

WHERE THE WILD THINGS ARE (OR SHOULD BE): RAWLS' CONTRACTARIAN THEORY OF JUSTICE AND NON-HUMAN ANIMAL RIGHTS

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Contractarian theories of justice are generally considered incapable of granting direct moral status to non-human animals on the basis that these creatures lack rationality. Mark Rowlands has argued that, contrary to this dominant view, John Rawls' seminal social contract theory not only allows for, but requires, the direct moral consideration of the interests of non-human animals. Rowlands' line of argument has been criticised, notably by Robert Garner. This paper provides a rebuttal of critiques by Garner and others and conducts a critical analysis of the practical consequences of adopting Rowlands' interpretation of Rawls' social contract in relation to non-human animals. Its concluding view is that this paradigm provides a sound theoretical construct for examining a wide range of issues in the area of animal rights.

I INTRODUCTION

In his influential work *A Theory of Justice*, John Rawls argues that the only legitimate principles of justice are those that would be chosen by rational individuals in a hypothetical 'original position' who are placed behind a 'veil of ignorance' which denies them knowledge of their socio-economic position, natural assets and abilities and conception of the good.¹ Rawls, like most contractarian theorists, chose to exclude non-human animals from this sphere of justice on the grounds that they lack rationality. Indeed, writers in this field generally agree that while contractarian theories may justify assigning some *indirect* moral status to non-human animals on the basis of their value to humans, they are fundamentally incapable of granting *direct* moral status to these creatures.²

The work of Mark Rowlands established a long overdue counter perspective to this view. Over the past fifteen years he has persuasively argued that a proper understanding of Rawls' theory (especially the relationship between Rawls' often overlooked intuitive equality argument and his well-known social contract argument) not only allows for the direct moral consideration of non-human animals, it demands it.³ Rowlands' argument has attracted many

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¹ John Rawls, *A Theory of Justice* (Harvard University Press, Revised Ed, 1999) 118.

² Mark Rowlands, 'Contractarianism and Animal Rights' (1997) 14(3) *Journal of Applied Philosophy* 235, 235.

³ *Ibid* 243.

critics, the most notable being Robert Garner who concedes that while Rawls' intuitive equality argument provides some support for the direct moral consideration of non-human animals, his influential social contract argument is superfluous and offers no value in that context.⁴

This paper seeks to fill a gap in the literature in two ways. It will provide a rebuttal of Garner's critique, which has been relatively unopposed since it was first espoused. It will also present an overarching critical analysis of the practical consequences of adopting Rowlands' interpretation of Rawls' social contract in relation to the treatment of non-human animals. Part II of the paper will set out Rowlands' argument in favour of a modified Rawlsonian theory of justice which is inclusive of animals as direct moral subjects. Part III will consider some general critiques of animal-inclusive contractarian theories before turning to Garner's critique of Rowlands. It will conclude that Garner has misunderstood the fundamental interrelationship between Rawls' intuitive equality and social contract arguments with the consequence that he has fallen into the error of disregarding the latter's importance. Finally, Part IV will highlight the usefulness of Rowlands' modified Rawlsonian theory as a means of resolving fundamental moral problems in animal welfare by applying it to two current issues: the practices of eating meat and treating animals as property. Overall, this normative analysis will lend support to the conclusion that Rawls' contractarian moral theory provides a strong case for the moral claims of non-human animals.⁵

II AN ANIMAL FRIENDLY INTERPRETATION OF A *THEORY OF JUSTICE*

A *An Overview of Rawls*

Many commentators assert that Rawls is unsympathetic to the plight of non-human animals.⁶ This is not entirely accurate. In *A Theory of Justice*, Rawls observes that the capacity of animals to feel pleasure and pain 'clearly imposes duties of compassion and humanity in their case.'⁷ Nonetheless, he concludes that non-human animals fall outside the scope of his theory of justice as it is not possible to include them in 'a natural way.'⁸ He makes this judgment because he confines his sphere of justice to 'moral persons' — those who have a 'conception of the good' (as expressed by a rational life plan) as well as a 'sense of justice' and a desire to act upon it in some minimal sense.⁹ Non-human animals, plagued as they are by irrationality, cannot fit this description and are thus excluded. It seems Rawls' intention was to relegate the issue of non-human animals to some ill-defined moral realm outside his primary sphere of justice where it could be dealt with at another time.¹⁰

However, as Bernard Rollin has observed, theories of morality 'have lives of their own that transcend the intentions of those who first articulated them.'¹¹ This is why Rowlands seeks, with the benefit of distance and hindsight, to re-evaluate and reinterpret Rawls' theories in

⁴ Robert Garner, 'Rawls, Animals and Justice: New Literature' (2012) 18 *Res Publica* 169.

⁵ Mark Rowlands, *Animal Rights: Moral Theory and Practice* (Palgrave MacMillan, 2nd ed, 2009) 118.

⁶ See, eg, Peter Carruthers, *The Animals Issue* (Cambridge University Press, 1992) 98-99; Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) 174; Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 327.

⁷ Rawls, above n 1, 448.

⁸ *Ibid.*

⁹ *Ibid.* 11.

¹⁰ *Ibid.* 448.

¹¹ Bernard E Rollin, *Animal Rights and Human Morality* (Prometheus Books, 3rd ed, 2006) 53.

light of modern day discourses regarding animal rights. He begins by pointing out that Rawls relied on not one, but two arguments, to justify the principles of justice he sought to adopt. The first is his lesser known ‘intuitive equality’ argument.¹² The argument goes as follows: If I have done nothing to merit the possession of a certain property — that is, my possession of the property is morally arbitrary — then I am not morally entitled to any benefits that accrue from this act of possession.¹³ This argument is compatible with a traditional liberal equality ideology which prohibits discrimination on the basis of morally arbitrary properties such as socio-economic status, race and gender. However, what makes Rawls’ theory distinctive is the expansive range of properties he regards as morally arbitrary.¹⁴ Under the intuitive equality argument any ‘natural talent or capacity’ from good looks to a high IQ to athletic or artistic ability, is considered to be morally arbitrary property from which the lucky individual is not entitled to gain a benefit.¹⁵

This leads to Rawls’ second argument of the social contract. As a starting point, Rawls asks us to imagine the existence of an ‘original position’ — that is, a hypothetical arena in which individuals must determine which principles or morality to accept or reject.¹⁶ The individuals in the original position are rational in the sense that in choosing between principles of justice, they will choose those principles that best advance his or her own interests.¹⁷ These rational agents are then placed behind a veil of ignorance, which denies them knowledge of certain key facts about themselves such as their socioeconomic status, natural assets or abilities, conception of the good and knowledge of the particular circumstances (eg the level of civilisation) of the society they will ultimately inhabit.¹⁸ The aim of excluding these key facts is to ensure that any principles agreed to will be just. This is the crux of Rawls’ argument for ‘justice as fairness’. In this original position, we are able to ‘nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.’¹⁹ As a result, whatever principles of justice these individuals would agree upon for the basic structure of society come from a place of perfect fairness. Therefore they are just.²⁰

Rawls’ arguments in relation to intuitive equality and the social contract do not exist independently of one another. Rather, they are ‘mutually reinforcing.’²¹ As Rowlands explains, there are many factors that could be included or excluded under the veil of ignorance and all would yield different principles of justice. Therefore, Rawls argues that one of the grounds for determining the conditions of the original position is whether it produces outcomes that we find intuitively acceptable — that is, they conform to the intuitive equality argument.

¹² Rowlands, above n 2, 238.

¹³ Ibid.

¹⁴ Ibid 239.

¹⁵ Ibid.

¹⁶ Garner, above n 4, 161.

¹⁷ Rawls, above n 1, 142.

¹⁸ Ibid 118.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Rowlands, above n 2, 240.

If, after this process, the contract does not produce results we find to be intuitively correct, we must decide whether to adjust the theory (if the intuition still seems compelling) or to shed the conflicting intuition (if the adjustments required seem too damaging to the theory's overall integrity).²² And thus, finally, after working from both ends, we reach Rawls' 'reflective equilibrium' — an internally consistent theory that sits well with all the considered and carefully reflected intuitions we have decided to keep.²³

B *Applying Rawls to Non-Human Animals*

Once the relationship between Rawls' intuitive equality argument and the social contract is made clear, Rawls' theory does not contain any obstacle that prevents non-human animals from obtaining direct moral status. The intuitive equality argument requires that no person should benefit from morally arbitrary property. However, as Rowlands points out, 'a person plays no role in deciding whether or not she is going to be rational, she either is or she is not. The decision is not hers, but nature's.'²⁴ The issue of species falls into the same category. Since it is the intuitive equality argument which informs the conditions of the original position, it must follow that both rationality and species should be excluded under the veil of ignorance. The question then becomes: If I did not know whether I was going to be a human or a non-human animal, or whether I was going to be rational or irrational, what kind of principles of justice would I choose to live by? Under this analysis, Rawls' decision to restrict justice to 'moral persons' turns out to be an unreflective judgment which can no longer stand up to the scrutiny of the social contract.

Thus, it does not follow that 'just because only rational agents can set up or be party to the rules, only such agents are protected by the rules.'²⁵ This is a logical fallacy, which according to Rowlands, has emerged in the literature due to a misunderstanding of the fundamental differences between a Hobbesian contractarian model and a Kantian contractarian model. A Hobbesian contractarian model relies upon a hypothetical social contract between rational actors to justify and give force to a certain moral code. The fact that rational, self-interested and equally positioned individuals would agree to certain principles of justice is what gives those principles their binding force.²⁶ By contrast, a Kantian model uses the contract as a purely heuristic device to identify and express the underlying principles in the moral code that we have in fact adopted in the real world.²⁷ Unlike the Hobbesian model, the Kantian model uses the contract to identify what is morally right or wrong in the first place.²⁸ The binding quality comes from the moral correctness of these principles, not from the agreement of the contractors.²⁹ Rawls clearly identifies with the Kantian model, frequently citing him throughout *A Theory of Justice*. Rawls points out that the original position is not an 'actual historical state of affairs.'³⁰ Rather, it is to be 'understood as purely a hypothetical situation characterised so as to lead to a certain conception of justice.'³¹ An unfortunate confusion

²² Frank Lovett, *Rawls's A Theory of Justice: A Reader's Guide* (Continuum International Publishing Group, 2011) 42.

²³ *Ibid* 42–43.

²⁴ Rowlands, above n 2, 242.

²⁵ Rollin, above n 11, 52.

²⁶ Rowlands, above n 5, 125.

²⁷ *Ibid*.

²⁸ *Ibid* 126.

²⁹ *Ibid* 126–127.

³⁰ Rawls, above n 1, 11.

³¹ *Ibid*.

between the two models had led friends and foes of non-human animal rights alike to disregard Rawls on the assumption that rationality is an integral element of his theory of the contract.

Indeed at times even Rawls appeared to be confused as to where he stood on the Hobbesian–Kantian contractarian spectrum, and this explains his ambivalent attitude towards non-human animals throughout *A Theory of Justice*. Rather than concluding that moral personhood was essential to direct moral consideration, Rawls chose merely to state that it was a ‘sufficient condition.’ Consequently, he pushed to one side the issue of whether it was a ‘necessary condition’, and left open the question of whether non-human animals were automatically disqualified due to their lack of rationality.³²

Furthermore, where Rawls does indicate that non-human animals should be excluded, his arguments are littered with qualifiers — it is ‘generally believed’³³ or ‘presum[ed]’³⁴ that we are ‘not required to give strict justice...to creatures lacking this capacity.’³⁵ This is because these observations are ‘unreflective intuitions’ — that is, intuitions in the common sense of the word, which have not been ‘duly pruned and adjusted by the sort of deliberations required to produce a mature conception of justice, or...to reach reflective equilibrium.’³⁶ Since, as established above, these unreflective intuitions conflict with Rawls’ intuitive equality argument, it follows that as part of the reflective equilibrium process, these unreflective intuitions regarding the status of non-human animals must be disregarded.³⁷ Rowlands concludes that these confusing, out of place references to non-human animals reflect nothing more than ‘unexpurgated, unnecessary and unwelcome’ remnants of a Hobbesian outlook which Rawls could never expunge.³⁸ Rawls, a product of his context, was never able to escape the Hobbesian idea of the need for an equality of power between contractors. Once Rawls’ social contract is revealed in its true form as a heuristic device — a purely hypothetical means of testing principles of justice — then these Hobbesian concerns are no longer relevant.³⁹

Ultimately, however, the fact that Rawls had a somewhat different view on the moral status of non-human animals is irrelevant. Rowlands is attempting to adapt Rawls’ theory to a new era of animal rights. Rawls’ failure to anticipate the later importance of his views on non-human animals does not make Rowlands’ argument any less legitimate. Indeed, a key point of difference between Rawls’ and Rowlands’ approaches should be noted. While Rawls was primarily concerned with reforming the major political, social and economic structures and institutions which form the building blocks of society,⁴⁰ Rowlands proposes to make use of the social contract in a much broader sense as a tool for assigning general moral rights and duties and resolving moral problems.⁴¹ This distinction will become clear in Part IV, when the application of Rowlands’ modified Rawlsean theory of morality to current animal issues will be considered. For now however, it is sufficient to conclude that Rawls’ contractarian theory of justice poses no barrier to assigning direct moral status to non-human animals.

³² Ibid 442-443.

³³ Ibid 441.

³⁴ Ibid 442.

³⁵ Ibid 448.

³⁶ Rowlands, above n 5, 154.

³⁷ Ibid 154-155.

³⁸ Ibid 155.

³⁹ Ibid.

⁴⁰ Ibid 47.

⁴¹ Rowlands, above n 5, 132.

III A RESPONSE TO ROWLANDS' CRITICS

Rowlands' line of argument has been disputed by two key sets of critics. The first is represented by Brian Baxter, Martha Nussbaum, Peter Carruthers and Will Kymlika. These scholars, although they do not reference Rowlands directly, express general concerns about extending Rawls' contractarian theory to include non-human animals. The second is represented by Robert Garner, who has specifically criticised Rowlands' argument on the basis that he has failed to sufficiently justify the value of Rawls' social contract in establishing a basis for the direct moral consideration of non-human animals. Part III of this paper, therefore, aims to break fresh ground in two ways. Firstly, it will provide a comprehensive synthesis of the general concerns voiced by Baxter et al and a critical rebuttal of these views. Secondly, and more importantly, it will respond to, and take issue with, Garner's previously unchallenged critique.

A *General Critiques of Non-Human Animal-Inclusive Contractarian Theories of Justice*

Brian Baxter is critical of the notion that non-human animals could be subjects of justice under a Rawlsian contractual theory of justice. He asserts that participants in the original position cannot be ignorant of their species because Rawls requires them to have a prerequisite level of rationality which allows them, at a minimum, to understand the different possibilities presented to them.⁴² Such abilities are only afforded to the human race. Baxter further maintains that it is pointless to imagine that these participants possess the characteristic of rationality, even for a short time, behind the veil of ignorance before they discover their true species, because such a scenario is senseless in a metaphysical sense. How can the person who conducts the contract exercise in human form turn out to be a non-human animal?⁴³ The weakness in this view is exposed by Rowlands when he explains that 'the veil of ignorance is neither an expression of, nor does it entail, a metaphysical theory of the person.'⁴⁴ Rather, it is a purely heuristic device designed to determine fairness. Just as we ensure a cake is divided evenly by preventing the cutter from knowing which piece they will receive, we ensure a fair distribution of rights and social goods by preventing those who could influence the selection process in their favour from doing so.⁴⁵

In a similar vein, Martha Nussbaum (a student of Rawls) asserts that the notion of a contract between humans and non-human animals is so 'fantastic' that it is not worthwhile pursuing.⁴⁶ Her concern is that there needs to be an element of 'realism' in the contract. Since the 'asymmetry of power' between humans and non-humans is too marked to imagine such a contract existing in the real world, imagining one is a useless exercise.⁴⁷ Julie Hilden dismisses Nussbaum's concern that a human/non-human animal contract is too 'fantastic' as a mere failure of her imagination. If children and fantasy writers and actors can imagine what it is like to be a non-human animal, why cannot philosophers and policy makers engage in the same exploration? Finding fault with employing imaginative scenarios is not a legitimate

⁴² Brian Baxter, *A Theory of Ecological Justice* (Routledge, 2005) 96.

⁴³ Ibid.

⁴⁴ Rowlands, above n 2, 239.

⁴⁵ Ibid.

⁴⁶ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 333.

⁴⁷ Ibid 334.

critique, especially in light of advanced contemporary research, which has greatly enhanced our knowledge of the mental and physical lives of non-human animals.⁴⁸ If we accept for the sake of the argument that what Nussbaum terms an ‘empathetic gulf’ is a reality, the effort of undertaking the imaginative exercise of the original position becomes even more necessary and important. Writers such as John Hart Ely have argued that ‘discrete and insular minorities’ often require special protections in the political process; not just because they suffer from barriers to the political process, but because society has a tendency to lack empathy towards them on the basis of prejudice or inaccurate knowledge.⁴⁹ In light of these findings, Hilden asks the question: ‘If we find alien those on the “other side of the tracks” or in the “gay neighbourhood” or the “black neighbourhood” in our own towns, how much more alien will we find those who make their homes in our forests and mountains, whom we rarely see and may have been taught to fear?’⁵⁰ She concludes that unless we are able to empathise with these creatures (as we are forced to in the original position) any protections that we afford to non-human animals will be no more than paternalism.⁵¹

In contrast, Peter Carruthers expresses concern that excluding rationality and species behind the veil of ignorance is a slippery slope that could lead to more dubious claims for justice on behalf of plants or even inanimate objects.⁵² Rowlands is quick to point out that under his modified contractarian approach, ‘the scope of morality is restricted to things that an occupant of the original position could rationally worry about.’⁵³ A rational agent would not concern themselves with the possibility of becoming a rock or a tree, because ‘such objects are insensate and indifferent to what happens to them.’⁵⁴ Therefore, Rowlands’ modified Rawlsian contractarianism makes sentience the clear cut-off point for direct moral consideration regardless of the fact that sentience is a morally arbitrary quality.⁵⁵

Finally, Will Kymlicka takes issue with what he describes as the ‘curious sort of perversity’ inherent in incorporating non-human animals into Rawls’ contract.⁵⁶ While an advantage of the veil of ignorance is that it makes vivid the notion that sentient beings matter as ends in themselves, it does so by ‘imposing a perspective from which the good of others is simply a component of our own (actual or possible) good.’⁵⁷ Kymlicka queries why a theory of equal consideration for non-human animals could not be generated by simply asking agents in the original position to give consideration to the needs of others regardless of their arbitrary talents and misfortunes?⁵⁸ Ironically, Rawls’ cynicism about the ability of human kind to look out for those less fortunate is considered one of the strengths of his theory as he is trying to create ‘a kind of moral geometry with all the rigour which this name connotes.’⁵⁹ Consequently, he worked on the basis that ‘a conception of justice should not presuppose extensive ties of sentiment.’⁶⁰ Through the device of the social contract, Rawls is able to

⁴⁸ Julie Hilden, ‘A Contractarian View of Animals Rights Insuring Against the Possibility of Being a Non-Human Animal’ (2007) 14 *Animal Law* 5, 17.

⁴⁹ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 2006) 153

⁵⁰ Hilden, above n 48, 18.

⁵¹ Ibid 18.

⁵² Peter Carruthers, *The Animals Issue* (Cambridge University Press, 1992) 114–118.

⁵³ Rowlands, above n 5, 160.

⁵⁴ Hilden, above n 48, 10.

⁵⁵ Rowlands, above n 5, 160.

⁵⁶ Will Kymlicka, *Contemporary Political Philosophy* (Oxford University Press, 2nd ed, 2002) 69.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Rawls, above n 1, 105.

⁶⁰ Ibid 111-112.

minimise our reliance on moral intuitions and substitute them with ‘prudential judgements’ on what a rational, self-interested person would do in that situation.⁶¹ Consequently, the weakness referred to by Kymlika becomes, in actuality, a significant strength.

B *Garner’s Critique of Rowlands’ Interpretation of A Theory of Justice*

In light of the analysis above, it can be seen that most criticisms of non-human animal-inclusive contractarianism are founded on erroneous or facile assumptions. The most damaging criticism of Rowlands’ line of argument, however, comes from Robert Garner. His critique is significant for two reasons. Firstly, he is an internationally renowned scholar in the area of animal law who has written extensively on the topic of contractarianism and non-human animals. Thus, his criticisms carry a great deal of weight and are likely to have great influence on academic thinking in this field. Secondly, Garner is the only theorist who has engaged directly with Rowlands’ argument at length and responded with a substantial critique. It will be demonstrated that even his apparently seminal critique contains flaws that significantly undermine the viability of the negative concerns it expresses about the value of Rawls’ social contract.

In his article, ‘Rawls, Animals and Justice: New Literature, Same Response’, Garner sets out to systematically discredit every major theory proposed in support of a Rawlsean animal rights framework.⁶² Garner admits that Rowlands’ work represents the ‘most sustained and original attempt’ at achieving this goal and is even open to the idea that the intuitive equality argument is capable of supporting justice for non-human animals.⁶³ He quickly moves on from this concessional point to express serious doubts about Rawls’ and Rowlands’ reliance on the process of reflective equilibrium. Garner asserts that the point of the contractual device is to ‘develop moral principles from scratch.’⁶⁴ However, as a result of the process of reflective equilibrium, key moral decisions in Rawls’ theory — such as whether non-human animals should be subjects of justice — are made prior to the contract on the basis of the intuitive equality argument, rather than being developed through the contract itself.⁶⁵ Since the principle that ultimately allows for the inclusion of non-human animals into Rawls’ sphere of justice is derived from subjective moral principles decided upon prior to entering the original position, Garner asks: ‘What is the value added of persevering with a contractarian approach for those interested in the protection of animals?’⁶⁶ Those looking to advance the position of non-human animals would be ‘better off invoking the intuitive equality argument as a free standing principle from which the justice claims of animals...can be derived independently of the contract.’⁶⁷ If Garner’s view is correct on this point, Rawls’ social contract argument — the most distinctive aspect of his theory — would have to be abandoned which could, in turn, lead participants in this debate to question whether it is worth persevering with Rawls at all.

⁶¹ Lovett, above n 22, 42.

⁶² Garner, above n 4, 169.

⁶³ Ibid.

⁶⁴ Robert Garner, *Animals Ethics* (Blackwell Publishers, 2005) 86.

⁶⁵ Garner, above n 4, 169.

⁶⁶ Ibid.

⁶⁷ Ibid.

Contrary to Garner's assertion, the social contract argument serves a number of important, albeit supplementary functions.⁶⁸ Firstly, it has the capacity to 'render vivid our intuitions,' a function which should not be overlooked.⁶⁹ Rawls' philosophical writings are in a large part remembered for the memorable way in which his unique social contract brings to life the principles of justice he seeks to endorse. Secondly, the contract device has the ability to make more precise general intuitions and to extract consequences from them that help to create useful principles of justice.⁷⁰ Finally, the contract provides an impartial perspective 'from which we can test opposing intuitions.'⁷¹ As Kymlika explains, 'certain intuitions might seem less compelling when they are viewed from a perspective detached from one's own position in society.'⁷² For example, a gifted athlete might deeply believe, contrary to the intuitive equality argument, that their talents are not arbitrary — that is, their athletic skills were achieved solely by their hard work and perseverance and thus they are morally entitled to reap the benefits of these cultivated skills. If however, when placed in the original position behind the veil of ignorance they no longer object, then this is proof that the intuitive equality argument is correct.⁷³

Nonetheless, the fatal weakness in Garner's argument for the abandonment of the social contract argument is that the intuitive equality argument cannot stand without the former. Although the interdependence of these two facets of Rawls' theory has been outlined above, it is worth delving a little deeper into the origins of Rawls' work to understand why Garner's attempt to isolate the intuitive equality argument is so deeply flawed. Rawls was writing in a time when utilitarianism was the dominant moral theory. His aim in *A Theory of Justice* was to present an alternative moral viewpoint that was more in line with our moral intuitions.⁷⁴ Despite this aim, as Lovett observes, two key problems plagued the intuitionist theories of the time. Firstly, they consisted of 'a plurality of first principles which may conflict to give contradictory directives in particular kinds of cases.'⁷⁵ Secondly, they lacked any 'priority rules' for determining what should be done if these first principles conflict.⁷⁶ The aim of 'justice as fairness' was to resolve this priority problem. After all, an obvious objection to any purely intuitionist theory of justice is to query where our intuitions come from. Clearly they are not derived from considerations of justice alone. They also stem from custom, context and current expectations. This leads to situations where, for example, a male growing up in a heavily patriarchal society comes to have a deeply held intuition that women are morally inferior to men. How do we make sure that our intuitions are fair and have not been 'clouded by a parochial upbringing?'⁷⁷

⁶⁸ Kymlika, above n 56, 69.

⁶⁹ Ibid 68.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Lovett, above n 22, 6.

⁷⁵ Ibid.

⁷⁶ Rawls, above n 1, 30.

⁷⁷ Lovett, above n 22, 38.

Rawls answers this question by returning to his social contract argument. He asserts that we can trust that our intuitionist principles are just if they would be chosen by rational individuals in the original position behind the veil of ignorance. Indeed, as Lovett observes, a large part of the appeal of Rawls' theory is that it is capable of 'deriving moral conclusions from non-moral premises.'⁷⁸ The same man who believed women were inferior to men would not rationally choose to discriminate between the two genders behind the veil of ignorance if he no longer knows what gender he is. Thus, his original intuition must be abandoned.⁷⁹

However, the social contract is not a complete protection against bias because, as discussed earlier, our intuitions inform our definition of the original position. Thus, if our society truly believed that women were inferior to men, we may consequently choose not to exclude gender behind the veil of ignorance — and this would lead to results which, from a gender neutral standpoint, would seem unfair.⁸⁰ Consequently, another safeguard is required, and this takes the form of Rawls' second strategy — his reflective equilibrium. By whittling down our intuitions to those which are the most considered — that is, 'those judgements in which our moral capacities are most likely to be displayed without distortion' — and then weighing them against each other if they conflict, making reasoned judgements as to which should remain and which should be abandoned, only then do we arrive at a truly objective and internally consistent theory of justice.⁸¹

Thus, it is clear that a conception of justice 'cannot be deduced from self-evident premises' like the intuitive equality argument alone. Instead, its justification 'is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.'⁸² This is what Rawls' social contract and reflective equilibrium provide. In light of this conclusion, Garner's premise that the social contract should be replaced by the intuitive equality argument as a free standing principle must fail and Rowlands' argument in favour of a non-human animal-inclusive contractarianism emerges largely unscathed.

IV APPLYING ROWLANDS' INTERPRETATION OF A *THEORY OF JUSTICE* TO CURRENT ANIMAL ISSUES

As foreshadowed earlier in this paper, Rowlands and Rawls differ somewhat in their proposed use of the social contract. While Rawls was concerned with extrapolating from the contract a just organisation of society in terms of the major social, economic and political institutions, Rowlands conceives of the contract as a more flexible tool which has the potential to provide a framework for the assignment of broader moral rights and resolve current ethical issues relating to non-human animals.⁸³ Despite these differences, Rowlands maintains that the hard work of developing a contractarian theory of non-human animal rights lies in 'defending the claim that non-human animals... are recipients of the protection offered by the contract, despite the fact they are not rational.'⁸⁴ He contends that, once this inclusion is established, the process of applying his theory to human/non-human animal interactions is

⁷⁸ Ibid 39.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Rawls, above n 1, 42.

⁸² Kymlika, above n 56, 69.

⁸³ Rowlands, above n 2, 236.

⁸⁴ Rowlands, above n 5, 162.

relatively straightforward.⁸⁵ Indeed, there has been little published academic analysis concerning the practical consequences of adopting a non-human animal-inclusive contractarian theory of justice.

Therefore, the fourth and final part of this article will apply Rowlands' modified social contract to two controversial non-human animal welfare issues — the practice of eating meat and the practice of treating non-human animals as property. This examination will reveal that although applying Rawls' schema does not always result in the clear-cut outcomes that Rowlands predicted, the methodology of the social contract remains a powerful tool for analysing and enlivening debate on non-human animal issues. Moreover, it provides a framework for the establishment of an effective advocacy base for the introduction of stronger rights and protections for non-human animals.

A *The Practice of Eating Non-Human Animals*

Vegetarianism, the practice of abstaining from eating meat, is the only specific practical issue that Rowlands has dealt with at length in his writings on contractarianism. He observes that although a person in the original position can fashion their moral and political world as they see fit, there are certain realities that must remain securely in place to make the exercise worthwhile. One of these realities is the natural order of living beings.⁸⁶ Thus, the issue of humans killing non-human animals for food remains pertinent. According to Rowlands, the first step in resolving this moral dilemma is to place ourselves in the original position behind the veil of ignorance as set out in Part II of this article. In this hypothetical scenario, we no longer have any knowledge of what species we will be in the world we are creating, or whether we will be rational or irrational. Then we ask ourselves: If I, as a rational, self-interested agent, did not know whether I would be a human or a non-human animal, would I choose to allow humans to kill non-human animals for food?⁸⁷

To answer this question, we must first consider what each group has to lose and gain from the practice of meat eating.⁸⁸ Compulsory vegetarianism would force humans to give up a number of features of our current existence, but not our life or our health.⁸⁹ The number of vegetarians subsisting on a healthy, meat-free diet proves that the consumption of meat is not essential to nutrition. Thus, the main loss to humans would be the pleasure of eating meat and the displacement associated with the abandonment of this embedded social practice. When this is contrasted against the loss suffered by non-human animals — the destruction of their very existence, not to mention the fear and pain suffered in the lead-up to their death as a result of modernised slaughtering processes — the rational choice is clear. In these circumstances, 'what one stands to lose as a human is surely inconsequential compared to what one stands to lose as a cow, or pig, or lamb.'⁹⁰ The practice of eating meat would therefore be outlawed.

⁸⁵ Ibid.

⁸⁶ Ibid 163.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid 165.

A major counter-argument here is that rational agents in the original position may come to a contrary conclusion if non-human animals were well-treated throughout their lives and experienced little to no suffering prior to their death.⁹¹ This objection draws on the work of utilitarian theorist Peter Singer, who is also acknowledged as the founder of the modern animal liberation movement.⁹² He asserts that non-human animals, by virtue of their sentience, have an interest in avoiding pain, which should be treated in the same way as that of a human. Singer agrees that the consumption of meat is a trivial, non-essential pleasure. However, he also argues that because non-human animals are incapable of appreciating their own consciousness or mortality, they have no interest in their continued existence. Therefore, provided non-human animals are killed painlessly, no harm has been inflicted upon them.⁹³

Rowlands, anticipating this argument, states that the notion that free range and pain-free farming could produce enough meat to feed the world's population is entirely impractical in terms of the amount of farming required and the impact it would have upon the environment.⁹⁴ Indeed, even Singer concedes that obtaining meat that has been raised and killed in a pain-free manner on a large scale is virtually impossible. He concludes, therefore, that a vegetarian or vegan diet is the more ethical option under the circumstances.⁹⁵ Rowlands' view differs from Singer here in one fundamental aspect. Rowlands asserts that although a world in which humans ate only wild or genuinely free-range non-human animals would be morally better than the world that exists now, it would not be better than one where all humans were vegetarians.⁹⁶ The fact remains that a 'relatively trivial interest of the human', the desire to eat meat as a pleasurable experience, is being weighed against 'the vital interest of a non-human — their very existence.'⁹⁷ Rational agents would not risk putting themselves in a position where their life could be ended on the whim of another regardless of the pain, or relative lack thereof, that was associated with their sudden demise.

A second anticipated objection to compulsory vegetarianism is the predator/prey argument: that is, animal husbandry cannot be morally reprehensible, as non-human animals naturally kill and eat each other. The usual response to this argument is to assert that non-human animals are not moral agents capable of dispassionate self-assessment in light of accepted moral principles, and thus cannot be held responsible for their actions.⁹⁸ However, as Rowlands points out, while this argument may justify the actions of non-human animals, it does not explain why humans do not have a moral duty to attempt to intervene where one non-human animal attempts to kill another, as they would have if one human tried to kill another.⁹⁹ Thus, from a contractarian perspective, a better response would be to return to the original position. If I did not know whether I was going to be a carnivore or an herbivore, I would not choose a rule that required moral agents to intervene to protect non-human animals. If I turned out to be a carnivore, I would have sentenced myself to a slow death by starvation. Even if I turned out to be an herbivore, studies show that the loss of predators in the wild inevitably leads to an increase in disease or starvation amongst the species.¹⁰⁰

⁹¹ Ibid 166-167.

⁹² Peter Singer, *Animal Liberation* (1995, Pimlico edition).

⁹³ Ibid.

⁹⁴ Rowlands, above n 5, 167.

⁹⁵ Singer, above n 92, 160

⁹⁶ Ibid 168.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid 169.

¹⁰⁰ Ibid.

Unfortunately, Rowlands' practical application of this theory fails to consider how Rawls' social contract device would deal with the difficult issue of veganism — the non-consumption of non-human animal or dairy products — as distinct from vegetarianism. It is questionable whether participants in the original position behind the veil of ignorance would be willing to morally distinguish between the loss of pleasure arising from being denied meat and the loss of pleasure from being denied all non-human animal-based products. If extracting milk or eggs from non-human animals caused the latter significant pain, this option would clearly not be one chosen by a rational participant in the original position. But what if the extraction could be carried out in a relatively pain free manner? Is the risk of losing the pleasure of consuming non-human animal products better or worse than the risk of being milked as a cow, or having eggs taken from you as a chicken? The decision is not so clear-cut. It highlights a limitation of the social contract — that in borderline circumstances, it cannot always provide specific, concrete answers to questions of morality. However, true to its nature as a heuristic device, it remains a useful tool for highlighting issues that may have previously been overlooked and for facilitating discussion about them.

B *The Practice of Treating Non-Human Animals as Property*

To consider the issue of whether the treatment of non-human animals as property can be justified under Rawls' social contract, we return to the original position. For the purpose of this heuristic exercise, we will assume that the participants in the original position have adopted enforced veganism. What remains is a society that does not eat meat or non-human animal products, but still envisions their relationship with non-human animals as one of owner/property. The question is: If I did not know whether I would be a human or non-human animal, would it be rational for me to allow the property status of non-human animals to persist? Once again, we need to consider the benefits and detriments for each group. It quickly becomes apparent that the property status of non-human animals, in a symbolic sense, has no bearing in the original position. A self-interested human has no interest in the status of a non-human animal; they only care what they can do with them. Furthermore, if I were a non-human animal, it would not be rational for me to care about my status as property on a symbolic level. As a human, the indignity of being someone's property might have a significant impact on my happiness. However, if I were a non-human animal, I would not be aware of whether I was someone's property or a free agent. What would matter to me is how I was treated in a very utilitarian sense, in terms of minimising pain and maximising pleasure. Thus, to conduct the contract exercise properly, it would be necessary to consider the benefits and detriments of each practice, which is able to take place due to the property status of non-human animals. Although a detailed analysis of this issue is beyond the scope of this paper, a number of points can be noted.

Firstly, some non-human animals, like household pets, due to the way society has developed, are largely incapable of living a safe and happy life independent of human care. The fact that humans are responsible for this predicament is, unfortunately, irrelevant. After all, Rawls' original position does not purport to be some kind of historical point in time before civilised society existed.¹⁰¹ As a heuristic device it is designed to test our intuitions and existing rules in a hypothetical, perfectly fair, environment. It is pointless for us to conceptualise the rules of justice that would exist in a society in which these non-human animals had not been bred, or a society that had not developed to a point where they can no longer exist in the wild.

¹⁰¹ Rawls, above n 1, 11.

These realities have already taken place and are irreversible. Therefore, a rational agent behind the veil of ignorance would allow for ownership of these kinds of non-human animals as this is a mutually beneficial relationship. Similarly, in regards to assistance animals, it is arguable such a relationship would be maintained. The benefit provided by guide dogs and other assistance animals is great, while the detriment to the animals (compared to the life they would be leading as pets) is very low. Although working dogs present a more difficult challenge — the benefit to humans remains about the same, but the risk of injury or death to the non-human animal is greater — they are still likely to be allowed under the original position.

It is highly likely, however, that these rational agents would also protect their interests by introducing strict animal welfare laws which, in addition to being adequately enforced by a well-resourced agency, would allow them (or, in reality, interested third parties on their behalf) to bring an action in response to an alleged breach of animal welfare laws. In other words, they would choose to endorse some kind of legal standing for non-human animals. Legal standing is something that is not currently provided for under the concept of property as it encompasses non-human animals in Australia.¹⁰² According to leading theorists, there are three key ways they could be introduced. Firstly, we could introduce a ‘guardianship model’ (akin to the one that already applies to children) to regulate human/non-human animal relations.¹⁰³ Secondly, we could legislate into existence a new category of property known as ‘living property’ in which legal and equitable title would be split between human owners and non-human animals, respectively. This would provide the non-human animal with a legally enforceable interest, which must be taken into account by the legal titleholder, while still facilitating an owner/pet relationship.¹⁰⁴ The third and final option for facilitating legal standing for non-human animals is the abolition of their property status and the introduction of legal personhood. Gary Francione has passionately argued for such an abolition. He asserts that it is preposterous to suggest that a system, which treats non-human animals as ‘things’, and then purports to fairly balance their interests against those of their owners, will ever achieve any real improvements.¹⁰⁵ Furthermore, it carries the risk of perpetuating, or even increasing, animal exploitation by making people feel better about supposedly more ‘humane’ animal exploitation.¹⁰⁶ The original position, however, is not concerned with these political realities. Consequently, any one of these options, provided that it could be adequately funded and enforced, would be acceptable to rational agents in the original position.

Although, as discussed above, the contractarian approach hits a snag when it is applied to more complex issues such as medical testing on non-human animals,¹⁰⁷ it remains a useful lens for reevaluating existing arguments about controversial animal issues.

¹⁰² Deborah Cao, *Animal Law in Australian and New Zealand* (Thomson Reuters, 2010) 78.

¹⁰³ *Ibid* 85.

¹⁰⁴ David Favre, ‘A New Property Status for Animals: Equitable Self Ownership’ in C R Sunstein and M C Nussbaum (eds) *Animals Rights: Current Debates and New Directions* (Oxford University Press, 2004) 245-250.

¹⁰⁵ Gary Francione and Robert Garner, *The Animal Rights Debate* (Columbia University Press, 2010) 26.

¹⁰⁶ Gary Francione, ‘Reflection on *Animals, Property and the Law* and *Rain Without Thunder*’ (2007) 70 *Law and Contemporary Problems* 9, 33.

¹⁰⁷ See Julia Tanner ‘Rowlands, Rawlsian Justice and Animal Experimentation’ (2011) 14(5) *Ethical Theory and Moral Practice* 569 for an in depth consideration of the application of Rowlands to vivisection.

C *Reflections on the Practical Usefulness of Rowlands' Theory*

It is interesting to note the similarities between the process of weighing the benefits and detriments in the original position and the 'unnecessary harm' test, which is currently applied in Australian courts in regards to animal welfare.¹⁰⁸ This test requires the court to balance a non-human animal's interest in avoiding harm to itself against a human interest in exploiting non-human animals in any given circumstance. However, there is a subtle but important difference between the two tests. While a Rawlsian analysis takes place in a perfectly fair, neutral environment behind the veil of ignorance, the 'unnecessary harm' test is viewed through the prism of a society that believes in human domination over non-human animals in which exploitation is prevalent.¹⁰⁹ There is no doubting that this context has a profound impact on the way in which the unnecessary harm test is conducted.

This moral gap in the unnecessary harm test concerns Peter Sankoff. He cites the Canadian case of *R v Menard*¹¹⁰ — one of the very few cases anywhere in the world to deal at length with the 'unnecessary harm' test — in which Lamer J admitted that 'in setting standards for the behaviour of men, we have taken into account our privileged position in nature...over animals.'¹¹¹ Such judicial statements make it clear that the unnecessary harm test, rather than being neutral, is weighted heavily from the outset in favour of the justification of harm against non-human animals.¹¹² This bias inevitably has an impact on the two key determinations the court has to make in regards to (a) whether a legitimate purpose exists and (b) whether the means used to achieve that purpose are legitimate?¹¹³ Judgments reveal that only three purposes are likely to be deemed illegitimate: sadistic cruelty, negligent or lax treatment of non-human animals and waste of economic capital.¹¹⁴ Regardless of clear evidence that there are more humane ways of achieving a purpose, the only means likely to be deemed legitimate are those that advance human convenience and economic gain.¹¹⁵

In this comparison between Rawls' contractarian analysis and the analysis currently conducted under the 'unnecessary harm' test, a clear practical use for Rowlands' work becomes evident. If judges applying the unnecessary harm test were to place themselves in the original position behind the veil of ignorance, where they did not know what their species was and then turned their minds to whether the actions taken in the case at hand were proportionate, this would make for a relatively fair and neutral procedure and lead to outcomes that would be far more 'friendly' to non-human animals. This could be achieved by introducing an interpretive provision into State animal welfare acts that would overrule or at least temper judicial authorities such as *R v Menard*¹¹⁶ and encourage a less anthropocentric interpretation of the unnecessary harm test. Such a provision would clarify that any assessment of unnecessary harm must be carried out objectively, without any reference to the existing inequalities that may exist between humans and non-human animals.

Clearly, effecting legislative change to make Rowlands' theory a reality in relation to the radical notion of mandating vegetarianism and veganism would be a momentous departure

¹⁰⁸ Cao, above n 102, 120

¹⁰⁹ Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia* (Federation Press, 2009) 20.

¹¹⁰ (1978) 43 CCC (2d) 458 (Que CA).

¹¹¹ Ibid 464.

¹¹² Sankoff, above n 109, 20.

¹¹³ Ibid 22.

¹¹⁴ Ibid 23-24.

¹¹⁵ Ibid 25.

¹¹⁶ (1978) 43 CCC (2d) 458 (Que CA).

from the current animal welfare framework in Australia and other developed nations. Currently, the most advanced of these systems continue to classify non-human animals as property and merely provide for some modest protection through welfare codes and anti-cruelty statutes. It is self-evident that the drastic reforms required will not occur anytime soon given Australia's current societal attitude towards non-human animals. For this reason, commentators such as Jonathan Lovvorn are very critical of the work produced by philosophers such as Rowlands. He sees it as an 'intellectual indulgence' to become concerned with advancing impractical theories 'while billions of animals languish in unimaginable suffering that we have the power to change.'¹¹⁷ Lovvorn argues, moreover, that such theories cause actual harm because they fuel the fire of anti-animal rights alarmists who assert that non-human animals cannot receive protection without conducting a fundamental overhaul of our legal system.¹¹⁸ Similarly, Mike Radford asserts that if the 'law is the means by which society expresse(s) its collective choice' and 'any shortcomings are those of the society itself', then the parlous state of modern day non-human animal welfare law clearly indicates that society is not ready to embrace the fundamental shift in the legal status of non-human animals proposed by Rowlands.¹¹⁹

Not everyone would agree that society's attitude towards non-human animals is so backward. Former High Court of Australia judge Michael Kirby has famously observed that 'there is nothing so powerful in the world as an idea whose time has come, and animal protection is just such an idea.'¹²⁰ Public opinion towards non-human animals has progressed dramatically over the past 30 years. It may not yet be at a stage where it would endorse legal personhood for non-human animals, or comprehensively support compulsory vegetarianism. Nonetheless, there is a strong argument to be made that all major societal reforms require a bedrock of persuasive logic and ethical clarity and that theorists such as Rowlands are playing an important role in laying down that foundation.

V CONCLUSION

A proper understanding of the interrelationship of John Rawls' intuitive equality and social contract arguments reveals that *A Theory of Justice* does not prevent non-human animals from achieving direct moral status. Rather, once the mutually reinforcing nature of these two arguments is properly understood, it is clear that Garner's critique, and others of a similar nature, are misconceived and that Rawls' contractarianism provides a strong foundation for the direct moral consideration of non-human animals. Although Rowlands' interpretation of contractarianism in relation to current non-human animal issues is overly simplistic in parts and blurred in others, it remains a very useful device for those seeking to justify the moral claims of non-human animals.

¹¹⁷ Jonathan Lovvorn, 'Animal Law in Action: The Law, Public Perception and the Limited of Animal Rights Theory as a Basis for Legal Reform' (2006) 12 *Animal Law* 113, 139.

¹¹⁸ Ibid.

¹¹⁹ Mike Radford, *Animal Welfare in Britain: Regulation and Responsibility* (Oxford University Press, 2001) 10-11.

¹²⁰ Voiceless: The Animal Protection Institute, *Michael Kirby AC CMG - Voiceless Patron* <<http://www.voiceless.org.au/who-we-are/michael-kirby>>