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## Can Animals Contract?

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### Abstract

Animals are, or are like persons, and so should not be treated as mere property. But persons are not just non-property; they are contractors. They interact with property and with other persons. This article analyses the possibilities for a range of animals to fit within market liberal society as contractors from a legal disciplinary perspective. Some animals are capable of contract-like relationships of reciprocal exchange, and can consent, in a certain sense, to parts of such relationships. However, the dangers of the contractual frame, which is used to legitimate exploitation, may exceed the benefits. Some scholars have begun to explore these issues through the lens of animal labour, animals as workers deserving protections and benefits for their efforts. I analyse the application of contract to a variety of non-human animals and consider the discursive implications of this application, then draw out lessons for the ongoing use of animal labour framing. If we are to think through animals as workers, we should be careful to oppose the contractualization of that work – just as human worker advocates do.

### Keywords

animals, contract, consent, law, animal labour

### Cover Page Footnote

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# Can Animals Contract?

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**Abstract:** Animals are, or are like persons, and so should not be treated as mere property. But persons are not just non-property; they are contractors. They interact with property and with other persons. This article analyses the possibilities for a range of animals to fit within market liberal society as contractors from a legal disciplinary perspective. Some animals are capable of contract-like relationships of reciprocal exchange, and can consent, in a certain sense, to parts of such relationships. However, the dangers of the contractual frame, which is used to legitimate exploitation, may exceed the benefits. Some scholars have begun to explore these issues through the lens of animal labour, animals as workers deserving protections and benefits for their efforts. I analyse the application of contract to a variety of non-human animals and consider the discursive implications of this application, then draw out lessons for the ongoing use of animal labour framing. If we are to think through animals as workers, we should be careful to oppose the contractualization of that work – just as human worker advocates do.

**Keywords:** animal law, contract law, animal labour, animal politics, post work

Existing work on the law of animals has focused on property. Are animals properly considered property? Will considering them legal persons, or something else other than property, better their situation (Deckha; Fernandez; Donaldson and Kymlicka, *Zoopolis* 24–32)? Juridical persons are not just non-property; they are contractors. They interact with property and with other persons. The institution of contract grounds much of market liberal society: it is through contract that most humans work, are paid, and acquire all the necessities and excesses of a good life outside of the home and family. Thinking about animals as persons should cause us to think about their relationship with the practices of contract as well as with the institutions of property. A shift in contract may be just as essential as a shift in property if animals are to fit into something like our<sup>1</sup> present society. While past work has detailed what it might mean for animals to be non-property, what might it mean for animals to be contractors?

This article explores two issues. First, whether and how animals can perform contractual practices of agreeing or refusing, performing or breaching, getting compensation and so on. Second, whether and how contractual discourse might be used to legitimize the resulting order. I bring legal disciplinary tools to this question: my focus is on how contract works as rhetorical system, how its arguments structure market liberal society to (re)produce patterns of power, and what the consequences might be of casting non-human animals as contractors. After introducing contract ('Contract Walk and Contract Talk'), I turn to my two questions in turn ('Animals as Contractors' and 'Contract and Legitimation').

My first conclusion is that non-human animals *can* contract in many respects, but we are missing the crucial capacity to communicate the choice of a contractual relation together; in short, we are missing the one thing that might plausibly *justify* contractual relations. This conclusion is not based on any philosophical or ethological claim about capacity, only on the fact that at the present state of interspecies communication, human and non-human animals are generally unable to communicate a choice among contingent future states of affairs together. Many animals could be fitted into a system that provides needs on the basis of forward-looking reciprocal exchange commitments, with human guardians to fill in certain communication gaps. Different animals are missing different elements of the ability to contract, but no domesticated animals can communicate consent to future contingencies in the way that humans can. Because contract is the archetypal avenue within liberalism for persons to define and alter their relationships with each other and with things, insofar as animals cannot contract animal

liberation demands other ways of interacting with other persons and things (Benson; Olsen). Just as thinking of animals as contractors should lead animal advocates to consider a post-contract society (Held), thinking of animals as workers should lead animal advocates to consider a post-work society (Donaldson and Kymlicka, 'Post-Work').

More immediately though, the contractual frame brings with it the danger that it will be used to legitimize existing forms of oppression – something it has proved quite capable of doing in human contexts. I will argue that, although no non-human animals have what we might think of as full contractual capacity, they can contract *enough* to ground rhetorically compelling legitimization claims. Considering how contract has been used to legitimate oppression in the human-to-human context, we see that idealized contractual capacity is not necessary for these legitimating moves. Because animals can in some ways be contractual, the risks of legitimization spillover seem as real in the animal context as in the human context – and because non-human animals are unlikely to engage in the kinds of collective action that has sometimes worked for human workers and consumers, the risks seem worse. I draw out this argument with a reading of two texts deploying animal labour rhetoric to show how even a small contractual toehold can produce problematic results.

While my focus is on contract, my argument keys into the conversation on 'animal labour' (Coulter; Blattner et al.; Porcher; Cochrane). Animal labour asks if we might achieve justice or good lives for animals by casting them as workers. As bringing animals into the 'persons' category might help us accord them rights, bringing them into the 'workers' category might help us accord them workers' rights, what Professor Jessica Eisen has called the 'labour-recognition-transformation thesis' (139). An archetypal success story is a police dog getting a retirement and pension after some years of work (Blattner et al. 2). A consequence of my argument for animal labour projects is that a focus on animals as workers brings with it the rhetorical dangers of the contractual frame, a frame quite consistent with serious exploitation of human workers under market liberalism (Delon).

There are many ways of conceiving of work and labour other than contractually, and there are many levels of association between dyadic contract and society writ large. Part of contract's rhetorical danger is that it elides these, its focus on dyadic decisions tending to flatten power and politics into a string of choices between equals, free to trade away their rights (Gardner). Human workers have often advanced precisely by grounding their justice claims

other than in contract, for instance in human dignity, and by pursuing larger associations, for instance through trade unionism. In drawing out the dangers of contract, I hope to clarify the stakes of animal labour projects. A focus on organized collective action instead of individual moments of contract avoids many of the problems I am about to discuss, but brings its own communicative difficulties. Thick conceptions of what is required for work to be just can look well past contract as a source of the obligations between worker and boss (Porcher and Estebanez 18; Muirhead). This said, the category of ‘worker’ will not do it on its own: progress for human workers has relied on active human participation to resist the contractualization of their work.

While ‘animal labour’ is a current framework, thinking of animals as contractors has a long history. Erika Ritter has explored the many stories that humans have told about their relationships with animals, our attempts to rationalize and make sense of our use of them through time. The contractual story is a story in which someone chooses their path, and the destiny at the end is legitimated by that initial choice. Discussing horses, Ritter writes: ‘we have always had to seek ways to enlist the horse’s complicity in its fate at our hands. ... [W]e make a special point of reassuring ourselves the role we have selected for this animal is not only honourable, but that the outcome – whether glorious triumph or gory death – is what it would choose for itself (173). We must ensure that fitting animals into contract and work is not but one more way of enlisting their complicity in what we do to them (Wadiwel, ‘Fish’ 205–07).

### **Contract Walk and Contract Talk**

For lawyers a contract is created by offer and acceptance. The offer is a communication from one party to the other containing the terms of the contract, obligations that each party must perform. For instance, one party provides cell phone service while the other party pays a monthly fee. The other party accepts the offer, generally, by a communication in response, for example by signing a document or by tapping on their phone. The offer demonstrates the first party’s consent to be bound; likewise with the other party’s acceptance. Once the offer is accepted, the terms of the contract become legally binding. If one party fails to perform their obligations, the other can sue them for the value of the performance, for example, the value of a chocolate bar paid for but not received.

This idealized story is not all that's going on. The legal story of the preceding paragraph ended with a legally binding contract, that is, one that could be sued on in court. Yet, although every delinquent cell phone user could in principle be sued by their provider for their monthly bill in a small claims court, the costs of legal enforcement generally outweigh the benefits. The fact that most cell phone users pay their bills nonetheless is evidence that non-legal enforcement mechanisms are at play. Contract has rhetorical power to co-ordinate even in the absence of formal legal sanction. For the cell user, the discipline of credit checks is an important non-legal enforcement mechanism inducing them to pay monthly and on schedule. Workers and bosses want to maintain their reputations for reliability, and so on. Thus, the question of whether or not animals can contract is not just the question of whether they can make or accept legally valid offers.

*Contracting*, as opposed to contract law, is at the root of what it means for our society to be liberal and market-based: people prospectively control obligations regarding their and others' labour and property. I break down contract into a set of four indicia, drawn from the work of Ian Macneil: reciprocity, presentation, consent, and enforcement. These are features that a practice might possess that make it contractual. Acquisitive individualism precedes and frames all these indicia: they apply to a practice engaged in by groups of two (or more) individuals who have and want things.

***Reciprocity*** – In a contract each party gets and gives. Reciprocity often relies on specialization of labour, as a worker might use their wages to buy food they could never grow. In keeping with contract's individualism, the benefits are direct benefits to the individual parties to the contract. The direct aspect of the benefits is important to contract's ability to incentivize and co-ordinate parties. Reciprocity is what allows contracting parties to make specific claims against each other on the basis that they have been adequately bargained-for, and is thus a key part of contract's rhetorical function.

***Presentation*** – This is Macneil's term for bringing the future into the present. Contracts are about future events, but the consequences of those events are determined at the outset of agreement. When you buy a carton of juice in a grocery store, most of the obligations of the deal are performed at the time of agreement – you pay money and receive the carton right then. If the juice is spoilt, you can go back to the store and demand a replacement. The store owes you a forward-looking contractual obligation, a warranty that the juice will be good for a reasonable

time. A cell plan might involve an obligation to pay the monthly fee for a set term or indefinitely until notice of cancellation is given. When you sign up for the plan, you are making a present decision based on a valuation of all those future payments and what you will receive for them. You are presentiating. A system of instantaneous trades can involve reciprocal exchange, but it will be more contractual with forward-looking obligations. Presentiation is also key to contract's function, because it is what projects the exchange through time; that is, it is because contract presentiates that a party at  $T_1$  can reference a deal struck at  $T_0$  to make claims against the other.

**Consent** – In general, contracts must be consented to by all the parties. Consent involves some understanding of the reciprocal obligations going into the future of all the parties. That is, the consent is tied in some way to the preceding factors. We might sometimes owe forward-looking reciprocal obligations to other people without consent; for example, it might be that we ought to send a thank-you card after a kindness, or care for a sick family member who sometimes cares for us. There is something contract-like about such obligations, but they are more contractual if consented to. Consent is also key to contract rhetoric, because it is what allows us to ascribe responsibility for a contract and its consequences to a particular party.

**Enforcement** – Legally binding contracts have, as noted, the consequence that they can be sued on in court. However, contract rhetorically grounds a number of non-legal enforcement mechanisms also, credible threats for breach and reputational sanctions. Promise is a practice quite like contract in many respects, but it is not as contractual as it could be if its moral obligations will never be enforced outside of the court of the breacher's conscience.<sup>ii</sup>

The most contractual social practices involve the consensual presentiated exchange of reciprocal obligations that will be enforced. Few if any social practices possess all these features in full degree, and the closest actualization is the business-to-business deal between sophisticated traders with legal advice (Schwartz and Scott). Much of our needs systems fail to meet this ideal type in various ways. Consent is often partial, because people are not fully informed before signing their contracts and may lack viable alternatives (Sovern et al.; Bagchi, 'Voluntary'). People are especially at a loss to understand and cost all the future implications of a contract, including what effects a contract will have under unpredictable future contingencies. Contracts with fine-print terms protecting a business from any legal challenge undermine the idea of reciprocal benefits.<sup>iii</sup> Even when consumers have contractual rights to sue on, enforcement in



court is often a fairy tale when the value of consumer transactions is compared to the costs of legal proceedings. There are, in other words, many problems with understanding the social practices that constitute our needs systems as contractual – but we still do.

At the same time that all this contracting is happening out in society, a set of legitimating discourses that constitute and reproduce contract is being spoken in courts, in politics, in the academy, and in our day-to-day lives. While it is impossible to trace out all the strands of contract discourse, which overlap and intersect with many foundational ideas in market liberalism, I will set out two themes here: economy and autonomy. We begin with a contracting subject, an individual, with plans and goals, property and preferences. The contracting subject chooses to enter into contracts and does so rationally. That is, they choose contracts that accord with their preferences and plans and thus express their autonomy or their valuations. This is all right and good because the expression of autonomy is good in itself, or because contracts tend to be welfare enhancing when both parties think themselves getting something better than what they give up. All this justifies contracting practice as I have just defined it, and points toward a policy of non-intervention in people's contractual affairs. We see this not just in academic philosophical justifications of contractual ordering, but in popular talk about the latest economic regulation. Our legal system goes one step further by enforcing a given contract even when a party no longer wants it enforced. Within either theme, autonomy or economy, there are further explanations of why we should not just allow contracting but positively encourage it through court enforcement. Perhaps one way of expressing autonomy is precisely by binding our future selves to a commitment, and the law should respect our autonomy by holding us to our commitments; perhaps binding commitments allow more plans and trust and co-ordination, and bigger and better markets, so that we can express our autonomy and increase social welfare by buying a new smartphone. Or perhaps it would be unfair to let someone who had relied on an agreement with another go without recourse should that other renege and leave them in the lurch.

These contractual discourses permeate our needs systems. The regulation of markets always contends with the notion that they are free and efficient, and this is true both in the loftiest levels of the ivory tower and in the day-to-day of informal policy banter. Both the autonomy and efficiency strands rely on a concept of choice, and there is often a gap between

the formal model of choice supposed by contract and the kinds of choice that can actually motivate a justification of the resulting order. A contractual choice is not necessarily a robust choice, for the reasons outlined above.

The spread of contract talk is illustrated by its centuries-long dominance of another field: social contract theory. While social contract theory is distinct from the theory of contract law, the same strands of autonomy and economy are visible, and debate continues about the potential of fitting animals into such theories (Larrère and Larrère; Reynolds 213–16; Garner). The shared conceptual lineage of legal contract and social contract results in important overlap. Clare Palmer has usefully laid out characteristics shared by most social contract theories. To paraphrase, the social contract marks a transition between a pre-contract situation and a post-contract society. It involves limitations on freedoms with commensurate benefits, such as for example giving up the freedom to do violence against others in exchange for protection from violence by others. Also, the ‘parties to the contract are free and equal individuals who understand and consent to it’, or hypothetically would (414). We can immediately see the elements of consent, reciprocal obligation, presentation, and enforcement in these characteristics. Some scholars have concluded that social contract theory offers a viable route to a political theory of animals (Gabardi; Palmer).

## **Animals as Contractors**

Now, can animals contract? To what extent can animals fit into contract practices and their associated discourses? Nothing I say here will apply to all animals – a category that ranges in contractual capacity from humans to porifera. Rather, I will focus on a few important or likely candidate species.

**Reciprocity** – Certainly, humans get things they want from animals. Domesticated animals are the most obvious example, from whom humans get meat, labour or companionship (Hribal, ‘Working Class’). Wild animals are hunted for food or fur. It is not important that some of these things might not ‘really’ be beneficial for humans, or beneficial in the long run (for example if meat-eating is physically or morally bad for us) – it is enough that some humans consider them beneficial and so will contract for them. Animals offer benefits that humans

cannot get any other way. The production of eggs by chickens is labour so specialized no human has yet learnt to do it – though phenomena like in vitro meat might suggest they are not far off (Lee). Humans are not good at turning cud into calories without a ruminant in between.

There are all sorts of more indirect benefits that animals bring to humans. For instance, earthworms aerate soil; mosquitoes get eaten by birds and subsidize birdwatchers' hobby. More broadly, we are all part of The Circle of Life, part of larger systems in which animals play many parts and from which we benefit (Milligan 22–25; Kymlicka and Donaldson 177–81; Kimmerer 6, 144). Ecologists have called this type of benefit 'ecosystem services', and they include 'sequestering carbon, purifying water, regulating the climate, providing fisheries, and pollinating agricultural crop production' (Blattner, 'Ecosystem Services'). The Circle of Life contractual argument is that we are all obliged to each other not just by dint of specific benefits we might transact but because of our participation in a larger reciprocal system. As I will explain in a moment, this sort of benefit is too diffuse to satisfy the contractual criteria of reciprocity.

Looking in the other direction, humans benefit animals both directly and indirectly. There are direct material (and perhaps social) benefits to specific animals. The exemplar may be sheltering, feeding, and providing medical assistance to domesticated animals. These are often unambiguous and ground the notion that humans might engage in reciprocally beneficial relationships with some animals. There are also indirect benefits, that Circle of Life argument that humans too are part of an environmental web that benefits all, perhaps by one day dying and being buried and decomposed. That is, humans also provide ecosystem services. Because humans engage in animal husbandry, some might also add the opportunity of a life to this list: were it not for humans, many animals would never be born at all.

We should question whether human contributions to ecosystems, and the opportunity of a life, are truly 'benefits' for animals. It is not clear that an opportunity of a life is a benefit at all (who benefits, exactly, if the counterfactual is not ever being born?), particularly for animals who seem to be bred only to suffer (Milligan 30–35; Holtug). For animals that will be killed as part of the deal, that disbenefit should also be considered in the balance (Višak and Garner). Being bred to purpose under capitalism in particular has meant that an animal's life will be regulated totally, resulting in the hellish conditions faced by many farmed animals (Wadiwel, 'Chicken' 536–39). As to ecosystem services, contemporary environmentalists and critical

theorists working within the frame of the Anthropocene question whether humans are now acting to the net detriment of other elements of our environments, or creating/subverting/redefining a new sort of thing entirely.

I do not need to evaluate these arguments. Whatever benefits the Circle of Life may provide, they are not the kind of reciprocal party-to-party benefits that motivate contracts. These benefits motivate polity-level policy choices, but they will not induce specific individuals to enter into or respect contracts with specific others. Because these benefits are indirect and diffuse, they do not have contract's rhetorical ability to explain precisely when and what obligation is owed: because of *this* benefit from A to B, B owes A reciprocally. So, a recognition of animals' ecosystem services has proved perfectly compatible with valuing and encouraging the suffering and death of particular animals for the sake of human interests (Blattner, 'Ecosystem Services' 16–18).

The opportunity of a life, in contrast, has the specificity needed to ground contractual claims. So we see the idea that a farmer gives an animal a life, and perhaps a good life, and that this is specifically a gift that reciprocates the gift of the animal's labour (Porcher 14–15). This sense of reciprocity tells us who owes what: the farmer who husbands a particular animal owes that animal a good life, and the animal owes that farmer their efforts in turn. This reciprocity even tells us how much is owed: an amount commensurate with the animal's 'gift'. If an animal's whole life is gifted in this way, the farmer must ensure that the animal's whole life is a good one. Note again, I am not making a claim about whether the 'gift' of a life to an animal which is bred to be killed is a real benefit. I am suggesting that it satisfies the rhetorical structure of reciprocity we find in contract, that such a 'gift' can be and is used as part of a contractual frame to justify practices of animal husbandry.

Putting aside the complexities of ecosystem services and opportunities-of-life, it is clear that some animals can engage with humans in relationships of direct mutual reciprocal benefit. I need make no claim as to whether these relationships are in an animal's best interests all told – just as we can identify a contract of employment without evaluating the fairness of the wage. Here I will set out some candidates of relationships of reciprocal benefit between humans and animals that have something contractual about them: companion animals (like house cats), animals raised to be eaten (like pigs), animals raised for less lethal products (like laying hens), and service animals (like sniffer dogs). This list focuses on relatively charismatic and social

animals, and that is a serious limitation inherent in the sense of reciprocity used here. In all these cases the animals are provided with at least food, shelter, and medical attention, though obviously there is immense variation between meeting a bare minimum and something approaching real comfort. Humans receive benefits from these animals: companionship, food and other products, and valuable services. There is also a great variation in how much of a ‘good deal’ these relationships seem to be on the non-human side.

A misanthrope might say that companion animals are more comfortable than farm animals because they need to be comfortable for humans to get what they want out of them. The companionship of a pet is predicated, for most people, on their treating that pet well. This is part of what makes humans happy to interact with their pets. We want them to like us, and we like to spoil them (in so far as this does not conflict with our wishes for their longevity). I do not intend to suggest that any sense of beneficence or even of an intention to reciprocate is behind the benefits humans sometimes afford animals. However, much the same can be said of many contracts in needs systems. An employer's apparent beneficence can be understood as doing the minimum they need to get the labour they want out of their employees, for instance when a wage increase is based on a desire to reduce turnover. Of course, humans have something of a choice to walk away from a bad deal. Do animals?

**Consent** – This is, for many animals, the sticking point. Different animals are able to consent in different ways and to different things. Mosquitoes might seem to lack the capability to consent or not consent to anything. We imagine their tiny nervous systems operating on pure instinct, a mechanistic and deterministic set of rules, rules that rule out real agency.

Some people seem resistant to the idea that any animals can consent to anything at all. They are all like mosquitoes. There has of course been much written against this instinct. Here I can dispose of it in a convenient way. Humans making contracts are also notoriously incapable of idealized consent. *Homo sapiens* are not *Homo aëconomicus*. They do not know the contracts they ‘agree’ to. They do not read them, and if they did, they would not understand them, and if they did, a host of biases and heuristics would impede their ability to evaluate their options (Enman-Beech, ‘*Douez*’ 436–38). Studies of contract have had to account for this fact. If humans are incapable of idealized consent, how is contract to function? The short answer: humans can consent enough – enough to keep the market liberal order of our needs systems running, and enough to satisfy a formal model of contractual choice. They do this by objectively manifesting

consent, by seeming to agree. This is enough to mark out a contract as chosen regardless of how robust that consent might be. My question is thus not one about the neurophysiology of animals or the philosophical nature of choice. I just want to know whether some animals can consent enough to engage in the actual practices of contract.

From the perspective of the stability of contract practice, all that is needed is discrete choices to which we can attach contractual significance, marking out sets of terms as ‘agreed’. Some animals can clearly communicate an effective consent in immediate situations. I can hold out food in my hand, and a non-human will choose to approach me and eat. A cat is communicating their choice to be touched by the time they roll over and purr. Regardless of our underlying views about the robustness of this choice, it is clear enough to ground a rule about whether or not to pet a cat – only if they communicate consent in this kind of way. Many people seem to follow this sort of rule when deciding whether to pet a cat, and it seems a reasonable enough rule that is based on an attempt to respect cats’ wishes (and to avoid getting scratched). In sum, this kind of immediate consent works just fine. The real problems arise when we look past immediate transactions, that is, when we get to –

**Presentiation** – I do not wish to assert, as others have, that non-human animals lack a sense of their future: ‘none of those long-protracted anticipations ... that we have’, ‘largely psychologically unconnected to themselves’ (Bentham 310–311n; McMahan 71). What matters here is not whether animals understand the future in a way that grounds a morally significant interest in their future conditions, but rather whether they can carry out courses of action recognizably based on those future conditions. Again, to some extent they can. I once observed a guinea pig who would regularly alternate chewing pellets and drinking water on the other side of her cage. During this process, she would occasionally take some pellets into her mouth, start chewing, run over to the water source, still chewing, and wait there, chewing, until she had chewed enough to drink the water. In running over to the water before she was ready to drink, this guinea pig acted on a future contingency. She prepared for a future course of action – preparing to drink water before she was ready to drink it – by positioning herself appropriately. This and nothing more is the relationship with the future required by presentiation. We can point to the guinea pig’s having approached the water to claim that she chose to drink, in advance.

Many kinds of choice about the future are more complicated than a guinea pig showing that she wants to drink water, a spider showing by building a web that they would like to catch a fly, a bird showing by building a nest that they would like a place for young. All these choices seem to many humans to be ‘merely instinctual’, and I think when humans have thoughts like this they mean that we can explain these choices as responding to needs without the intervention of thought or agency. The guinea pig is thirsty now; the spider needs a web. Whether or not humans are right in thinking such choices merely instinctual, since my question is about objectively manifesting a presentiated choice we would like to find animals doing things inconsistent with such ‘merely instinctual’ framings. We would like to see animals manifesting a presentiated choice to something neither general nor immediate, that is to a contingent future state of affairs. Ethologists have studied animals’ sense of the future. In one experiment, scrub jays spent time in a set of rooms. Each morning they would be confined to one of two rooms. In one of the rooms they would be given breakfast; in the other nothing. After spending some days in this set-up, the jays were given the opportunity to cache food – hide it for later consumption. The birds cached three times as much food in the room they had learnt would be barren as they did in the room where breakfast would be available. This suggests an ability to predict and plan for future needs (Zimmer; Raby et al.). In another study, some chimpanzees and orangutans engaged in a puzzle involving finding a hidden stick that could be used to reach a banana. They went through the test four times. Over the next three years the apes were put through a host of different such tests using similar elements, but never featuring the same set-up. When they were presented with the same set-up three years later, most of the apes immediately remembered where to find the stick and how to get the banana (Morell; Martin-Ordas et al.). It is certainly possible to imagine some animals, given the appropriate learning opportunities, manifesting a choice from among different future states of affairs in some situations.

There is clearly a range of relationships different animals have with the future. The spider web is a cross-cultural symbol of crafty planning, yet we do not assume that in constructing a spider web a spider demonstrates much understanding of the future. We suppose that spiders are driven to construct webs under certain conditions. This logic does not hold for those animals just described that make future decisions based on things they have learnt over time – and so, not in any direct sense, instinctively. If the scrub jay caching food in a place they have learnt to expect to be barren is acting ‘merely’ on instinct, this calls into question much

human planning. For instance, in the case of humans choosing to have children, who can draw the line between instinct and non-instinctual planning? Granting again that, as with the previous indicia, the ability of animals to presentiate comes in degrees with no clear demarcation, the question again returns to what is enough. Recall our candidate relationships: the companion animal, the laying hen, the pig raised for to be eaten, and the sniffer dog. I consider the outdoor cat to be the best candidate for an animal that chooses its ongoing relationship to humans, and so I will focus on the limitations of even this strongest case.

An outdoor cat can leave their human owners whenever they want. There are genuine issues, for anyone considering the justice of a cat's situation, as to whether this is a robust choice. The argument might be, for instance, that we have to some extent bred dependency into cats over time, or that we have put the cat into a built environment that lacks what a cat needs to live without humans, or that we have caused an overpopulation of cats that the non-human world cannot support.<sup>iv</sup>

In any case, though cats roam, they typically come back the very next day. It seems likely that a cat understands many things about their situation in deciding to return to their humans. A cat knows that food will be available, likely at specific times of day and in a specific part of the home. Cats demonstrate this by showing up at the right time and place, and sometimes are better at remembering when they are supposed to be fed than their humans. Many cats have lively social relationships with their humans that include seeking attention and physical stimulation. A cat might be understandably skeptical that other humans, with whom they are unfamiliar and anyway who are scary, would find just the right spots to scratch. Of course, cats also show affection.

All of this helps explain why an outdoor cat returns from a ramble. Is it enough? In particular, what of potential future benefits that might be presentiated? The cat returns expecting food, warmth, and affection, into the future. It seems right to say that the cat returns and chooses these benefits against whatever disbenefits there may be. But food, shelter and affection are only part of choosing a human. One of the benefits of human care a cat might experience is a life-saving surgical procedure. There is a certain amount any particular human is willing and able to pay for such a procedure. I believe cats I have lived with have no understanding of this fact. If they did, they might think it worth it to try their luck with the neighbour down the street with treble my income or better pet insurance. Even in this strongest



case of an animal choosing their long-term futures, cats can manifest a choice to some things about the future (such as that they be fed again tomorrow in the same place) but not others (such as that they receive a certain standard of veterinary care). Unlike with fellow humans, we have as yet devised no way to communicate these more complex contingencies to a cat to secure an explicit choice about them.

In the animal worker frame, it seems that saying a sniffer dog who has spent her best years working *deserves* a comfortable retirement in return for services rendered is a powerful rhetorical claim. Yet we would not suppose that a sniffer dog communicates an upfront understanding of this kind of eventuality. More to the point, sniffer dogs cannot manifest a choice between two police services based on the competing retirement packages, weighed against the other benefits or disbenefits of the respective services – at least at the present state of interspecies communication.

In sum, animals with whom we have reciprocal relationships, even when there is something consensual about them, seem unable to understand complex and contingent future states of affairs. Insofar as they can, we are unable to communicate with them about such complexities. This represents a serious problem for our ability to engage in contract-like relationships together.

**Enforcement** – If we do find humans and animals manifesting agreement to reciprocal future benefits, what are the possible enforcement mechanisms? Organizations could be charged with acting as litigation guardians for animals. Criminal and regulatory sanctions are already used to enforce legislation protecting animals, scanty as they may be. Reputational sanctions against businesses include consumer boycotts, and these too are already used by animal advocates. Veganism is itself a form of boycott, and targeted consumer interventions have led for instance to the move by fast-food chains to cage-free egg production (Hui). This is all to say, in so far as human-animal relationships of chosen forward-looking reciprocal benefits give rise to obligations on the part of humans, a variety of enforcement mechanisms are possible.

But what to do if an animal, rather than a human, ‘breaches’? The same difficulties that arise when we ask an animal to consent to a presentiated deal arise when we ask whether they will take enforcement into account in their decision making. To some extent we can imagine training as an enforcement mechanism that, for some animals, results in them successfully

internalizing the desired behaviours, but this only reveals another problem: is it justice or bare authority? In so far as animals are required to uphold their end of any bargain through coercive social or legal sanctions, what theory could legitimate this?

Most animals probably cannot want or expect enforcement of a broken contract about future states of affairs. Similarly, it would be difficult to convince them to perform some obligation we suppose them to have. Some animals can enforce what look like moral norms (Bekoff and Pierce; de Waal). For instance, experimenters urge that chimpanzees have a sense of fair division of benefits and will vividly communicate their repudiations of poor offers (Proctor et al.; Henrich and Silk). Chimps seem exceptional, and humans do not typically look to them for reciprocal benefits anyway. Among the more likely examples I listed above, there will not be an uprising of laying hens or working dogs when one of their company doesn't get its deserved retirement. This is not to diminish the history of individual animal resistance to human violence (Wadiwel, 'Fish'; Hribal, *Fear*). As Dinesh Wadiwel has shown, the fact of animal resistance is recorded not least in the many human technologies designed to overpower it, but this resistance is not resistance to a contractual breach. Resisting animals do not refer to past agreements as a basis for their resistance. It might be possible to read animal resistance in contractual terms, so that it could play a part in a contractual understanding of animal-human relations. But for now, any enforcement mechanism for breached obligations referencing contingent futures will have to be outsourced to humans at almost every step.

This is a major stumbling block for a theory of contractual justice (as opposed to contract practice) between humans and animals. The rule of law probably includes things like having one's legal claims vindicated or denied with reasons intelligible to one personally (Gaus). This is an issue for contractual justice, but not for the functioning of a contract system. Many humans regard lawyers and the legal system with doubt and dread – a feeling exemplified in Kafka's *The Trial*. Often, we do not understand the law or feel it represents our ideals of justice. Sometimes we do: again, it is a matter of degree. None of this poses a serious practical difficulty for legal ordering. Most humans are never going to be a part of the legal system that is meant to secure our rights, but we continue to contract anyway.

Contractors do not typically need to understand why it might be just to connect enforcement to breach of some obligation in order for enforcement to effectively regulate behaviour – they need to recognize enforcement and breach and that they are rhetorically

connected. When animals benefit from the enforcement of obligations owed to them by humans, they do not need to understand those benefits as arising from contract to enjoy them. Humans often do not. Yet there does seem to be a difference of degree between humans' understanding of complex mutual obligations and that of non-human animals, and for some people this difference of degree will undermine claims that we owe animals contract-like obligations.

To summarize my argument so far: contract grounds needs systems, does practical things out in the world, and moreover, comes with a set of legitimating discourses. Animals can enter into relationships of reciprocal benefit with humans that extend into the future. The rhetoric of contract can be applied to such relationships. An intuitive notion of *quid pro quo* can be used to think about whether they are fair, and they can be justified on the basis and to the extent that they are chosen. Animals can agree to some things, but no non-human can communicate agreement to complex future commitments with us. Despite this, such relationships could, with the help of human guardians, be legalized and enforced. My review of the functions of contract tends to this conclusion: some non-human animals can do everything required of contract *except the one thing that is supposed to justify it* – that is, to choose it.

## Contract and Legitimation

Having answered my titular question, I turn to implications. It seems that as a practical matter contract could well work as a frame for many animals in many instances, with various qualifiers, and with support from humans in a guardian-like role. Even still, contractual justice is off the table because robust choice is not available. This does not end our inquiry though, because contract is already being used as a frame for understanding human-animal relationships, and it will continue to be so used, with varying effects. Here I discuss one effect in depth: the extent to which applying a contractual frame to human-animal relationships is likely to legitimate existing forms of abuse rather than overturn them.

Scholars have explored how the contractual frame can be used to legitimate existing social structures across needs systems (Bagchi, 'Myth'; Radin, *Boilerplate*; West; Hart; Enman-Beech, *Contract Life*). Autonomy theories take contractual choices to express the autonomy of contracting parties. The resulting social order is then legitimated by the multitude of individual

contracts that comprise it. Efficiency theories conclude that contracting, in workably competitive markets, leads to welfare-enhancing outcomes, because contractual choice is an expression of parties' preferences. Each deal makes its parties better off, or they would not agree to it. There is always a mismatch between the ideal conditions necessary for these theories to be persuasive (for example, that contracting parties are rational and well-informed, that markets are typically competitive), and the reality of contracting. The focus of contract on individual moments of choice obscures many forms of injustice, particularly those that require a broader view to see – structural injustices such as race-, gender-, or class-based injustices. Despite this mismatch, legitimation spills over to situations where the ideal conditions do not hold.

We can see this legitimation spillover throughout human needs systems. Poor working conditions are justified by the contractual choices of workers; bosses are insulated from responsibility for those conditions by the same logic. Global supply chains are simultaneously connected and severed by contract, so that consumer purchasing decisions in a grocery store in one place justify working conditions and environmental consequences on the other side of the world. The 'miracle' of the modern grocery store, with its cheap shrimp procured through distant and invisible slave labour, pits people-as-consumers against people-as-workers (Lorr; Polanyi 266). Gig-economy and social media platforms are reworking swathes of daily life, but users have all clicked 'I agree'. When this kind of contractual legitimation is overthrown, it has often been by contesting contract's focus on individual moments of consent, giving the broader perspective needed to see broader injustice. Thus, we have collective action through government regulation, workers' unions, and consumer organizations. Non-human animals do not have governments, workers' unions, or consumer organizations.

I have just discussed a kind of processual legitimation, where the process of making a contract ends up justifying its substance. Thinking of animals as contractors risks this kind of legitimation spillover, where contract-like forms seem to legitimate any kind of substance. This is why contractual justice requires being able to say no to contract entirely, and in particular, as Charlotte Blattner has argued, good work requires being able to refuse work at all ('Animal Labour'). But contract also has a distinctive substantive notion of fairness: equivalent exchange (Benson 30). This is just the idea that if what I give is worth X, what I receive should also be worth X – less, and I'm being stinted; more, then they are. This can ground claims for animals,

like retirements for working dogs – it’s no more than what they’ve given up. Note where the rhetorical shift here lies. Animals are already often commodified. It’s uncontroversial that humans get value out of laying hens. Contract here doesn’t draw our attention to value where previously we did not see it; rather it attributes that value to the animal themselves (in these examples as worker). That a person owns themselves and their labour is a fundamental tenet of political liberalism (Macpherson). At the same time, it is a tenet tied directly to the commodification of the self, and so to contract as a site of domination and exploitation (Pateman). Framing a person’s labour or bodily products as something they own opens them to be given up in an exchange, and contract can substantively legitimize such an exchange as an equivalent *quid pro quo*. Thus, in human work, contract legitimizes the resulting structure (labour relations, broadly speaking) both processually and substantively. Processually, each worker has chosen their work contract; substantively, the part of their life given over to the strictures of their bosses is fair value for the wages received.

Because contract involves this mix of processual and substantive fairness, there is a persistent danger of spillover where the contractual frame is involved. John Gardner describes this phenomenon in the context of a work contract thus:

whenever the norms of certain roles and relationships can be understood as having their source in a contract, they are so understood. They are reinterpreted as contractual norms, existing for content-independent reasons. . . . The obligations (and other norms) of all or most other social roles and relationships are reinterpreted as having their source in a contract, such that the idea that they are good norms for people to be bound by is bypassed in favour of the idea that they were, at some time and place, created by the actions of those who are bound by them. (36–37)

The elisions here are all too easy. Process legitimizes substance; substance is taken to stand for process.

To reiterate a point from my introduction, there are thick theories of ethical life under the heading of animal labour that seek to foreclose these elisions. They do so through a number of means, perhaps by insisting on a set of rights as a baseline that cannot be commodified (Coulter), or by decoupling labour from contract entirely so that it is not a matter of choice or agreement in the first place (Porcher). Either way, such theories produce a set of norms for

certain roles or relationships, to use Gardner's term. I have spent the bulk of this article showing the extent to which such norms can be understood as contractual. It is not that animal labour scholars necessarily see them as contractual; rather there is a rhetorical basis for interpreting them as contractual. I am concerned with a concomitant rhetorical danger, that despite the potential of our theories, bringing animals into what looks like liberal-individualist contract may lead to their exploitation in the same way it has led so many human workers and consumers (Radin, *Contested Commodities*; Enman-Beech, *Contract Life*). I illustrate this danger with two examples, both about the choices of working dogs.

My first example of the potential of contract is the 1934 text, *Working Dogs: An Attempt to Produce a Strain of German Shepherds which Combines Working Ability and Beauty of Conformation*, by Elliot Humphrey and Lucien Warner. The title of the book gives a good sense of its content, but its rhetoric is what calls out for analysis here.

At once this text, wrought in the forges of Fordism and Taylorism, sees each bred and trained dog as like 'a fine piece of machinery ... all the time becoming a more dependable and better adapted product' (xiv). We find that 'the household pet must, in a sense, work for his living', that a draught animal is often considered 'a valuable citizen' (2, 3). Yet the animal is not just worker and citizen: a seeing-eye dog is 'a loyal, faithful, dependable, courageous, and affectionate comrade, who will lay down his life for his friend without whimper or hesitation' (xiv). The dog is 'a loyal canine companion', 'a friend who is always at [the blind person's] side day or night; who is not only willing but adorably eager to serve; who is the very embodiment of love and faithfulness' (21). The authors helpfully and parenthetically add, '(and, incidentally, [the dogs] seem happiest when serving well)' (25).

These contradictions are summed up in the momentarily unassuming phrase, 'dog lovers and users' (xiv). That a dog lover can be a dog user, and vice versa, helps us question the liberatory valence of animal labour (Mackinnon). At the same time, we should not be surprised, for the very same contradiction exists with respect to human workers. The idea that we are happiest when serving has been applied also to the natural servility of the working classes, and to enslaved people. It is only through organized struggle that humans have sometimes turned 'labour' into a frame, however fragile, for a good life.

*Working Dogs* is a good example of how this rhetoric can work, but it is a particularly redolent text. Its patterns can be traced into the current work of Jocelyne Porcher, who has used work to help justify raising and killing animals in the course of husbandry (Delon). So I wish to consider a more sympathetic example: Jason Hribal's 2006 essay 'Jesse, A Working Dog' ('Jesse'). It is about a service dog who saved 'her owner and employer' from a burning building, then died while going back into the building to save 'her friend, a cat'. Hribal rightly notes the dearth of focus on animal agency among animal rights people, a gap that has been rapidly filling over the past fifteen years:

[Animal] agency, as an historical and sociology reality, is not only neglected within the animal rights community; it is oftentimes dismissed as undeserving of consideration. Instead, animals are perceived and presented as helpless victims and static characters. These creatures are, consequently, segregated from society. This is a top-down view – one which serves to reproduce and reinforce similar beliefs among the general populace.

But see how quickly the attempt to ascribe agency to a working dog slips into a processual justification of the dog's work: 'Jessie would not want your sorrow or sympathy. She would want you to recognize her abilities and skills. She would want you to understand how hard and difficult her work was'. And, 'Jessie would want you to recognize that service dogs are active and productive workers in society. They are members of the working-class. Service dogs deserve rights because they have earned them'. Is this right? Or would Jesse have wished never to have been bred and trained into her role? Would Jesse have wished to live as a companion animal instead of as a working dog? Could we communicate with Jesse about this kind of choice either way? The contract frame does a lot of work here. We started with a straightforward analogy between Jesse and a human worker. As I discussed in the previous section, this analogy has a sensible toehold on reality because Jesse may well be engaged in an ongoing mutually beneficial relationship with a human that has elements of choice about it (for instance, Jesse chose to go back into the building, a choice that we might find problematic for reasons I have already discussed). There is in other words something definitely contractual about this situation. Yet the analogy takes us much further – we suppose that Jesse owns their labour and can exchange it to earn rights, that there is pride in this work, that Jesse's choice is robust. Here the contractual frame allows us to even find something heart-warming in Jesse's death, a heroic sacrifice – arguably a perverse result.

Jesse presents a relatively sympathetic vision of animal labour. The representations of animal labour from agribusiness pose an even slipperier set of images. Eisen notes that these industries use labour framing to obscure and normalize what goes on down on the farm (146–48). On top of obscuring and normalizing, labour tropes stand to legitimize farm ‘work’ as reflecting animals doing what they like to do and getting a fair exchange for it. For instance, the choice of a dairy cow to use a milking machine may appear robust. We suppose that the cow is not thinking beyond their immediate need for release, or their hunger for the food offered by the machine. We also suppose, perhaps wrongly, that this is about as much thinking as a cow generally does anyway. The human-imposed constraint on choice aligns with and is legitimated by the supposed ethological constraint on choice. As with contracting humans, contract countenances any degree of exploitation consistent with a parties' choice, a choice in this case materially manipulated by humans to produce the desired result.

Again, it is quite possible to imagine positive substantive visions of animals as workers. My point is that this framing comes with legitimation dangers that have been previously analyzed within human-focussed legal scholarship. Also, because animals are not engaged in the kinds of collective action that have sometimes turned work and consumer frames into results for humans, animals-as-contractors and animals-as-workers seem dangerous outside of narrow rhetorical contexts – basically, when preaching to a choir. Outside of such contexts, there is a real danger that animals-as-contractors will be used to justify their exploitation rather than to organize disparate human interests into the collective action necessary to motivate real change for animals.

## Conclusion

I have shown that some animals can engage in contract-like relationships with humans. These relationships can include reciprocal benefits that extend into the future, and a variety of enforcement mechanisms are possible. In some of these situations, animals might have a relatively robust opportunity to consent or not to the contract – like outdoor cats. But mostly, consent to the full scope of the relationship, that is extending into the future and including potential enforcement mechanisms, will be absent, hypothetical, or made on behalf of the animal by a human. Without communicating that kind of consent, it is doubtful that a system of



contract between humans and animals can be just – but this does not mean contract does not have enough of a rhetorical toehold here to structure our thinking, frame claims and counterclaims, and legitimize results. Some projects along these lines, including animal labour, are already being written. If such contractual visions are to be pursued, we need to attend to ways animals do and do not fit into the contractual frame. We should worry that contract will serve to legitimize existing practices, rather than mobilize opposition to them.

It is true that thinking of animals as workers can ground a claim for reciprocal benefits for their work. But the history of human work shows that what counts as a fair deal has always been up for grabs: it is determined by the party with power. Only through dedicated collective action, through politics, have human workers achieved their partial successes. At the same time, it is not clear what animals-as-workers has to add to existing frameworks according animals dignity or respect (Eisen 152). Indeed, the contractual framework is unsurprisingly content-neutral on such basic questions as whether or not it is appropriate to raise and kill animals (Delon), just as it seems to allow humans to contract themselves into slavery without added protections (Ellerman). As I have shown, the contractual framework is already being used to make us feel better about a dog being bred into a lifetime of servitude or dying in a burning building.

Labour claims have had particular traction among police and military dogs – just as with police and military humans whose unions do so well (Donaldson and Kymlicka, ‘Post-Work’ 212; Coulter 94). No one doubts that contract can serve as a rhetorical tool for the powerful to get what they want. Yet we must consider, what is a contractual frame likely to do if unleashed on the countless animals farmed, caught, killed and eaten every year? Contract can legitimize all these forms of abuse. It took centuries of activism for humans to build the protections around work and consumption that make contract function – so far as it does – for workers and consumers today. If we are to cast animals as contractors, we should ensure we can settle the foundations for those protections first.

## Notes

<sup>i</sup> This article is written from a particular human perspective, and asks how animals might fit into the institution of contract as it exists in certain (market liberal) human societies. My focus is on core features of contract that can be found on every continent, but my presentation will be slanted to my home jurisdictions of Canada and the UK.

<sup>ii</sup> The notion that the difference between promise and contract is (legal) enforcement is encoded in the *Restatement of Contracts* §1: ‘A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.’

<sup>iii</sup> There *are* usually reciprocal benefits in these contracts, just not enforceable ones. The reciprocity and enforcement norms are present here, but in a weakened form, and so such agreements are said to not live up to ideals of contract.

<sup>iv</sup> We might also have wrongfully induced preferences in the cat. If it was wrong of us to keep the cat in the first place, and they have learnt to enjoy our company and rely on our provisions, it could be that we exploit the cat by taking advantage of the preferences we have induced. I do not mean to suggest that a preference stemming from a wrongful act means that any choice based on that preference is not real. Rather, when someone induces a preference through a wrongful act and then takes advantage of it by extracting a deal based on that preference, the result may be a form of exploitation. This is in direct analogy to contracts extracted through fraud, the line between preferences and information being thin. Thanks to a reviewer for pointing out an error in my formulation here.

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