

Hallie Liberto
Revised Preliminary Paper in Political Philosophy
April 14, 2008

Species Membership and the Veil of Ignorance

When advocating animal rights, philosophers and activists rarely appeal to John Rawls's contractarian theory of justice. According to Rawls's theory, there are two principles that govern a just society. One of Rawls's main arguments for these principles rests upon the claim that a group of rational agents gathered behind a hypothetical "veil of ignorance" would choose these principles out of rational self-interest to govern their society. Rawls himself did not think that non-human animals (which I will from here on refer to as "animals") deserve representation behind the veil of ignorance, nor did he think that animals are protected by his two principles of justice. Yet, Mark Rowlands gives a compelling argument that, if Rawls's contractarianism is consistently applied, then it entails that representatives behind the veil of ignorance should be blind to species membership in the same way that they are blind to economic status and natural talent.¹ Rowlands thinks that, given representation behind the veil, animals become recipients of Rawlsian justice. I argue that Rawls's theory of justice, consistently applied, does not *entail* though is open to duties of justice for animals.

Furthermore, I argue that *if* we suppose that representatives of animals can be among those stationed behind the veil of ignorance, we cannot conclude that those behind the veil, knowing they might represent animals, would choose the two principles. Rawls thinks that it is rational for agents behind the veil of ignorance to choose to give the liberty principle lexical priority over the second principle, and to use *maximin* decision theoretic reasoning instead of utility averaging reasoning when settling on principles of justice. These are the two respects in

¹ Rowlands, Mark. "Contractarianism and Animal Rights." *Journal of Applied Philosophy*, Vol. 14, No. 3, 1997

which agents behind Rawls's veil of ignorance make choices using reasoning that diverges from strictly utilitarian reasoning.² However, Rawls's justifications for *why* rational agents behind the veil of ignorance would use *maximin* reasoning instead of utility averaging reasoning to choose their principles, and *why* there should be priority of the liberty principle over the second principle, fail when applied to rational agents who might represent animals. Without such justifications, we are left with no reason to prefer Rawls's two principles of justice over a utilitarian principle of justice for governing our treatment of animals (and non-rational humans).

1. Rawls's Two Arguments for his Two Principles of Justice

Rawls believed that a perfectly just society would be one that is governed by the following two principles:

- (a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and
- (b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).³

The first principle (a: the liberty principle) is lexically prior to the second principle (b). In circumstances of justice, no infringement on the liberty principle, however small, is to be traded for any benefit, however large, to the satisfaction of the second principle, or for any other primary good.

² It seems like the divergence here is from *consequentialist* reasoning, more generally. However, Rawls thought that it was, specifically, maximizing average-utility reasoning that was the main competitor to maximin reasoning. Why he might have chosen this competitor over overall utility maximization is a topic I'll address later in this paper. Due to Rawls's comparison of maximin with average utility maximization, I will stick with "average utility maximization" as the alternative decision making approach. However, some other utilitarian or consequentialist view might be perfectly substitutable for utilitarianism in this paper, and might even be better.

³ Rawls, John. pp. 42-43 *Justice as Fairness: A Restatement*. The Belknap Press of Harvard University. Cambridge: 2001

Rawls believes that there are two distinct ways of coming to the conclusion that the two principles of justice, and the priority of the former, are the ideal principles on which a just government is based. Rowlands characterizes Rawls's first argument as the "Intuitive Equality" Argument:⁴

"P. 1 If an individual I has done nothing to merit possession of property P, then I is not morally entitled to P.

P. 2 If I is not morally entitled to P, then I is not morally entitled to whatever benefits accrue from the possession of P.

P.3 For any individual I, there is a set S of properties, $\{P_1, P_2, \dots P_n\}$ that I possesses without having done anything to merit such possession.

C. Therefore, for any individual I, there is a set S of properties such that I is not morally entitled to the benefits that accrue from possession of S."⁵

What Rowlands marks as the conclusion here is really just a lemma in the argument that concludes with the two principles of justice. In order to move from this conclusion, that people are not morally entitled to those benefits that accrue from the properties they did not initially merit, to the further conclusion of the two principles, we need something more. Rawls explains that members of a society participate in a collaborate endeavor (4). More resources can be produced in virtue of cooperating with each other than could be produced by the same set of individuals, each by him/herself. This collective responsibility for the accrued benefits provides a reason of justice for a distribution that will benefit everyone. The priority of basic liberties is grounded in those being the rationally preferred primary goods.⁶

Rawls's second argument for his principles of justice is called the Veil of Ignorance argument. He asks his readers to imagine that there are rational agents who are ignorant of the sort of lives that they, or those that they represent, will lead in the world. The veil is designed to be thick enough to hide from them what race, gender, class, family situation, goals, and

⁴ Rowlands, 238.

⁵ Rawls, John. pp. 9 *A Theory of Justice*. Belknap Press of Harvard University Press. Cambridge: 1999.

⁶ Rawls, John. pp. 63 *A Theory of Justice*.

conception of happiness will be theirs (or will belong to those they represent) in the world.

Rawls thinks that such agents as these, blinded from all that could bias them toward a particular person or group of people, would choose his two principles of justice.⁷

These principles are selected because, together, they prevent any individual from suffering a whole life less good than the life he or she would lead if there were an even distribution of the means to primary goods (resources). In response to the second principle, as derived from the Veil of Ignorance argument, someone might ask: so, why not split such resources evenly? Rawls responds,

Now in view of the special role of the basic structure, it is natural to ask the following question: by what principle can free and equal moral persons accept the fact that social and economic inequalities are deeply influenced by social fortune, and natural historic happenstance? Since the parties regard themselves as such persons, the obvious starting point is for them to suppose that all social primary goods, including income and wealth, should be equal: everyone should have an equal share. But they must take organizational requirements and economic efficiency into account. Thus it is unreasonable to stop at equal division. The basic structure should allow organizational and economic inequalities so long as these improve everyone's situation, including that of the least advantaged, provided these inequalities are consistent with equal liberty and fair equality of opportunity. Because they start from equal shares, those who benefit least (taking equal division to be the benchmark) have, so to speak, a veto. And thus the parties arrive at the second principle.⁸

The two principles are chosen on the assumption that people are free and equal moral persons who deserve equal opportunity. The reason why "equal division" is the benchmark for assessing people's allotment of primary goods is because "it reflects how people are situated when they are represented as free and equal moral persons."⁹ Rawls believes that deviation from this benchmark is justified to the extent, and only to the extent, to which it makes the worst off better off and leaves equal access to offices and positions. The first principle is, again, chosen because

⁷ Rawls, John. pp. 10 *A Theory of Justice*.

⁸ Rawls, John. pp. 282 *Political Liberalism*. Columbia University Press. New York: 1996.

⁹ Rawls, John. pp. 282 *Political Liberalism*.

of people's rational preference, in circumstances of justice, for basic liberties over other primary goods.¹⁰

2. Mark Rowlands's Argument for Why the Representatives of Animals Deserve a Seat Behind the Veil

Philosophers have thought contractarianism incompatible with animal rights because whatever agreement is drawn up in a fair contract must be made by rational agents. Views of contractarianism often assume that individuals' rights are derived from those individuals having lobbied for them during the contract formation, or from having the power to break the contract if other contracted parties do likewise. For instance, Tom Regan thinks that contractarianism is inconsistent for denying duties to animals but claiming duties to non-rational humans.¹¹ After all, non-rational humans are no more capable of participating in the formation of a contract than are animals. However, as I'll discuss later, Rawls does not make any *absolute* claims that his contractarianism entails duties to non-rational humans.

Rowlands argues that if Rawls's contractarianism is properly understood and consistently applied, the result is that we have duties to both non-rational humans *and* animals. Rowlands points out that "the fact that the framers of a contract must be conceived of as rational agents does not entail that the recipients of the contract, that is, the individuals protected by the principles of morality embodied in the contract, must be rational agents."¹² Rowlands argues that Rawls's view allows for direct duties of justice to animals and, though Rawls himself never takes this step, that Rawls's theory of justice *entails* that we have direct duties to animals. (Let us put aside the question of humans who are not moral persons until section 3.)

¹⁰ Rawls, John. pp. 63 *A Theory of Justice*.

¹¹ Rowlands, 238. I'll discuss this inconsistency at much greater length later in the paper.

¹² Rowlands, 236.

Rawls gives a definition of moral personhood that excludes animals.

Moral persons are distinguished by two features: first they are capable of having (and are assumed to have) a conception of their good (as expressed by a rational plan of life); and second they are capable of having (and are assumed to acquire) a sense of justice, a normally effective desire to apply and to act upon the principles of justice, at least to a certain minimum degree.¹³

However, Rawls goes on to say that moral personhood is only a sufficient condition, and not a necessary condition for being entitled to equal justice. “We see, then, that the capacity for moral personality is a sufficient condition for being entitled to equal justice. Nothing beyond the essential minimum is required. Whether moral personality is also a necessary condition I shall leave aside.”¹⁴ This leaves Rawls’s contractarianism *open* to including duties of justice for animals.

Rowlands also argues that duties of justice to animals are *entailed* by Rawls’s view. Rowlands appeals to the two distinct arguments for Rawls’s two principles of justice: the intuitive equality argument and the veil of ignorance argument. Rowlands explains that the veil of ignorance argument is crucially dependant on the intuitive equality argument.¹⁵

And, according to Rawls, one of the grounds on which we choose a description of the original position is that it yields principles we find intuitively acceptable. That is, one important way of justifying a description of the original position is that it yields the sort of principles which emerged from the intuitive equality argument.¹⁶

The intuitive equality argument leaves us with the conclusion that whatever resources people have, possession of which they’ve done nothing to merit, and whatever benefits they’ve accrued from the possession of such resources, are not resources and benefits to which they are morally entitled. The set-up of the original position is designed to take this intuition into account.

¹³ Rawls, John. pp. 18 *A Theory of Justice*.

¹⁴ Rawls, John. pp. 18 *A Theory of Justice*.

¹⁵ Rowlands, 238.

¹⁶ Rowlands, 240

Because the veil of ignorance is thick enough to hide contractors from the conditions they'll be born into, contractors will design a fair contract that doesn't allow people to benefit from unmerited resources unless it benefits the least advantaged.

People do nothing to merit the conditions and resource allotments into which they are born. Similarly, people do nothing to merit their natural talents and abilities.

Rawls argues that the same can be said about inequalities in natural talents or capacities. No one deserves to be born athletically gifted, stunningly handsome or with an IQ of 153, any more than they deserve to be born into a certain class or sex or race. Therefore, if it is unjust for someone to benefit from undeserved socio-economic properties, then it must be equally unjust for them to benefit from undeserved natural talents.¹⁷

Though Rawls insists that natural assets are not be redistributed and that people have a right to their natural abilities and to what they acquire through a fair social process, he does think that resources people accrue because of natural talents must still be garnered in accord with the second principle.¹⁸ Just like a woman whose advantage is being born into a wealthy family, a different woman who happens to be very intelligent and so makes a lot of money may only raise her own collection of primary goods to the extent that it raises the lot of the worst off. This suggests that Rawls does not believe in an entitlement to the resource-benefits of natural talents any *more* than he believes in an entitlement to the resource-benefits of social/economic upbringing.

The intuitive equality argument helps us design the original position insofar as the argument's conclusion demands that we shield people's socio-economic status from their representatives behind the veil. Similarly, Rawls thinks that what natural gifts people have need

¹⁷ Rowlands, 239

¹⁸ Rawls, 283. *Political Liberalism*. "Thus even if an equal distribution of natural assets seemed more in keeping with the equality of free persons, the question of redistributing these assets (were this conceivable) does not arise, since it is incompatible with the integrity of the person." And Rawls, 284. *Political Liberalism*. "We have a right to our natural abilities and a right to whatever we become entitled to by taking part in a fair social process."

to be shielded from their representatives behind the veil. Rowlands points out that, just as individuals are born with different natural talents, individuals are born as different *animals*. It is not the fault of the poor person, or the unintelligent person, or the animal that he is born as he is born. So, if economic circumstances and natural talents should be shielded from people behind the veil of ignorance, species membership should be shielded from them too.

3. A Critique of Rowlands' Entailment Claim

Behind the veil, all agents are equal. All agents participating in the process of choosing principles of justice stand as much chance of becoming beautiful, intelligent or strong. This equality behind the veil is supposed to represent the actual equality of all moral persons. Rawls believes that this equality exists in virtue of characteristics that make people moral persons: their conception of the good, and their sense of justice. Rawls explains that people's value does not correspond to *how much* of a conception of the good or a sense of justice that people have. Instead, he refers to moral personhood as a range property. Like each point on a chart within the lines of a circle is *equally* within the circle (no matter where located within), each individual who meets the sufficient conditions of moral personhood is of equal moral value.¹⁹

Most animals do not meet Rawls' sufficient condition for moral personhood. Since equality behind the veil is secured in virtue of moral personhood, it is not clear that Rowlands is correct that animals deserve representation, *no matter how little anyone merits being born human instead of non-human*. Rowlands thinks that the extension of equal representation to animals can follow from Rawls' example of a range property (i.e. the property of being interior to a circle).

¹⁹ Rawls, John. pp 508 *A Theory of Justice*.

In Rawls discussion of the mentally disabled, it is easy to see why Rowlands has grounds for thinking that Rawls' theory of justice might provide equality for all animals and humans.

“It should be stressed that the sufficient condition for equal justice, the capacity for moral personality, is not at all stringent. When someone lacks the requisite potentiality either from birth or accident, this is regarded as a defect or deprivation. There is no race or recognized group that lacks this attribute. Only scattered individuals are without this capacity, or its realization to a minimum degree, and the failure to realize it is the consequence of unjust and impoverished social circumstances, or fortuitous contingencies. Furthermore, while individuals presumably have varying capacities for a sense of justice, this fact is not a reason for depriving those of lesser capacity of the full protection of justice. Once a certain minimum is met, a person is entitled to equal liberty on a par with everyone else... provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice.”²⁰

Rawls cannot extend equality to all human beings by describing moral personhood as a range property. There are some human beings without *any* conception of the good and without *any* sense of justice. At least, there are some human beings without any greater amount of these characteristics than the amount that many animals possess. On the other hand, there are some animals that probably do, according to Rawls's account of moral personhood, count as moral persons (perhaps great apes, dolphins, and elephants). However, Rowlands is wrong too.

Rawls' description of who falls within the range of having the property of moral personhood does not describe most animals.

If Rawls can justify the representation of all humans and no animals behind the veil then the justification will have something to do with the irrelevancy of “fortuitous circumstances” to moral equality. Furthermore, “fortuitous circumstances” will have to *include* the varied circumstances of genetic disorder, conception, birth, and accident, and *exclude* genetic differences underlying species membership. Rawls tries to make this distinction by appealing to

²⁰ Rawls, John. pp 506-507 *A Theory of Justice*.

potentiality.²¹ Rawls thinks that humans have the potential to be moral persons, animals do not.

He admits that there are still some problems with this distinction.

“A full discussion would take up the various special cases of lack of capacity. That of children I have already commented upon briefly in connection with paternalism. The problem of those who have lost their realized capacity temporarily through misfortune, accident, or mental stress can be regarded in a similar way. But those more or less permanently deprived of moral personality may present a difficulty. I cannot examine this problem here, but I assume that the account of equality would not be materially affected.”²²

Those more or less permanently deprived have no more potential for moral personhood than do animals.

Rawls’s theory does not force him to exclude either animals or the mentally disabled from representation behind the veil. He explains *who* the recipients of justice will be in the following way,

“We use the characterization of the persons in the original position to single out the kind of beings to whom the principles chosen apply. After all, the parties are thought of as adopting these criteria to regulate their common institutions and their conduct toward one another; and the description of their nature enters into the reasoning by which these principles are selected. Thus, equal justice is owed to those who have the capacity to take part in and to act in accordance with the public understanding of the initial situation.”²³

In this passage, Rawls explains who is owed justice by looking at the make-up and the choices of the agents behind the veil of ignorance. Yet, the set-up of the veil of ignorance is supposed to represent our intuitions and discernments about what should and shouldn’t be factored into decisions about just policies.²⁴ That is, we must determine the thickness of the veil of ignorance by what characteristics of individuals we think should not influence their decisions. In the

²¹ Rawls, John. pp 505 *A Theory of Justice*.

²² Rawls, John. pp 509-510 *A Theory of Justice*.

²³ Rawls, John. pp 505 *A Theory of Justice*.

²⁴ Rawls, John. pp 18 *A Theory of Justice*. “Thus it seems reasonable and generally acceptable that no one should be advantaged or disadvantaged by natural fortune or social circumstances in the choice of principles. It also seems widely agreed that it should be impossible to tailor principles to the circumstances of one’s own case” (18).

passage quoted above, Rawls determines who is a recipient of justice based on the qualities and decisions of the agents behind the veil that he has already established are *not* blind to species membership and, perhaps, not blind to severe cognitive deficiency. He is working in the wrong direction!

We must determine, before contriving the set-up of the original position, who is owed equal justice. Tom Regan thinks that all good theories of justice have at least this much in common: a formal principle of justice:

“That [formal principle of justice] requires that that all individuals be given their due, something we fail to do if similar individuals are treated dissimilarly. The principle is said to be a formal principle because by itself it does not specify what individuals *are* due. The principle implies only that, whatever this is, justice will not be done if, without being able to cite a morally relevant difference, individuals are treated differently.”²⁵

As we have seen already, Rawls has failed to pinpoint a morally relevant difference between the permanently cognitively disabled and animals who have the same capacities. Either Rawls must be willing to deny representatives behind the veil to the permanently disabled, or he must extend representation to animals, or he must endorse a theory that distinguishes between individuals on morally irrelevant grounds and so breaks the formal principle of justice that Regan describes. I will assume that the latter is not an option for Rawls.

When Rawls considers whether or not the capacity of moral personhood is a necessary condition for being the subject of claims (he never decides whether it is), he says, “Even if the capacity were necessary, it would be unwise in practice to withhold justice on this ground. The risk to just institutions would be too great.”²⁶ So, perhaps Rawls can claim that denying justice from humans that, due to their mental deficiencies, are not *owed* justice is wrong because it compromises just institutions, whereas denying justice from animals does not carry this danger.

²⁵ Regan, Tom. pp. 232 *The Case For Animal Rights*. Routledge & Kegan Paul. London: 1983.

²⁶ Rawls, John. pp 506 *A Theory of Justice*.

Are we really prepared to say that the cognitively disabled should only be protected as a means to protecting our just institutions? Regan expresses his concerns for this sort of status for human “morons,”

... we owe it to them not to treat them in certain ways, not out of niceness, or sentimental interest, or because they provide a sort of “warm-up” for the really serious moral game played between rational free beings, or because treating them thus is optimistic—rather, we owe it to them not to treat them in certain ways because they themselves have a moral right not to be treated in these ways.²⁷

Such a right could not be generated without representation behind the veil of ignorance.

It is completely possible that, if Rawls had carried on with his discussion of the mentally deficient, he would have concluded that we owed them nothing, least of all equality. What I have attempted to do, so far, is defend Rowland’s claim that there is no principled reason why moral personhood, as Rawls defines it, *need* be a condition for representation. In fact, the passages quoted above suggest that Rawls’s *does* want to offer protections to the permanently cognitively disabled, waives as to how far to extend moral personhood, and waives as to the necessity of moral personhood for being represented in the original position. It seems that Rawls’s theory of justice is, at least, *open* to representation, though it clearly does not entail representation, for animals and humans who are not moral persons behind the Veil.

Rawls might have argued that humans who are not moral persons (according to his definition), unlike animals, are subjects of *justice*. We must have special reasons of justice for turning ethical obligations into political obligations. We have such reasons in the case of protections for animals. Without political protections, we can expect very little from human’s with respect to fair treatment of animals. Humans often cause animal suffering and animal death

²⁷Regan, Tom. pp. 322. “Utilitarianism, Vegetarianism, and Animal Rights.” *Philosophy and Public Affairs*, Volume 9, Issue 4 (Summer, 1980), 305-324).

for the sake of their own “most trivial interests.”²⁸ Rawls thinks that they do not deserve the protections of the two principles of justice. “Presumably this excludes animals; they have some protection certainly but their status is not that of human beings.”²⁹ However, he does grant them “some protection.” However little protection he might have in mind, Rawls thinks that the answer to the question, “what do we owe animals?” involves more than just an appeal to individual morality. It is a matter of justice.

Indeed, grounding for the inclusion of animals in a theory of justice can be seen in Rawls’s initial discussion of the role of justice. Rawls says,

Although a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as by an identity of interests. There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts. There is a conflict of interests since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share.³⁰

Even if animals are not voluntary collaborators in human projects, the efforts of their collaboration produce benefits that are the subject of Rawls’s distributive justice. Their interests conflict with human interests in terms of how these benefits are garnered and distributed.

Human and animal interests could potentially be shared if the benefits of animal and human efforts were directed toward certain projects.

Animals interests are affected by human affairs. Even animals living in remote rain forests may have their interests compromised by climate change, or by other species moving into their environmental niche due to deforestation at the forest margins. If a benefit to humans (or to some humans) is obtained or, in the course of ordinary human affair *could* be obtained at the cost

²⁸ Singer, Peter. pp. 23. *Animal Liberation*. Avon Books. New York: 1975 Humans are willing to kill and cause suffering to animals in order to eat food that tastes slightly better to them than other food, to wear clothing that is slightly prettier to them, to wear cosmetics that might otherwise be deemed unsafe in order to look prettier.

²⁹ Rawls, John. pp 505. *A Theory of Justice*.

³⁰ Rawls, John. pp 4. *A Theory of Justice*.

to some animal (or, perhaps, species of animals), this is sufficient reason to list the animal as a member of the community that is the subject of justice. This being established, there is no more reason recognized in this paper for morally distinguishing humans who are non-moral persons from animals who are non-moral persons. In what follows, my discussion of animals can be assumed to apply to all humans and non-humans who fail to satisfy Rawls's conditions for moral personhood.

4. Can Rawls's Contractarianism Secure the Two Principles of Justice for Animals?

Rowlands' primary theses are that Rawls's contractarianism (i) is open to and (ii) entails direct duties of justice to animals. Though I have found Rowlands' support for these theses insubstantial, I have laid out what I believe to be a substantial argument for (i) in the previous section. Rowlands does not argue for the conclusion that animals are owed protection from Rawls's two principles of justice. However, he wraps up his paper by suggesting that this application could follow from the conclusion that animals deserve representation in the Original Position. Rowlands points to passages from *A Theory of Justice* in which Rawls opposes the protection of the two principles of justice for animals.

Our conduct toward animals is not regulated by these principles, or so it is generally believed.³¹

Presumably this excludes animals; they have some protection certainly but their status is not that of human beings.³²

While I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity.³³

³¹ Rawls, John. pp. 20 *A Theory of Justice*.

³² Rawls, John. pp. 21 *A Theory of Justice*.

³³ Rawls, John. pp. 22 *A Theory of Justice*

Rowlands explains these claims away by pointing out the uncertainty embedded in each. Rawls says, “or so it is not generally believed,” and “presumably,” and “it does not seem.”

It is tempting to think that Rawls’s contractarianism, when extended to animals, would leave us with something very much like Regan’s account of animal rights (one that is, like Rawls’s, heavily influenced by Kantian moral theory).³⁴ After all, it is clear that animals play a collaborative role in social structures, and that the community that is a subject of justice includes animal members. If representatives of animals are sitting with other representatives behind the veil of ignorance, why wouldn’t they give whoever they represent a package of unalienable basic liberties? Why wouldn’t they maximize the allotment to the worst off?

To answer these questions, we must first address Rawls’s explanation for why agents would choose the liberty principle and the second principle, and the priority of the former. Why *would* agents behind the veil of ignorance choose for everyone to have a package of inalienable liberties that could not be sacrificed for *any* other kind of advantage to society? Why *would* agents behind the veil of ignorance choose to use maximin reasoning instead of using an average-utility calculus to determine principles of justice?

Though Rawls gives satisfactory answers for why representatives of humans would choose the liberty principle and the second principle (and the priority of the former), his answers cannot justify the choice of these two principles by representatives of beings who might be humans and might be animals. Rational agents behind the veil of ignorance will choose Rawls’s two principles of justice to govern humans, but will find that utilitarian-based principles of justice are adequate to govern our treatment of animals.

³⁴ Regan’s view is that animals have basic rights just like people have rights. He thinks that there is intrinsic value in both humans and in animals, and individuals have basic rights in virtue of this intrinsic value. Regan, Tom. *The Case For Animal Rights*. University of California Press. Berkeley: 2004.

5. *An Examination of the Defense of the Priority of the Liberty principle and an Argument that it Fails when Applied to Animals*

Rawls believes that there should be lexical priority of the liberty principle over the second principle. No basic liberty of any individual should ever be traded by society for any distributive advantage. Rawls's justification for this lexical priority has three grounds.³⁵ I'll explain each, and then explain why the grounds fail to justify this lexical priority when the individuals in question are animals.

The first ground for justifying the lexical priority between the principles is that the basic liberties and their priority create a stable environment in which people can develop and sustain a sense of justice. Rawls thinks that when people fear having their basic liberties stripped from them, they cannot have the emotional wherewithal to appreciate living in a just society. Can animals develop and sustain a sense of justice? Rawls says the following about what he means by "a capacity for a sense of justice:"

To be sure, we assume (as do the parties) that citizens have the capacity for a sense of justice, but this assumption is purely formal. It means only that whatever principles the parties select from the alternatives available, the persons the parties represent will be able to develop, as citizens in society, the corresponding sense of justice to the degree to which the parties' deliberations, informed by commonsense knowledge and the theory of human nature, show to be possible and practicable.³⁶

What is practicable and possible for animals does not include an appreciation for, or an understanding of the rules that govern their treatment. It is clear that animals, to our knowledge, will never achieve this, no matter how stable their environment.

The second ground for justifying the lexical priority between the principles is that self-respect is needed for people to develop a sense of justice and to make a life plan and think that

³⁵ Rawls, John. pp. 316 *Political Liberalism*.

³⁶ Rawls, John. pp. 315 *Political Liberalism*.

plan is worth pursuing. “Thus, the parties give great weight to how well principles of justice support self-respect, otherwise these principles cannot effectively advance the determinate conceptions of the good of those the parties represent.”³⁷ Additionally, Rawls thinks that a secure sense of one’s own value is needed to pursue his or her conception of the good, or a “worthwhile plan of life.”³⁸ Even if animals are capable of self-respect, we have already established that even self-respect cannot advance them toward a sense of justice, as Rawls describes it. Similarly, most animals are incapable of carrying out long term plans-of-life, even if some can advance some “conception of the good.”

The third ground for justifying the lexical priority between the principles is that the priority of the basic liberties allows for a “social union of social unions.” People are able to work with each other to live a life better than any one of them would have lived individually (which wouldn’t be the case if some individual’s basic liberty could be compromised).

What makes the social union of social unions possible is three aspects of our social nature. The first aspect is the complementarity between various human talents which makes possible the many kinds of human activities and their various forms of organization. The second aspect is that what we might be and do far surpasses what we can do and be in any one life, and therefore we depend on the cooperative endeavors of others, not only for the material means of well-being, but also to bring to fruition what we might have been and done. The third aspect is our capacity for an effective sense of justice which can take as its content principles of justice which include an appropriate notion of reciprocity.³⁹

Rawls thinks that these attitudes are best secured by the principles of justice.

The first and second of these aspects could be true of animals in a social union. The talents of my cat for mousing combined with my milk-providing talents could lead us both to having a better life than either of us would have had independently (though, perhaps the mouse would have fared better on his own). The third aspect is impossible for animals. Even if

³⁷ Rawls, John. pp. 318-319 *Political Liberalism*.

³⁸ Rawls, John. pp. 319 *Political Liberalism*.

³⁹ Rawls, John. pp. 322 *Political Liberalism*.

animals *might* be able to appropriate some notion of reciprocity, they cannot do so as part of Rawls's conception of a sense of justice.

This section has established that Rawls's contractarianism cannot justify lexical priority between the two principles for governing our treatment of animals. This means that basic liberties that we might assign to animals (freedom from slavery, etc.) might be justly traded for other benefits, so long as the resulting distribution still maximizes the lot for the worst off. If the liberty principle doesn't have priority over the difference principle when governing our treatment of animals then, for animals, the liberties are just another form of primary goods.

6. An examination of Rawls's argument that, behind the veil, rationality demands maximin reasoning

Rawls thinks that the second principle is chosen by agents in the original position because it is rational to use maximin decision-making instead utility averaging reasoning behind the veil. If agents behind the veil of ignorance were to do an average utility calculus in choosing principles of justice, they might allow for very poor conditions for a very small minority of society if such conditions could yield a sufficient amount of benefit to a great majority.⁴⁰

Rawls gives the following argument for why it is rational for agents in the original position to maximin, which leads to choosing his two principles, instead of averaging utility:

- (i) If there are certain conditions in which it is rational to be guided by the maximin rule when agreeing to principles of justice for the basic structure, then under those conditions the two principles of justice would be agreed to rather than the principle of average utility.
- (ii) There are certain conditions, three in particular, such that, when they obtain, it is rational to be guided by the maximin rule when agreeing to principles of justice for the basic structure.
- (iii) These three conditions obtain in the original position.

⁴⁰ Harsanyi presents a scheme for social justice very much like Rawls' original position except that agents maximize utility. Harsanyi, J. (1977), Rational behavior and bargaining equilibrium in games and social situations. Cambridge University Press.

(iv) Therefore, the two principles would be agreed to by the parties rather than the principle of average utility.⁴¹

The three conditions referred to in premises (ii) and (iii) are as follows:

(a) The first condition is that the parties have no reliable basis for estimating the probabilities of the possible social circumstances that affect the fundamental interests of the persons they represent. This condition fully obtains when the concept of probability does not even apply.

(b) Let's call the best worst outcome the "guaranteeable level." The second condition obtains, then, when the guaranteeable level is itself quite satisfactory. It fully obtains when this level is completely satisfactory.

(c) The third condition is that the worst outcomes of all the other alternatives are significantly below the guaranteeable level. When those outcomes are far below that level and altogether intolerable, and must, if possible, be avoided, the third condition fully obtains.⁴²

The soundness of Rawls's argument for the two principles over the principle of average utility depends upon whether the three conditions above obtain and whether, in those conditions, it is rational to maximin. I will assume that Rawls is correct that, in such conditions, it is rational to maximin. Based on premise (ii) it seems clear that Rawls intended for these three premises to be only *jointly* sufficient for rationalizing maximin decision making.⁴³

I will argue that, though these three might obtain for the representatives of humans in a society, they no longer *all* obtain if some agents (though no one knows which) represent animals. Whether these conditions obtain when humans *and* animals are represented depends entirely on what Rawls means by "satisfactory level." Either the satisfactory level is set at a quality of life obtainable by humans only, in which case (b) does not obtain, or it is set at a level obtainable by all animals, in which case (c) does not obtain, or it is set at different, species-specific levels, in which case (b) does not obtain. I believe that the human-standard satisfactory level, the animal-standard satisfactory level, and the species-specific satisfactory levels constitute an exhaustive

⁴¹ Rawls, John. pp. 97-98 *Justice as Fairness*

⁴² Rawls, John. pp. 98 *Justice as Fairness*

⁴³ If Rawls had intended that any subset of these conditions be sufficient to justify maximin decision making behind the veil of ignorance, he, presumably, would have said so here.

list of good possibilities for what “satisfactory level” could mean when applying these three conditions to both humans *and* animals.

Rawls wants members of society to each live a life emotionally stable enough to cultivate a sense of justice and to pursue a formed conception of the good.⁴⁴ Rawls envisions literacy, projects, and rich social bonds to constitute a satisfactory life level. Almost no animal could ever be at a “satisfactory level” if that level was determined by what a minimally fulfilling life for a human might be (especially if the level was determined by what Rawls’s envisions as a minimally fulfilling life). In this case, condition (b) would fail to obtain, because the worst off (some animal species) would always, even in the best conditions, fall far below the “satisfactory level.”

However, if Rawls had envisioned a just society in which the principles of justice were formed to protect the satisfactory lives of animals, it would have been reasonable for him to have lowered his standards for what it meant to have a life at a satisfactory level. Imagine a fish has a satisfactory life when it is free to swim downstream, explore, and have its life eventually ended by internal decay or by the swift jaws of a bigger fish. If this standard were satisfactory (or, as the third condition says, tolerable) then, so long as we prohibit merciless practices like factory farming and sweatshop labor we could easily have *many* options for principles of justice, certainly ones that depend upon utility maximization, which would produce tolerable lives for the worst off. In this case, condition (c) would fail to obtain because alternatives to providing a “gauranteeable level” to the worst off could still provide them with satisfactory levels of living.

Maybe a satisfactory level for animals is a species-specific notion. Perhaps a human’s quality of life can only be satisfactory if she can read, participate in her democracy, be well nourished, build relationships, and have somewhat equal opportunities compared to other

⁴⁴ Rawls, John. pp. 18 *Political Liberalism*

humans (at least, equal access to offices and positions). However, perhaps a mouse's quality of life is satisfactory if she can nest, gather food, and raise baby mice without being traumatized by the threats of a dangerous environment, or one insufficiently laden with food-resources.

The problem with the species-specific account of a "satisfactory level" is that the means required for obtaining satisfactory levels for human beings are often in conflict with the existence of satisfactory levels for animals. Similarly, the existence of satisfactory levels for some animals is in conflict with the maintenance of satisfactory levels for other animals.

Humans needed to overtake the homeland of animals to build societies in which people can now attempt to form "social unions of social unions." Humans must protect society from dangerous or disease-carrying animals, which often involves interrupting and destroying the lives of these animals. There are similar conflicts between land use and competition for food from animal species to animal species.

While eating meat is not necessary for humans to live at a perfectly satisfactory level, it is debatable whether animal research isn't needed to cure diseases that would otherwise drag humans below a satisfactory level. Certainly scientific testing must be done in order to approximate the effectiveness and safety of drugs; if animals aren't used, human subjects might be needed in greater numbers and at earlier stages of drug development, perhaps sacrificing the satisfactory level of some humans. If satisfactory species-specific levels cannot be met by both animals and humans then, using the species-specific standard, condition (b) fails to obtain.

One might respond to the proposal that inter-specific conflict renders a failure in condition (b) by saying that sometimes the satisfactory levels of humans are in conflict with one another. For instance, many humans live in regions in which the nutrient resources are so scarce as to require some humans to fall below a satisfactory level. With a shortage of donated organs,

humans suffering from organ failure will fall below a satisfactory level unless other humans are required to give up their organs, a requirement that would drag many below satisfactory levels. These sorts of conflicts make it questionable whether maximin reasoning is rational for choosing *any* policies in the Original Position.

Rawls could defend his view that condition (b) is required for the rationality of maximin reasoning *and* that the set of moral persons can satisfy (b) by examining each conflict case by case. Perhaps there would be no conflict between people being well nourished if governments otherwise operated in accordance with the two principles of justice. Perhaps dying of natural, bodily causes, when there is no known or justly obtainable cure, even at a young age, is not a condition that puts one below the satisfactory level (in which case, neither cases of organ failure *nor* scientific research on animals would give rise to conflicts in the implementation of justice). Though I may not have adequately resolved the problem of intra-specific conflict for condition (b), defending Rawls's own position on the rationality of maximin reasoning is not a primary concern of my paper.

Distribution will look dissimilar to what Rawls himself imagined as an ideal. A utilitarian principle must govern the distribution of goods and protections among humans and animals, except that human's basic liberties must always be protected, and the second principle of justice needs to be upheld for humans. The result is that the worst off humans *might* be worse off than they are in a Rawlsian ideal that excludes duties of justice from animal recipients. However, the utilitarian principle would probably afford animals more *protections* than it affords them redistributed income. For instance, it is clear that utilitarianism demands the protection of animals from factory farming, but very improbable that utilitarianism would demand spending

money on material goods for animals. The utilitarianism protections of animals (from factory farming, from environmental degradation) would probably, ultimately, benefit all humans.⁴⁵

In this paper I have argued that Rowlands is wrong in saying that a consistent application of Rawls's contractarianism entails duties of justice to animals. However, I have argued that Rawls's contractarianism, when his basis for equality deals consistently with human and non-human moral persons, as it should do, is open to the inclusion of direct duties of justice for animals. I have argued that Rawls's rationale for choosing his two principles of justice to govern our treatment of humans in an ideal society fails to justify choosing his two principles to govern our treatment of animals in a just society. We might instead choose a hybrid approach that combines Rawls's two principles to govern our treatment of humans with one of a few variants on utilitarianism to govern our treatment of animals. Though I have concluded that Rawls's contractarianism gives us no reason to prefer the two principles of justice over a utilitarian principle for governing our treatment of animals, I have not specified which hybrid approach would be the *most* rational choice for representatives of humans and animals in the Original Position. However, I have made some suggestions as to what sorts of steps we might take toward any one of these hybrid options.

⁴⁵ Factory farming's economic efficiency relies on the ability of factories to pollute water ways without cost, and to mono-harvest corn to produce cow feed instead of using land for cow grazing. These two practices are unsustainable methods of agriculture (Bittman, Mark. "Rethinking the Meat Guzzler." in the New York Times (Jan. 28, 2008).
http://www.nytimes.com/2008/01/27/weekinreview/27bittman.html?pagewanted=1&_r=1