



The Rights of Pigs and Horses

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In this age of the horror stories about factory farming and tragic, high profile and well-documented deaths on the track,¹ it is a pertinent time for Catholics to reconsider the rights of animals. Do animals have any rights and do we consequently have any direct moral duties to animals or are our moral duties to animals merely indirect duties to humanity?² Do the rights of animals include the right to life? If it does, then those of us who are omnivores are either living in bad faith or in culpable or non-culpable ignorance. If animals do not have a right to life, do they have any intrinsic rights at all?

¹ The two most recent high profile cases are those of Barbaro, the decisive winner of the 2006 Kentucky Derby, who shattered his leg in the Preakness and after months of extensive treatment was later “put down”, and Eight Belles, who suffered compound fractures in both her front legs in the 2008 Kentucky Derby after finishing second in the race. Her injuries were so severe she was immediately euthanized on the track.

The New Bolton Center at the University of Pennsylvania Widener Hospital for Large Animals maintained a website which updated the condition of Barbaro daily. Although Barbaro could not be saved, his tragic case is an example of bringing good out of evil. The overwhelming sympathy for Barbaro and the publicity surrounding the efforts to save him resulted in the creation of a “Barbaro Fund” at the hospital which provides funding for treatment of animals whose owners would not be able to afford the necessary treatment to rehabilitate their animals and would otherwise have had to euthanize them.

The inhumane treatment of animals in factory farms (and especially pigs) is well-documented. See, for example, David DeGrazia’s graphic description of the horrible life of a pig in a factory farm in his article “Meat Eating” in Susan Armstrong and Richard Botzler (ed.), *Animal Ethics* 2nd edition (London and New York: Routledge, 2008), p. 219. See also the film “Food, Inc.” Dairy farms are not immune to ethical critique either. Even if the milk cows on a dairy farm are treated well, the existence of dairy farms entails the issue of what to do with young male calves. The most common solution is to use them for veal. Since male calves, if not used for veal, would eventually become bulls, there are other “solutions”, like bullfighting or *Toro júbilo*, but such practices would be inconsiderable (rightly) in our culture.

² Aquinas, like Kant, considers our duties to animals to be indirect; so, for example, his view of the biblical injunction against cruelty to animals is that “this is... to remove man’s thoughts from being cruel to other men, and lest through being cruel to animals one become cruel to human being.” *Summa Contra Gentiles* book III part II chapter CXII.

Andrew Linzey, although a strong supporter of animal rights, also holds a position which amounts to our duties to animals being merely indirect, for he holds that animal rights are grounded in what he calls “Theos-Rights.” As he expresses it, “When we speak of animal rights we conceptualize what is objectively owed to animals as a matter of justice by virtue of their Creator’s right. Animals can be wronged because their creator can be wronged in his creation.” *Christianity and the Rights of Animals* (New York: Crossroads, 1987).

The issue of whether animals have rights is not the only way direct moral duties regarding our treatment of animals can be generated. Some philosophers think that our focus should be animal welfare without a founding in rights,³ and environmentalist concerns would be another ground of moral duties with implications of direct moral duties,⁴ but I will not consider such alternative approaches in this paper. My assumption is that the first and most preferable consideration consistent with a basically natural law approach should be the consideration of animal rights. Other considerations would be secondary to the consideration of animal rights. In other words, if animals do have rights or valid claims, implications concerning moral duties to animals regarding their welfare would clearly follow and if animals do not have rights, then welfare and environmentalist concerns could still be applicable without a grounding on the basis of rights.

The case for animals' moral rights is prompted by the case of marginal cases of humans—humans whose capacities are at or below the level of the capacities of the higher animals. The argument for animals' rights is something like the following:

1. All humans, whatever their capacities, have moral rights.
2. The higher animals have capacities which equal or surpass the capacities of marginal humans.
3. If the capacities of the higher animals equal or surpass the capacities of marginal humans,⁵ then there is no basis for recognizing moral rights for marginal humans while not recognizing the same right for the higher animals.

Therefore, the higher animals have moral rights.⁶

³ Peter Singer argues for the equality of interests of animals, but eschews arguing for it on the basis of rights. It is not so much that he rejects rights, but thinks that it is putting the cart before the horse. See his *Animal Liberation*, updated edition (New York: Harper Perennial, 2009), p. 8.

⁴ Elizabeth Anderson holds that there are basically three theoretical approaches in regard to animal ethics: animal welfare, grounded on sentience or suffering; animals rights, grounded on subjecthood; and environmentalism, grounded on life. She argues that "... while each perspective has identified a genuine ground of value, none has successfully generated a valid principle of action that does justice to all the values at stake. The plurality of values must be acknowledged" (279). This seems to me to be a sound principle. See her "Animal Rights and the Values of Nonhuman Life", in Cass R. Sunstein and Martha Nussbaum, *Animal Rights: Current Debates and New Directions* (Oxford and New York: Oxford University Press, 2004), pp. 277–298.

⁵ As will be evident later, I do not hold that there really are "marginal" humans; but the position that animals have a right to life is considerable only if some humans who nonetheless have a right to life are "marginalized".

⁶ There are certain rights which are taken for granted as applying to human persons: e.g. the right to life and the right not to be treated as property. Gary L. Francione argues for the rights of animals being grounded in their right not to be treated as property. This has

In this paper, I want to assess the cogency of this argument. Although some may question the first premise of the argument, I will not do so. Of course if one rejects the first premise, a viable option would be to deny moral rights to life for marginal humans. This is precisely why I do not wish to question the first premise. My view (which I take it is not idiosyncratic) is that denying the right to life to marginal humans would signify a moral regression, and would clearly be contrary to the position of the Church and the natural law position. Hence the first premise is secured.

The second premise seems to be unquestionably warranted by an unbiased view of the empirical evidence regarding the state of the existence of marginal humans versus the state of existence of the higher animals. I am deliberately remaining vague concerning what humans fit the description “marginal”; but the point is that in order to insure that the second premise is true, the bar must be set low enough such that a significant number of humans will be categorized as ones whose capacities are below those of the higher animals. Anencephalic babies and the severely mentally retarded are humans who would clearly lie below the bar.

The third premise is of course the controversial one and hence the one upon which the cogency of the argument hinges. There are some philosophers who argue that the criterion for who (or what) has a right to life should not be determined by the capacities which the subject has;⁷ and if the second premise is true, and if one thinks that all humans have the right to life but that the higher animals do not, it seems that rejecting the third premise is the only feasible way out. Hence my investigation will focus on assessing the warrant of the third premise. My position will be that the defining capacities of the natural kind will entail a certain dignity for specimens of that natural kind⁸ and would be the criterion for determining the rights for individuals of that natural kind. Then the critical problem will be how to extend those rights to individuals of that natural kind who lack some of those capacities. So the defining characteristic of the kind human is that humans are free, rational, self-conscious animals. This defining characteristic entails a number of capacities which distinguish humans from all other animals. Nonetheless, marginal humans do not share the capacities which well-functioning members of the human

very wide applications in regard to our treatment of animals. See his “Animals—Property or Persons?” in Sunstein and Nussbaum, *op. cit.*, pp. 108–142.

⁷ So, e.g., a moral theorist who thinks that there is no natural law according to which positive law must accord, that rights are established by a mere social contract and are the arbitrary creation of those who articulate, agree upon (and defend) certain claims which are then accorded the status of “rights”. Such a theorist could hold that we have in such a way established the right to life to apply to all humans but not to any other animals.

⁸ See Martha Nussbaum’s notion of “animal dignity” (300) in “Beyond ‘Compassion and Humanity’” in Sunstein and Nussbaum, *op. cit.*, pp. 299–320.

species have—they are not free, rational, self-conscious agents to the degree that entails the natural capacities upon which we think that human rights (and particularly the right to life) are contingent. If these humans lack these capacities, then what is our justification for extending the right to life to such humans?

The Rights of Marginal Humans

One of the things the problematic argument regarding marginal humans shows is that the problem cannot be solved by an appeal to a non-question begging conception of a person. For example, if we take the Boethian conception of a person as an individual substance of a rational nature, then it seems that on the basis of empirical evidence, marginal humans do not satisfy that concept. In response, one might object that simply because they are humans, those who are marginal are persons (i.e., entities with a rational nature) even though they do not exemplify the capacities which identify humans as persons. But if what is an entity of a rational nature is not identified by what on the basis of evidence has the capacities by which we identify humans as persons, on what evidence then do we base our judgment that marginal humans *are* persons?

One of course could appeal to a theologically loaded conception of a person as one who has an immortal soul, but then the same question could be asked: what is the evidence that marginal humans have an immortal soul. We then would be stuck with the same problem (or worse) as that posed by the Boethian conception of personhood. Of course one could stick with a theological basis for what constitutes the nature of a person, but that in itself begs the philosophical question, for what is the evidence that such a theological conception is correct? Karl Schudt suggested taking a backdoor approach which ends up at the same juncture as the traditional theological approach.⁹ He appeals to the teleology of the human which distinguishes it from the teleology of animals and thereby grounds the moral rights of marginal humans. As Schudt argues, all humans, even those who are marginal, have rights as persons because their end is to live with God. This is no better however than the traditional appeal to humans as having immortal souls because it is equivalent to the notion of having an immortal soul—it is by virtue of having an immortal soul that humans have the teleology that they have.

The case of the marginal human is a unique case. There are other humans, infants or the elderly who have lost their capacities, who are in temporary states which are equivalent to the state of the marginal human, but this is (or was) a temporary state. There is of course a

⁹ Schudt, Karl, "Are Animal Rights Inimical to Human Dignity," *Proceedings of the American Catholic Philosophical Association* 2003; 77: 189–203.

distinction between infants and fetuses and the elderly in that infants and fetuses, unless there is evidence to the contrary, have the potentiality to exercise the defining capacities of persons in the future, but the elderly who have lost their capacities will not. Hence the moral case of these elderly is closer to the case of the marginal humans (they have become marginal humans) but I do not wish to complicate the issue by addressing such cases.

So if marginal humans have rights, on what are such rights grounded? Let's take a simple case. Let us take a human who owns property (as, say, an inheritance), but one who is incapable of exercising (or ever exercising) the use of their property and consequently incapable of benefitting from it. Would it be justifiable to deprive this human of their property rights? They cannot drive their automobile and they cannot even live in their own house—they must live in a nursing home in order to get the requisite care. It seems to me that in such a case, it would be justifiable for someone else to *use* their property, but not to deprive them of their property: despite their inability to use their property, they nonetheless retain the rights to their property (i.e. they have a valid claim on it). Contrast this case with the case of a higher animal whose capacities exceed the capacities of our marginal human. Can we give that animal the property rights to a house and an automobile? Well, perhaps we could, but what would be the point of it? Their capacities, although they surpass those of the marginal human, would still not rise to the level such that it would be able to exercise a use of its property. But then isn't the case equivalent to our marginal human; and if so, why would it be unjustifiable to deprive the marginal human of his property rights but nonetheless not grant the higher animal the same property rights?

I think that a case can be made that special relations between persons and higher animals can in fact constitute a sufficient ground for according some animals certain rights. If I will some property to my horse, then that property, upon my death, becomes his rightful property. However, my horse does not have rights to that property on the basis of its nature, but on the basis merely of my granting him such rights. One might argue that the same is true of the rights to my property upon my death that my own children have—that it is on the basis of their special relation to me rather than on their nature. Well, it is so that their rights are grounded on a particular relation to me—they are my children. However, this does not imply that these rights are constituted by my avowal of those rights, as in the case of my horse. If I do not have a will which designates them as my heirs and unless I specifically deny them those rights, they would nonetheless be recognized as such by law, whereas the rights of my horse to an inheritance must be explicitly established by me. It is also the case that if a child of mine with whom I've never had

a relationship appears he could nonetheless rightfully petition to be granted a portion of inheritance.

If I am right about our not being justified in depriving the marginal human of his property rights, then wouldn't the same follow for his moral rights, such as his right to life, and his right not to be treated as property? In fact, wouldn't it be even more so, for moral rights are the most fundamental of natural rights. But what then grounds this right? I think we want to maintain that the rights which a human has are contingent upon the defining capacities for humans; but that in cases where a human lacks the requisite capacities, the extension of the same rights to them is justified by their simply being members of the same natural kind. Depriving them of their right to life amounts to a clear disrespect of their humanness; and this is just another indignity heaped upon their already tragic condition.¹⁰ If an individual is a member of a natural kind, then she has the inalienable rights which accrue to members of such a kind on the basis of the defining capacities of that kind. Consequently, lacking the defining capacities of that kind does not justify another depriving them of those rights.¹¹

One might argue that this is just a speciesist argument and is no better than the bad arguments used to support racist or sexist positions in the past. But the charge against speciesism as an inadequate grounding for rights, on the basis of comparisons with racism and sexism, lacks an evidentiary ground and is just groundless speculation. It is true that for millennia, the rights of other races and women were not recognized, but that we now know that these were gross errors. However, these errors were made manifest by the evidence that we encountered concerning women and other races when it happened that the oppressive discriminatory practices and treatment of other races and women were removed. When blacks were not deliberately deprived of the right to read, they learned to read as well as members of other races. Similarly, as each artificial obstacle to the advancement of women is removed, they have equaled or exceeded

¹⁰ Cf. Nussbaum's "animal dignity" and Elizabeth Anderson's adoption of that notion in Sunstein and Nussbaum, *op. cit.*

¹¹ Roger Scruton, in *The Rights and Wrongs of Animals* (www.demos.co.uk) takes fundamentally the same position. As he states:

It is in the nature of human beings that, in normal conditions, they become members of a moral community, governed by duty and protected by rights. Abnormality in this respect does not cancel membership. It merely compels us to adjust our response. Infants and imbeciles belong to the same kind as you or me: the kind whose normal instances are also moral beings. It is this that causes us to extend to them the shield that we consciously extend to each other and which is built collectively through our moral dialogue. (p. 43)

Of course, the exceptional cases of restricting rights is when the individual is "dangerous to oneself or others", and in many cases, this is problematic.

the capacities of men. What is the comparable evidence regarding the higher animals? Do my dog and cat not read because I have unjustly deprived them of the right to read? They often sit on my lap when I read and nonetheless show no interest in the book—even one with pictures of dogs and cats! There are no books in the barn or the pasture, and so has this environment deprived my horses of the ability to read? Nonsense! On the basis of what evidence can we say that our treatment of animals has caused their lack of capacities of personhood rather than their nature? There is none.

If the opponent of speciesism argues that the evidentiary status of racism and sexism was equivalent to speciesism today in that, say 1000 years ago, there was no evidence that women had equal capacities to men even though there was no deliberate attempt to stunt the development of those capacities, I'm not sure that would be correct. However, even if I grant that, is it a cogent inference to say that if we were mistaken about women 1000 years ago we *might* be mistaken about other animals today? Well this inference is far too weak to ground animal rights. The form of the inference needed to ground a substantive charge of speciesism is the following:

If 1000 years ago, we had no evidence that the capacities of women were not equal to men, and that we were nonetheless mistaken, then we are likewise mistaken today that the higher animals do not have equal capacities to us.

But if you are willing to accept this argument based upon epistemological skepticism concerning the higher animals, why stop there? What about the lower animals? How about snakes, toads, birds, insects, clams? At best, the cogent inference would be that we *might* be mistaken today in our judgment that the higher animals (perhaps chimps, dolphins and whales) lack the defining capacities of persons. However, we might be mistaken about any substantive contingent proposition, but unless we have some evidence that we *are* mistaken, nothing critical follows.

Nonetheless, there are some philosophers who maintain that the strict singular line which distinguishes humans from other animals must be discarded and that we ought to accept that the cognitive capacities of the higher animals are in fact much closer to the cognitive capacities of humans than has been traditionally recognized. There is surely room for debate regarding this issue, but there are certain mistaken assumptions about animal cognition which need correction. Most basically, there are two errors we need to avoid: dogmatic materialism and linguistic imperialism. The first error entails that only matter and material processes are subject to scientific inquiry and hence that any attribution of mental properties is a mere product of “folk psychology”; and the second is a failure to recognize the

ubiquitous analogical character of language.¹² However, if we have an adequate semantic theory in which analogical predication of terms is the rule rather than the exception, the ascription of beliefs, desires, intentions, inferences, depression, happiness, etc. to animals and humans does not entail that humans and animals experience the *same* states, only that they experience analogous states; just as when we predicate “good” of both God and humans, the property is not the same, but merely analogous.¹³

Another argument against speciesist defenses of the rights of marginal humans is that our intuition about my property rights case is not a reliable intuition. The intuition is not based on moral reasons at all, but merely legal reasons, which are of course mere social conventions. But my objection to this attack is that most would agree that laws can be distinguished as just or unjust to the extent that they are compatible with the moral law. So my intuitions about the property rights case is that regardless of what civil law states, my intuition is that it is not grounded in legal practice but on moral reasons. I can’t prove this, but neither can my opponent prove that it is not morally grounded.

Is there, however, a better argument to support speciesism? Let us say that the principles of justice are determined from a Rawlsian original position. Can we derive the right to life of marginal humans that way? I think we can. In Rawls’s original position, we are behind a veil of ignorance, none of us knowing where we will end up in the social structure.¹⁴ In choosing principles of justice, we are to abstract from our own social status, gender, our own abilities, even our own decisions about what constitutes the good. If we then abstract from the proposition that we are not marginal humans, would we choose principles of justice whereby marginal humans are granted the right to life? If we are in a Rawlsian original position and are just selecting the principle of justice regarding basic moral rights, then I think we would choose a principle which guarantees marginal humans basic moral rights. If I don’t know whether or not I am a marginal human, then I will choose a principle of justice which would protect me if I were so situated. This seems clear to me.

¹² See *Comparative Cognition: Experimental Explorations of Animal Intelligence* (Oxford and New York: Oxford University Press, 2006), edited by Edward A. Wasserman and Thomas Zentall.

¹³ For an illuminating study of the universal and systematic feature analogical predication in natural languages, see James F. Ross, *Portraying Analogy* (Cambridge: Cambridge University Press, 1981).

¹⁴ In his *A Theory of Justice* (Cambridge: Harvard University Press, 1971), John Rawls discusses the veil of ignorance on pp. 136–142. On p. 137, he gives a detailed list of the kinds of “particular facts” which the parties in the original position “do not know.” All the facts which he lists are of contingent properties of individuals.

Jan Narveson and Donald Vanderveer have argued that the Rawlsian original position cannot be applied successfully in order to generate rights for animals.¹⁵ On the other hand, if I am right, it can be applied successfully to generate the right to life for marginal humans. If we then take Vanderveer's and Narveson's positions as complements to mine, then we get the position which we want: rights to life for humans but not for the higher animals. One may object that we should put behind the veil of ignorance in the original position whether or not we are a member of the human species, otherwise the Rawlsian position incorporates a speciesist bias. The response is that the items which we put behind the veil of ignorance in the original position are all *contingent* matters of fact—e.g. my race, social or economic status, special talents, gender; but that I am a human being and not a pig, horse, or dog is not a contingent matter of fact—I am necessarily or essentially a human being. If I were not a human being, I would not exist. This is what I think grounds including all humans, whatever their status, in the original position, but not the other animals.

Rowlands' Argument for Animal Rights

Contrary to Vanderveer's and Narveson's position, Mark Rowlands argues for the rights of animals on the basis of a Rawlsian contractarianism.¹⁶ He argues that the "orthodox" view of Rawlsian contractarianism is a misinterpretation of the original position because of a failure to understand properly the heuristic nature of the original position. According to Rowlands, in order to apply the reasoning process of the original position properly, the "intuitive equality argument" implicit in the original position must be utilized in order to correctly determine which properties must be put behind the veil of ignorance.¹⁷ According to Rowlands, the intuitive equality argument is as follows:

P1 If an individual I is not responsible for their possession of property P, then I is not morally entitled to P.

P2 If I is not morally entitled to P, then I is not morally entitled to whatever benefits accrue from their possession of P.

¹⁵ Narveson, Jan, "Animal Rights Revisited," pp. 45–60, and Donald VanDeVeer, "Interspecific Justice and Animal Slaughter," pp. 147–164, in *Ethics and Animals* edited by Miller & Williams, Humana Press, 1983.

¹⁶ Mark Rowlands, *Animal Rights: Moral Theory and Practices* 2nd Edition (New York: Palgrave Macmillan, 2009).

¹⁷ Rowlands, p. 139.

P3 For any individual I, there will be a certain set of properties $S = [P1, P2, \dots Pn]$ such that I possesses S without being responsible for possessing S.

C. Therefore, for any individual I, there is a set S of properties such that I is not morally entitled to the benefits which accrue from the possession of S.¹⁸

As Rowlands views it, this is what entails that properties like one's "social, racial, economic, or gender group—is an undeserved and, hence, morally arbitrary property."¹⁹ And since such properties are undeserved, it is "unjust to benefit" from such properties, and this also follows for "natural talents" which are undeserved.²⁰ According to Rowlands, the Rawlsian position entails that this intuitive equality argument and the original position argument are mutually co-dependent in such a way that the original position "yields the sort of principles which emerge from the intuitive equality argument."²¹

The most significant implication of the intuitive equality argument which Rowlands infers is that rationality is a property which must be "excluded behind the veil of ignorance",²² and hence that "(t)herefore the restriction of the beneficiaries of the contract to rational agents is one that we cannot legitimately apply."²³ Although rationality is of course a necessary property of those who are in the original position, it is a property which must be bracketed in considering who are to be the beneficiaries on the contract. The general principle in the reasoning process of the original position goes something like this, according to Rowland: 'As a matter of fact, I possess property P; but if I did not have property P, what principles of morality would I want to be adopted?'²⁴ And applied to rationality as the property, "there is no reason to think that the bearers of rights derivable from the original position are restricted to rational agents."²⁵

This has far-ranging implications beyond merely according animals rights. Since a person plays no role in deciding whether or not she is rational, it is only "nature", rationality is a morally arbitrary property and hence "one is not morally entitled to whatever benefits accrue from its possession."²⁶ But if I must decide what moral principles

¹⁸ *Ibid.* pp. 133–134.

¹⁹ *Ibid.* p. 134.

²⁰ *Ibid.* p. 135.

²¹ *Ibid.* p. 139.

²² *Ibid.* p. 149.

²³ *Ibid.*

²⁴ *Ibid.* p. 143.

²⁵ *Ibid.* p. 148.

²⁶ *Ibid.* p. 149, Cf. p. 150. It seems to me that Rowlands' position on the intuitive equality argument presumes an atheistic bias. His position is that if we are not responsible for being rational and it is just decided by "nature", then rationality is a morally arbitrary

to adopt by bracketing my rationality and I am not morally entitled to benefit from the rights which accrue from my possession of rationality, how are the rights which we value *because* we are rational morally justified from the original position (e.g. consider Rawls' two principles of justice)? If we are rational mutually self-interested agents in the original position and rationality is not put behind the veil of ignorance, it is pretty clear what principles of morality should be adopted in the original position; but if rationality is to be bracketed in the original position and I cannot assume it in the original position, it is not at all clear what principles of morality I'd want adopted. So if Rowlands is right about this, most of the liberties and rights which I value would be liberties and rights I would not be morally entitled to and would be undeserved.

Rowlands does not discuss how these liberties and rights are to be adopted from the original position once rationality is bracketed behind the veil of ignorance, but that is not his main issue in any case. His issue is the rights of animals. And it is clear that if Rowlands' interpretation is accepted, bearers of rights will not be restricted to rational agents. If I must bracket rationality in the original position since it is a property which I am not morally responsible for, then it does seem clear that I would choose to adopt principles of morality which apply to non-rational agents, for I myself might turn-out to be one of those agents. So if Rowlands is right about the original position, I would adopt principles of morality which apply equally to humans, pigs, and horses, for it might turn-out that I am a pig or a horse rather than a human. As he states:

... once it is understood that what moral principles we can deduce from the original position depends on the description we give of that position, and once we understand that what we regard as an adequate description of this position derives from the consistent application of the intuitive equality argument, then we must allow that the principles of morality apply equally to both rational and non-rational individuals.²⁷

So Rowlands' conclusion is that once we have the proper description of the original position, then we will adopt principles of morality which apply equally to both rational and non-rational animals. But if this were so, we would get a morality which is too thin for us and too thick for non-rational animals. Even those who are sympathetic with the position that animals have some direct rights (e.g. the right not to be treated cruelly, or the right not to be killed indiscriminately)

and hence undeserved property. However Christians would not accept this position. Christians would agree that humans are not responsible for their own rationality; but would not argue that the property of rationality is not undeserved because it is not decided by mere blind nature but by a providential God.

²⁷ Ibid. p. 151.

might not think that the direct rights animals have extend in scope as far as the rights that rational agents have (viz. the liberties which only rational agents can justifiably enjoy).

There is, however, a deeper problem with Rowlands' construal of the original position. Animals accrue equal rights to persons in Rowlands' position because rationality is bracketed in the description of the original position behind the veil of ignorance because the property of rationality is an undeserved property and hence is morally arbitrary. But animals become bearers of rights in Rowlands' construal of the original position because of their sentience, and sentience, just as much as rationality, is an undeserved property. If this is so, then doesn't the adherence to the intuitive equality argument entail putting sentience behind the veil of ignorance? Rowlands considers this objection, and answers it by claiming that "this exclusion, in one way or another, makes no sense."²⁸ According to Rowlands, it makes no sense that "I might turn out to be a rock or a tree."²⁹ So, for Rowlands, the "contractarian position, then, makes sentience the cut-off point for morality—and does so even though sentience is an undeserved property. And there is no worry of extending the scope of the principle of morality beyond this limit."³⁰ But why should sentience be the property which is the absolute cut-off point of morality rather than rationality or life? Rowlands does not answer this question excepting to point to the fact that both we and animals can suffer—but why should suffering be the ultimate consideration? Although trees and other non-sentient living things cannot suffer, they can be harmed—by being killed indiscriminately or deprived of an environment within which they can flourish. So why shouldn't life, rather than sentience be the cut-off for morality?

I suggest a different tack for how to treat the veil of ignorance in the original position which is more compatible to a natural law position on moral rights. Instead of taking sentience as the absolute cut-off for our heuristic decision procedure, we instead use rationality, sentience, and life (we could use finer distinctions as well if we liked) in three distinct heuristic processes of reasoning. If we do not bracket rationality behind the veil of ignorance, then we will get the kind of position we find in Rawls, Narveson and Vanderveer—where non-rational animals are not in consideration. If the presumption in the original position is that we are free, mutually self-interested, rational individuals, then there is no implication (either negatively or positively) regarding the rights of non-rational individuals. In order to determine what principles of morality ought to be adopted *for persons*, there is no reason why rationality ought to be bracketed. If,

²⁸ Ibid. p. 158.

²⁹ Ibid.

³⁰ Ibid. p. 160.

instead, we are *not* interested in what principles of morality ought to be adopted for persons, but just for non-rational animals, then we would bracket rationality and take sentience as the presumption in our reasoning process in the original position. In this process of reasoning, what principles of morality we would adopt for persons drops-out of consideration—there is no implication (either positively or negatively) regarding the rights of persons as rational. The only implication in this consideration for persons would be what principles would be adopted for persons qua sentient individuals (i.e. as animals). Rowlands argues that if we take sentience as the cut-off point, then the “principles of morality apply equally to both rational and non-rational individuals”, but this is not what follows if sentience (without rationality) is our presumption. Instead, in this reasoning process, what we would get are just the principles of morality which apply to sentient individuals who are not rational. Likewise, a third approach would be to bracket both rationality *and* sentience and use only life as our presumption in the original position. In this approach, we would be considering what principles of morality ought to be adopted from the point of view of living, non-sentient, non-rational individuals. If we take this three tiered tack, we would get three different sets of moral principles: one set for individuals qua rational, one for individuals qua sentient, and one for individuals qua living. Of course some individuals (e.g. human persons) will fall into all three classes, and some (e.g. pigs and horses) will fall into two classes, and so for those individuals, all of the relevant sets of moral principles would apply.

My three tiered approach has the advantage of keeping the right sorts of properties in focus in our reasoning from the original position. This approach contrasts significantly with Rowlands’ approach. For example, in his argument in defense of vegetarianism, he appeals to an analogy with H. G. Wells’ morlocks and eloi. The morlocks and eloi are two different tribes of humans, the morlocks being cannibals who raised, killed, and ate the eloi. Rowlands rightly infers that from the original position it would be wrong for the morlocks to engage in their cannibalistic practices. This is obvious. But this is not analogous to our eating pigs or other animals: both the morlocks and eloi were human tribes, and thereby both were rational kinds. That we would adopt principles of morality which would entail that it would be wrong to raise, kill, and eat eloi implies nothing regarding whether or not it is justifiable for us to raise, kill, and eat pigs. If we are to adopt moral principles for sentient animals who *are not rational*, then rationality has to be not just bracketed in making the decision in the original position, but if we are interested solely in the rights of sentient individuals as sentient, then our presumption is that the individuals are *not* rational. In other words, if we are interested in the rights of pigs, our consideration must be ‘would I want these

principles if I were a real pig' and this entails that I would be a sentient but not rational individual.

The way that Rowlands suggests that the morality of vegetarianism (vs. animal husbandry) should be reasoned from the original position is as follows:

If one did not know whether one was going to be a human or an animal preyed on by humans, the rational choice would surely be to opt for a world where vegetarianism was a widespread human practice and where, therefore, there was no animal husbandry.³¹

In Rowlands' description of the original position, the reasoning process is marred by his not considering the relevant parameters of the rational choice. If one considers what principles of morality ought to be adopted without knowing whether or not one was going to end-up being a pig (i.e. a sentient but non-rational animal) or a human (i.e. a rational sentient animal), one may chose a world in which vegetarianism was a widespread human practice, but staging the options in this way masks the relevant alternatives if one ends-up being a pig. If instead we take my tiered approach to the original position, and we are interested in determining which moral principles (i.e. which world) we would choose, the relevant question is not: 'Not knowing whether you are going to end up being a pig or a human, would you choose a world where vegetarianism was the widespread practice and animal husbandry did not exist or a world that included animal husbandry?' If those were the relevant parameters, the vegetarian world might very well appear to be the rational, self-interested choice. But phrasing the choice in this way excludes what are the relevant options (i.e. either the vegetarian world or the world of animal husbandry) for which, if you existed, you would end-up being a pig.

Rowlands' position obscures what would be relevant in making a rational choice of which piggish (sentient) world would be preferable; for if vegetarianism were the widespread human practice and animal husbandry did not exist, this world would include very few pigs. In such a world, all the pigs which we currently eat would not exist. There are currently about 300 million Americans and the average American eats about 50 pounds of pork a year (or 1/3 of a pig). So each year, about 100 million pigs are slaughtered and eaten.³² In a vegetarian America, only a small fraction of pigs would exist. It seems to me that a conservative estimate for how many pigs would exist in a vegetarian America would be 10 million. Of course these 10 million pigs would have a significantly longer lifespan, but of

³¹ Ibid. p. 165.

³² See <http://answers.yahoo.com/question/index?qid=20070711132338AAjiH3s> and <http://www.fda.gov/downloads/AnimalVeterinary/GuidanceComplianceEnforcement/ComplianceEnforcement/BovineSpongiformEncephalopathy/ucm129596.pdf>.

course the replacement rate for the 100 million pigs we eat each year would be significantly higher than the replacement rate of the 10 million pigs which we do not raise to eat. So, if one is going to end-up being a pig if one were to exist at all, the relevant choice is something like this:

Would you rather be in a world where you exist as a pig and enjoy a normal pig lifespan and finally die a natural death or death by disease or some other infirmity; or would you rather be in a world in which you have a 10 times greater chance of existing but exist for a significantly shorter time enjoying a piggish life, and then be slaughtered and eaten?

I guess I cannot speak for others, but if I were to choose a world and the moral principles regulating it *if I were going to end-up being a pig in that world*, then I would clearly prefer the second kind of world; and that would be the world that included animal husbandry, not the vegetarian world. I will return to this consideration at the end of the next section.

So far, I have reached a conclusion on the rights of marginal humans and animals which is contrary to the conclusion reached by Jeff McMahan in “Our Fellow Creatures”.³³ He argues that there is no ground for the distinction between animal rights and the rights of marginal humans. However, he recognizes that rights can be grounded in either the nature of the individual or can be grounded in a special relation, as the special relation between parents and a child entail special rights that the child has as a result of that relation. If that is so and there are rights by special relation, then another way open to ground rights to marginal humans is that we have a special relation to them—we are of the same species.³⁴ McMahan rejects this as a satisfactory ground, but he doesn’t offer an explanation excepting to say that being of the same species is not special enough.³⁵

³³ McMahan, Jeff, “Our Fellow Creatures,” *The Journal of Ethics* (2005) 9: 353–380, pp. 359–361.

³⁴ Mary Midgley, in *Animals and Why They Matter* (Athens: University of Georgia Press, 1983), argues that humans are by nature bonded to other humans. This is not based on some other proposition as a premise, but it is just based on a natural emotional attachment which we have to other humans. There is no reason to think that this attachment is irrational and not an indication of a well-functioning human.

³⁵ In *The Ethics of Killing: Problems at the Margins of Life* (Oxford and New York: Oxford University Press, 2002), chapter 3, 3.2, McMahan considers the question of comembership in the human species as a special relation which distinguishes the rights of marginal humans from the rights of animals with similar capacities. He thinks that for comembership in the human species to ground the distinction “implies that the species relation is as significant morally, or nearly as significant, as the parental relation. That, however, is clearly false.” (p. 225) McMahan holds that “Our vague, intuitive commitment to a fundamental moral equality among all human beings—all members of the species *Homo sapiens*—has to be abandoned.” (233) Nonetheless, he thinks that it may still be morally required to treat severely retarded human beings differently from similarly endowed animals. This is because the persons who are closely personally related to the severely retarded are

So that is my argument for all humans having the right to life but no other animals having that right. But do animals have *no* rights? I don't think we need to absolutely deny animals any rights. I wish now to focus my attention on pigs and horses. I wish to focus attention on pigs and horses because they are two species which humans most commonly use: pigs for food and horses for work and entertainment. Our question will be to what extent is our use of these two species justified?

The Rights of Pigs and Horses

I will start with the easier of the two cases—the horse. The plight of horses is in the news since the 2008 Preakness. At the end of the race, Eight Belles, a filly (young female) broke down: she had finished second and then collapsed with two broken front legs and had to be immediately euthanized. Animal rights advocates pointed to this as an example of the barbaric treatment of racehorses: that her death was a result of the mistreatment of these magnificent animals. However, the trainer of Eight Belles and her vet have since testified that she had never been given drugs or steroids to enhance her abilities nor mask any pain, and she was in perfect condition when the race started. It seemed that her breakdown was the result of a genetic defect or a tragic misstep.

I have three horses and I have the responsibility of the morning feeding of them and their four other barn mates. Immediately after feeding them, I let them into the pasture. I open their stall doors and just let them loose. If they were show horses or expensive horses, they would not be allowed to run out of the barn, they would be led out of the barn. But these horses are just for pleasure riding and they have value only to us or others who are interested in pleasure riding. They are not investments or competitive horses. When I let them out of their stalls, they run into the pasture. When they pass through the corral and hit the pasture, one would think that they would immediately start grazing—a horse's favorite activity. But they do not immediately graze, instead they run. And when they run, it is clear that they are engaging in a kind of instinctual activity in order to vie for position of alpha in the herd, even though the alpha

typically motivated by love and compassion to care for them, "(a)nd the rest of us are morally bound to respect these people's feelings and commitments." Hence marginal humans have an "enhanced moral standing... by virtue of their being specially related to certain people." (232) The problem with such a view, however, is that the enhanced moral standing is contingent upon there being people who care for them: if no others cared about them, it would seem that they would then not have the enhanced moral standing that entails the requisite treatment. Of course a theist would not face such a problem, because for *all* humans, there *is* another person (actually, three) who cares about them motivated by love and compassion, viz. God.

position has long been settled by somewhat less peaceful and more aggressive means. They compete to be first in the pasture and then when reaching the pasture they run in large circles as if in a race before settling down to graze. This is particularly true of the geldings (castrated males) in the herd. The geldings, just as would be typical of boys, engage in what one would call rough-housing, unlike the mares who appear to be above such activity. The only time the mares appear to be interested in such play is when they are in estrous and they of course then desire to mate; but since all the males are geldings, they don't quite know how to respond appropriately to the mares. They do respond in some sense, they obviously feel something and take an intense and sometimes jealous interest in a mare in estrous, but their testosterone level is not sufficient to produce the required physical response in their genitals.

This is the life of the horse when it is not "working." It grazes all day long interspersed with periods of play and rest. This is the nature of the horse, and what is most evident (besides the grazing) is the running. It is quite evident that they love to run. This is also evident when they are working (when we pleasure ride them). They often prefer to gallop rather than to walk or trot, and when they run, the rider must be careful so as to not lose control of their horse, because they want to race; and unless one is a skilled rider (and even if one is), horseracing can be dangerous.

If indeed it is the case that horses love to run, what then can be wrong about horseracing? Aren't we thereby just integrating our interest in the magnificent athletic ability of these beautiful animals with their own teleological interest to run and hence being true to their animal dignity? That's what it appears to me. And the life of a racehorse is a much pampered life. The care and attention they receive far exceeds the care and attention my horses get!

But the objection of the animal rights advocates is that their breeding, intense training and racing at such a young age, their daily regimen, and their lack of humane and adequate placement after being retired from the track is such that they are not allowed to be natural horses. They are terribly inbred and this results in genetic abnormalities and since they are bred only for speed, and speed is enhanced by long, lean legs, they are bred in such a way that their legs carry too much weight. They are 1200 pound animals whose ankles are no bigger than ours! The practice of steroid use (which is legal in most states) has the same deleterious effects it has on humans, but in the case of the horse, they have no choice in taking the steroids. Painkillers very often mask the pain of an injury resulting in more serious injury or even death by euthanasia.

If I am right and horses are indeed born to run, there is nothing intrinsically wrong with horseracing, but the practices in caring for and breeding racehorses surely needs to be more carefully regulated

so as not to alter their nature in such a way that the racing causes stress which is beyond what they would naturally experience when running. We of course cannot eliminate *all* the stress caused by a horse's running, but if running they do by nature, then the entertainment value for us in their running is not exploitative nor contrary to their dignity. Just as children (who cannot freely consent to it) are encouraged by parents to engage in physical activities where injuries may occasionally or even often occur (e.g. soccer); there is nothing immoral in allowing and even encouraging such activities within reasonable boundaries.³⁶ Of course, in order to determine what is good and natural for horses, the science of the nature of horses must improve.³⁷

Gary L. Francione would object to my position because he holds that what is primarily unjust in our treatment of animals is our treating them as property versus as persons.³⁸ His argument weighs heavily on the analogous position between speciesism and racism and sexism in the past.³⁹ However, if my argument in the previous section for a multi-tiered Rawlsian heuristic original position is correct, Francione is mistaken in thinking that there are merely the two exclusive applicable categories, i.e. that the only relevant moral options are that animals are property or persons.⁴⁰ Rowlands' mistake is grounded, like others who hold such a position, is his taking the similar capacities which humans and animals have in an unwarranted univocal rather than an analogous sense.

What about the pigs? As they say, the only part of the pig which is not used is the "oink"! In any case, we really use pigs, not just for food, but in multifarious ways; but it is the use of pigs for food that is central. And what justifies our breeding and raising pigs in order to eat them? In consideration of this issue I am going to ignore issues concerning the nutritional value of eating pork. Pork is a rich source of protein and as such satisfies one of the nutritional requirements for humans, but there are vegetarian sources of protein that could be substituted for the eating of meat. So I am going to assume that there is no nutritional advantage of a diet which includes meat over

³⁶ For a realistic and sensitive consideration of the issues surrounding horseracing, see Linda Hanna, *Barbaro, Smarty Jones, and Ruffian: The People's Horse* (Moorestown: Middle Atlantic Press, 2008). Elizabeth Anderson, in *op. cit.* (287), points out that the rights to provision for domesticated animals is contingent upon a relation of reciprocity, the reciprocity being based upon the discipline of the animal. Of course, the discipline needs to be formed by the human individuals responsible for the animal, and hence this imposes obligations upon such humans to conscientiously train their animals. These obligations are analogous to the obligations of parents to their children.

³⁷ See Steven Budiansky, *The Nature of Horses: Exploring Equine Evolution, Intelligence, and Behavior* (New York: Free Press, 1997).

³⁸ Francione, in *op. cit.* p. 108.

³⁹ Francione, pp. 110f.

⁴⁰ Francione, p. 131.

a vegetarian diet in the vast majority of cases. So the issue is really: how can we justify eating pork when it is not necessary to do so?⁴¹ In other words, the bottom line is that we eat pork merely because we enjoy it. So is this adequate justification for the massive slaughter of pigs which such a diet necessitates?

This year I had one of my neighbors slaughtered. We live adjacent to a family farm which raises pigs and beef cattle, and we decided that we should stop buying and eating factory bred meat. We know our neighbors (both the humans and the livestock) well and know how the animals are treated. What is most distinctive of the treatment of livestock in a small family farm versus their treatment in the large factory farms is the freedom which the livestock have in living a good piggish life. They are allowed to run around freely, wallow in the mud, and otherwise interact with the other pigs. The sows and their piglets have their own spacious pens wherein which the piglets can feed unmolested by the other pigs. There is an additional moral reason for eating neighbor pigs rather than anonymous pigs. If one eats neighbor pigs, one is clearly apprised of the cost to the pig and one is more likely to be sensitive to the plight of pigs. It is easy to eat anonymous pigs or even factory bred pigs purchased at the supermarket—it is very easy to forget about the cost to the pig. In fact there is no need to *forget* it, for one was never aware of it in the first place!

Let me return to my consideration in the last section of this paper when responding to Rowlands' animal rights position. As I argued, there is an additional moral reason for eating pigs rather than being a vegetarian. If we didn't eat pigs, very few pigs would be brought into existence.⁴² The vast majority of pigs exist because we eat them. It is true that they don't live as long a life as it would be if they were allowed to live out their natural days; but while they live, if they are raised on a humane farm, they have a fulfilling life for a pig.⁴³ And since pigs (or chickens or cattle for that matter) do not have self consciousness and a narrative conception of the future—they don't have a life plan—that they do not have a completed future is of no

⁴¹ Gary L. Francione, in *op. cit.*, claims that most of the suffering imposed upon animals is unnecessary, but of course this claim is colored by his position that animals are to be treated not as property, but as persons.

⁴² Temple Grandin, a consultant for the meat industry specializing in developing more humane means of treating livestock, states that "The animals we raise for food would have never lived at all if we had not raised them." See her "Thinking Like Animals" in *Animal Ethics*, *op. cit.*, p. 227.

⁴³ As Bernard E. Rollin states, "Assuming that an animal has adequate welfare requires that it be in a position to actualize the needs and interests dictated by its biological and psychological nature or *telos*—the "cowness" of the cow, the "pigness" of the pig—and that, experientially, it does not experience prolonged noxious mental states, such as, fear, anxiety, boredom, loneliness, social isolation, and so on." See his "To Control Pain and Suffering in Farm Animals" in *Animal Ethics*, *op. cit.*, p. 257.

concern to them. Jeff McMahan argues that “what is fundamentally wrong with killing, when it is wrong, is that it frustrates the victim’s time-relative interest in continuing to live,”⁴⁴ and that the strength of an individual’s time-relative interest in continuing to live is “the extent to which it matters, for his sake now or from his present point of view, that he should continue to live.”⁴⁵ But if this is so, it is not clear why McMahan holds that animals have a right not to be killed given that he denies that their lives lack a complex narrative structure, which is what, in his view, grounds a human’s right to life. For as he states:

In the lives of animals, however, this potential for complex narrative unity is entirely absent. There are no projects that require completion, mistakes that demand rectification, or personal relations that promise to ripen or mature. Rather, as Aldous Huxley once put it, “the dumb creation lives a life made of discreet and mutually irrelevant episodes.” Each day is merely more of the same. As an animal continues to live, goods may continue to accumulate in sequence, but the effect is merely additive.⁴⁶

Pigs live almost exclusively in the present, excepting for a memory of the past and an anticipation of very near future rewards and punishments predicated upon presently stimulated desires and aversions. Hence slaughtering an animal that has no significant self projection into the future is no injustice to the animal. One may question whether it is the case that the pig has no self-projection into the future. However when we consider what evidences a human’s life plan or self-projection, it is his or hers articulation of such a plan or engagement in projects the completion of which stretches far into the future—and pigs evidence neither. But if there is no evidence that they do have a projection into the future, we are not unjustified in inferring that they do not have a concern for a life in the future.⁴⁷

⁴⁴ *The Ethics of Killing*, p. 194.

⁴⁵ *Ibid.* p. 105.

⁴⁶ *Ibid.* p. 197.

⁴⁷ Steven L. Davis argues that *more* animals would have to be killed in the U.S. if we adopted a vegetarian (vegan) diet rather than a diet which includes the eating of meat. The reason is that more animals would die in the creation and use of the agricultural fields needed to produce a sufficient vegetarian diet than die in the slaughterhouses. See his “The Least Harm Principle May Require that Humans Consume a Diet Containing Large Herbivores, Not a Vegan Diet”, in *Animal Ethics*, op. cit., pp. 243–247. If Davis is right, there would still be one considerable difference: the animals killed in the production and use of agricultural land are not intentionally killed, whereas the animals killed for meat are intentionally killed. The doctrine of double effect of course entails that intentional killing and unintentional foreseen killing are not morally equivalent: e.g., whereas intentionally killing an innocent human being is never justifiable, unintentional foreseen killing can be justifiable if it is in aid of a greater good. So vegan advocates could argue that even if more animals are killed by the adoption of a vegan diet, these animals are killed unintentionally and hence, unlike what happens in the slaughterhouse, is justifiable. However this response

Consider if the natural laws regarding human life and reproduction were very different, there was no issue of overpopulation, and something like the following were true. What if human parents had to choose between having very many children (say 10 children) each of whom would have a life expectancy of say, roughly, 80 flourishing years versus having two children each of whom would have a life expectancy of say, roughly, 400 flourishing years? Assume however that humans in such a world would still mature at roughly the same age as we do. What should parents choose if that were the relevant sort of choice? If that were so, I think one should choose to have the many children rather than the few, even though their life span would be significantly reduced. But someone might object that even if the laws of nature did present us with such a choice, it is not analogous to the choice regarding the lives of pigs in the real world, for in the real world, pigs don't just die, they are *killed*! Well, what if the laws of nature in the hypothetical world were such that our increased procreation is what *caused* our children to have a significantly reduced life span, and that we knew this to be the cause? Would we still be justified in choosing to procreate the many versus the few? I think we would.

I think we may justifiably conclude that only humans and other natural kinds of persons have a right to life. Justification can be provided by a Rawlsian inference from an original position which includes all humans of whatever capacity, however limited it may be. We may also infer this from the special relation between us and marginal humans—they are our fellow creatures with whom we have a special bond. But animals do not have a right to life and consequently there is no moral basis for vegetarianism. In fact, on the contrary, as I have argued, vegetarianism would only deprive most pigs (and the other animals that make-up the carnivorous part of our diet) of having any life at all. Nonetheless, it seems clear to me that animals do have intrinsic rights grounded in their natures which entail duties upon us to treat animals with dignity and care and seriously sanction cruel treatment of them, but the details of that would be the subject of another paper.

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to Davis's position begs the question, for the doctrine of double effect is applicable to cases which involve what are granted to be bad alternatives; but killing animals is bad only if animals have a right to life, which I am arguing against.