⁷⁵

Altogether, the picture Kafka paints of so-called freedom in the modern world has none of the humanistic overtones of republican conceptions of positive liberty, or the triumphal overtones of liberal conceptions of negative liberty. Instead, we see a being moving from an unbearable to a bearable intermediate position, from half standing to half lying. We also see a being scraping through narrow to wider passages, where virtually insurmountable obstacles that threaten one’s existence are replaced by less consequential tasks that might even be completed “with pleasure.” From this perspective, we can see the shared drive of all animate beings in the modern world, to find a way out of impossible situations and arrive, not at a radically free state, but far enough along that the task of navigating the maze becomes, potentially, a source of stimulation. The human fleeing destitution in the market only to shoulder the burdens of other responsibilities, and the animal fleeing its cage only to shoulder the burdens of domestication, do not seem that different. Red Peter would probably find the Fourth Department’s claim that “habeas corpus

170. *Id.*
171. *Id.* at 189.
172. *Id.* at 177–78.
173. *Id.* at 178.
174. *Id.* at 179.
175. *Id.* at 190 (emphasis added).

does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself¹⁷⁶ confusing, for, from his perspective, the human world offers nothing but changing conditions of confinement.

Coming back full circle to the social contract tradition, we find that after human beings leave the state of nature and enter political society, they are not completely free as they were before. Rather, they are at liberty to navigate the maze of conventions, to move from more to less oppressive situations. They have never actually chosen to enter the maze; rather, their consent to be ushered in is assumed because, in the abstract, it would have been rational to always make this choice. Now, they are at liberty to find *ways forward*, even if they never *get out*. In this regard, it seems that animals are in the same boat as us. They will never escape the human world, never choose to enter into it, but they should be entitled to find ways forward. And we should afford them the same courtesy that we afforded ourselves: to assume that this would be their rational choice, even if it is not their choice to make.

176. *Kiko*, 124 A.D.3d 1334, 1335 (N.Y. App. Div. 2015).