

Species Membership and the Veil of Ignorance: What Principles of Justice *would* the Representatives of all Animals Choose?

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Mark Rowlands gives a compelling argument that, if John Rawls's contractarianism is consistently applied, and Rawls's premises fully explained, then we have powerful reasons to believe 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 I argue that even if we suppose this to be correct, these agents would not choose the two principles of justice, but instead ones that more closely resemble utilitarian principles.

Philosophers have long-standing doubts about the ability of contractarian theories of justice to handle our political duties to non-human animals, and to some human beings who lack cognitive functioning. Almost all of this discussion has focused on whether animals should or can be represented by those involved in the contracting process. However, there is another interesting question to ask: what type of contract would such representatives design? In this article, I explore some of the significant ways in which contractarianism would yield different results for the shape of justice, depending on whom it served. In particular, I examine the contractarian theory of John Rawls – and how the deliberative process of agents behind his Veil of Ignorance would be different if the agents knew that they might be representing non-human animals (which I will from here on refer to as 'animals'). I conclude that the principles that agents *who might be representing animals* would choose behind the veil would more closely resemble utilitarianism than they would the two principles introduced by Rawls.

¹ Mark Rowlands, *Animal Rights: Moral Theory and Practice*, 2nd edn. (London, 2009). More recently, Rowlands's argument has been used as the basis for other inquiry into contractarianism and duties to animals. Julia Tanner, for instance, accepts Rowlands central argument but suggests that there are some circumstances in which contractarianism would allow for animal research. See Julia Tanner, 'Rowlands, Rawlsian Justice and Animal Experimentation', *Ethical Theory Moral Practice* 14 (2011), pp. 569–87.

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 which agents behind Rawls's Veil of Ignorance make choices using reasoning that diverges from strictly utilitarian reasoning. Rawls thought that it was, specifically, maximizing average-utility reasoning that was the main competitor to *maximin* reasoning. I will later explain why he believed that 'maximizing average utility' was the main competitor to *maximin reasoning*, and the most obvious approach for agents behind the veil to use, if it were not for his special arguments in favor of *maximin*. For the reasons that Rawls himself provides, I will take on this assumption.

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). Instead of getting animals anything in the order of rights, the Rawlsian approach yields applied conclusions for animals more similar to those advanced by Peter Singer.

In [sections I and II](#), I lay out Rawls's arguments for his two principles, and Rowlands's argument that Rawlsian justice can be extended to animals. In [section III](#) I carefully lay out the *basis* for equality that Rawls puts forward. I argue that Rawlsian justice is open to but does not entail political justice for animals. In [sections IV–VI](#) I argue that, if animals were represented behind Rawls's Veil of Ignorance, the deliberating agents would not choose the two principles of justice. In [section VII](#) I explore a variety of 'hybrid' options from which such representatives might rationally choose.

I. 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).²

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.

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.³

- 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, {P₁, P₂, . . . 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.⁴

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 collaborative endeavour.⁵ 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

² John Rawls, *Justice as Fairness: A Restatement* (Cambridge, 2001), pp. 42–3.

³ Mark Rowlands, 'Contractarianism and Animal Rights', *Journal of Applied Philosophy* 14.3 (1997), pp. 235–7, at 238.

⁴ John Rawls, *A Theory of Justice* (Cambridge, 1999), p. 9.

⁵ Rawls, *Theory of Justice*, p. 4.

⁶ Rawls, *Theory of Justice*, p. 63.

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 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 towards 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). 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'.⁸ 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 of people's rational preference, in circumstances of justice, for basic liberties over other primary goods.⁹

II. MARK ROWLANDS'S ARGUMENT FOR WHY THE REPRESENTATIVES OF ANIMALS DESERVE REPRESENTATION 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. 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

⁷ Rawls, *Theory of Justice*, p. 10.

⁸ John Rawls, *Political Liberalism* (New York, 1996), p. 282.

⁹ Rawls, *Political Liberalism*, p. 63.

both non-rational humans *and* animals. Rowlands points out that ‘the fact that it is (ideally) rational agents who, in the original position, are responsible for formulating the principles of morality does not entail that these principles subsume, or apply to, only rational agents’.¹⁰ Rowlands argues that Rawls’s view allows for direct duties of justice to animals. Note that 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.¹¹

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.’¹² This leaves Rawls’s contractarianism *open* to including duties of justice for animals.

On Rowland’s adaption of Rawls’s theory, duties to animals are entailed by the same moral considerations that provided the premises for Rawls’s two arguments: the intuitive equality argument and the Veil of Ignorance argument. Rowlands explains that the Veil of Ignorance argument is crucially dependent on the intuitive equality argument.¹³ ‘That is, one important way of justifying a description of the original position is that it yields the sort of principles which emerge from the intuitive equality argument.’¹⁴

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. 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 does not allow people to benefit from unmerited resources unless it benefits the least advantaged.

¹⁰ Rowlands, *Animal Rights*, p. 148.

¹¹ Rawls, *Theory of Justice*, p. 18.

¹² Rawls, *Theory of Justice*, p. 18.

¹³ Rowlands, *Animal Rights*, pp. 139-42.

¹⁴ Rowlands, *Animal Rights*, p. 139.

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. Rationality, like other talents and abilities, is undeserved, and so, given the intuitive equality argument, we must be blind to rationality behind the Veil of Ignorance, just as we are blind to race, athletic ability, etc.¹⁵

Though Rawls insists that natural assets are not to be redistributed and that people have a right to what they acquire through their natural abilities and a fair social process, he does think that the resources people accrue because of natural talents must still be garnered in accord with the second principle.¹⁶ 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 in so far 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 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.

III. IN VIRTUE OF WHAT IS ANYONE REPRESENTED BEHIND THE VEIL?

The topic of my article is: *if* animals were represented behind the Veil, what principles of justice would they choose? It is a follow-up question to Rowlands's conclusion that animals ought to be so represented. However, before answering this conditional question, it seems important to offer some analysis of the antecedent, taken from Rowlands. In this section, I will do some mining of Rawls's texts

¹⁵ Rowlands, *Animal Rights*, p. 149.

¹⁶ Rawls, *Political Liberalism*, p. 283: '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.' Also, on p. 284: '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.'

and argue that the account does not itself entail the representation of animals. However, it should – and must if it going to offer any protections for the severely mentally disabled. My analysis here does not amount to either an objection to or a defence of Rowlands – as his own moral theory is, at most, a neo-Rawlsian account and tailored to the moral and not the political realm. However, if you are happy to accept Rowlands's conclusion as a plausible extension of Rawls's own contractarianism, which is the antecedent of my own question, then you might find it useful to skip this section.

Behind the Veil, all agents are treated equally. All agents participating in the process of choosing principles of justice stand as much chance of becoming rich, 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. Just as 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.¹⁷

Most animals do not meet Rawls's sufficient condition for moral personhood. Therefore, it is not clear 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's example of a range property (i.e. the property of being interior to a circle). In Rawls's discussion of the mentally disabled, it is easy to see that Rawls's theory of justice has the resources to 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

¹⁷ Rawls, *A Theory of Justice*, p. 508.

on a par with everyone else . . . provided the minimum for moral personality is satisfied, a person is owed all the guarantees of justice.¹⁸

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, Rawls's 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 potentiality.¹⁹ 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.²⁰

Those humans more or less permanently deprived have no more potential for moral personhood than do animals. Should we find it acceptable for Rawls to extend justice to them and not to animals?

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 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.²¹

¹⁸ Rawls, *A Theory of Justice*, pp. 506-7.

¹⁹ Rawls, *A Theory of Justice*, p. 505.

²⁰ Rawls, *A Theory of Justice*, pp. 509-10.

²¹ Tom Regan, *The Case For Animal Rights* (London, 1983), p. 232.

As we have seen already, Rawls has, thus far, failed to pinpoint a morally relevant difference between the permanently cognitively disabled and animals who have the same capacities. However, Rawls is not merely engaging moral questions, but political ones.

Perhaps animals and humans alike, who are lacking in rational capacities, need equal moral consideration. However, there might be features of non-rational humans that give agents in the original position special reasons to provide them, and not animals, with political protections:

- (a) rational agents would desire protections for non-rational humans because these humans would be their family members and loved ones. So, non-rational humans would get protections, perhaps even rights, even without representation behind the Veil;
- (b) their *dependence* on our social and political institutions gives them a claim to actual representation.

Let us take (a) first. This provides us with a good way of distinguishing between non-rational humans and animals in the political sphere. It would certainly avoid conflicting with Regan's formal principle. However, are we really prepared to say that the cognitively disabled should only be protected as a means to satisfying the desires of rational agents? Regan expresses his concerns for this sort of status.

[W]e 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 *optimific* – 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.²²

Even if, on (a), the chosen principles of justice would offer political rights and protections to non-rational humans, Regan's concern can still be applied to the set-up of the Original Position, and the reasons for which they acquire these rights. Rational agents choose principles that protect non-rational humans because, given what they know about human psychology, and the emotions they are bound to experience toward other humans, they believe that offering political protections to all humans, even those not represented behind the Veil, is *rationaly optimific*. After all, they might be born into the world as the family member of a non-rational human. I believe this solution to be unsatisfactory. However, it is certainly a solution open to Rawls that

²² Tom Regan, 'Utilitarianism, Vegetarianism, and Animal Rights', *Philosophy and Public Affairs* 9.4 (1980), pp. 305–24, at 322.

would both allow him to exclude representation for animals as well as offer significant protections to non-rational humans.

Let us now consider (b). Many animals who live on earth will never encounter a human being. Whereas, most non-rational humans will be in constant contact and experience continual dependence on other humans. Now, those animals who do interact with humans can hardly be described as depending on human society – except perhaps for the food and antibiotics that keep them miserably alive until their slaughter. In fact, most such animals are, if anything, harmed by being brought into an existence filled so exclusively with suffering. Whereas, non-rational humans are often sustained and kept comfortable by the humans who care for them. If dependence on social systems is sufficient for inclusion in Rawlsian justice, then non-rational humans might be more entitled to such justice than are animals with similar cognitive abilities.

Rawls is clear that the role of justice is tied to the structure of social cooperation.

Let us assume, to fix ideas, that a society is a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them. Suppose further that these rules specify a system of cooperation designed to advance the good of those taking part in it.²³

We do not ordinarily think of animals as ‘taking part in’ a system of cooperation that includes humans. There are certain animals that, non-voluntarily, contribute their services to human needs, but these animals can be better characterized as serving a slave role than a cooperative one.

Rawls certainly thinks that animals 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.’²⁴ 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 some political protection – not just the moral consideration of individuals.

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

²³ Rawls, *A Theory of Justice*, p. 4.

²⁴ Rawls, *A Theory of Justice*, p. 505.

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.²⁵

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. Perhaps this passage explains why we might owe duties of justice to the animals that we force to collaborate with us (e.g. animals we use for food and labour). Their interests clearly conflict with human interests in terms of how these benefits are garnered and distributed. Humans often cause animal suffering and animal death for the sake of their own 'most trivial interests'.²⁶ This is a satisfying result in that it explains why we might owe it to cows not to cause them suffering in factory farms, but not owe it to rabbits to save them from foxes.

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. Considerations like these alone would be enough for some theorists to consider animals the appropriate recipients of political justice.²⁷ However, the conflict of interests does not stem from or produce any behaviour that could be considered 'collaboration'. It is true that most animals' efforts are not used to promote human affairs or, if they are, it is in a remote way, perhaps with respect to their role in the planetary ecosystem.²⁸ Whereas, almost all non-rational humans play a role in human social projects – even if just in the project of inspiring family engagement and providing an object of familial care.

²⁵ Rawls, *A Theory of Justice*, p. 4.

²⁶ Peter Singer, *Animal Liberation* (New York, 1975), p. 23.

²⁷ Sue Donaldson and William Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford, 2011).

²⁸ Aldo Leopold, 'The Land Ethic', in *A Sand County Almanac* (Oxford, 1949). Aldo Leopold suggests extending the moral community to all members of the ecosystem. Even if we do want to say that non-sentient members of an ecosystem have interests (Singer would say they do not, Judith Jarvis Thomson would say they do), what matters in the Original Position is that it would be irrational for an agent who might become a flower to make policies just for the sake of protecting the interests of the flower. This is because a rational agent, though she will care whether she will become a sentient creature or a flower, will not care if the flower she becomes goes plucked or unplucked. Even if things can go better or worse for something that is non-sentient, as Thomson argues, it will not matter to the non-sentient thing if affairs get better or worse for it (Judith Jarvis Thomson, 'The Right and the Good', *The Journal of Philosophy* 94 (1997), pp. 290–8). Because any representative of a flower, if he knew he was one, would, rationally, experience complete ambivalence as to what principles of justice were chosen in the Original Position, it seems safe to assume that there is no reason of justice to include the representatives of non-sentient beings behind the Veil.

In this section I have explained why Rawls has open to him some grounds for justifying the exclusion of animals from representation behind the Veil. However, I find one such grounding (a) to be highly unsatisfactory, since the protections afforded to non-rational humans would only be derivative of the interests of rational humans. I find the other (b) to be incomplete – as it would not ground the exclusion of all animals. It is these concerns that make my project well worth pursuing. *If* animals were represented in the Original Position, what principles would they choose?

IV. CAN RAWLS'S CONTRACTARIANISM SECURE THE TWO PRINCIPLES OF JUSTICE FOR ANIMALS?

Rowlands's 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's support for his second thesis somewhat insubstantial, I have endorsed and contributed to his case for the first. Rowlands does not argue for the conclusion that animals are owed protection from Rawls's two principles of justice. However, he wraps up his article 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.²⁹

Presumably this excludes animals; they have some protection certainly but their status is not that of human beings.³⁰

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.³¹

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).³² After all, it is clear that animals play a

²⁹ Rawls, *A Theory of Justice*, p. 20.

³⁰ Rawls, *A Theory of Justice*, p. 21.

³¹ Rawls, *A Theory of Justice*, p. 22.

³² Regan's view is that animals have basic rights just like people have rights (Regan, 'Utilitarianism, Vegetarianism, and Animal Rights', p. 322).

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 whomever 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 correctly decide that utilitarian-based principles of justice are adequate to govern our treatment of animals.

V. AN EXAMINATION OF THE DEFENCE 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.³³ 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':

³³ Rawls, *Political Liberalism*, p. 316.

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.³⁴

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 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.'³⁵ 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'.³⁶ Even if animals are capable of self-respect, we have already established that even self-respect cannot advance them towards 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 would not 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.³⁷

³⁴ Rawls, *Political Liberalism*, p. 315.

³⁵ Rawls, *Political Liberalism*, pp. 318–19.

³⁶ Rawls, *Political Liberalism*, p. 319.

³⁷ Rawls, *Political Liberalism*, p. 322.

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 to us both 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 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 does not have priority over the difference principle when governing our treatment of animals then, for animals, the liberties are just another form of primary goods.

VI. 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 of 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.³⁸

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.

³⁸ Harsanyi presents a scheme for social justice very much like Rawls's original position except that agents maximize utility. John Harsanyi, *Rational Behavior and Bargaining Equilibrium in Games and Social Situations* (Cambridge, 1977).

- (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.
- (iv) Therefore, the two principles would be agreed to by the parties rather than the principle of average utility.³⁹

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.⁴⁰

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*. From premise (ii) it seems clear that Rawls intended for these three premises to be only *jointly* sufficient for rationalizing *maximin* decision-making.⁴¹

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

³⁹ Rawls, *Justice as Fairness*, pp. 97-8.

⁴⁰ Rawls, *Justice as Fairness*, p. 98.

⁴¹ 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.

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 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.⁴² 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 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 labour 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 'guaranteeable 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 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.

⁴² Rawls, *Political Liberalism*, p. 18.

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 is not 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 are not 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 article.

VII. HYBRID POSSIBILITIES

As we have just seen, the three conditions that could justify the use of *maximin* decision-making over utility averaging do not obtain when some agents in the original position represent animals. Rawls's justification for the lexical priority of the liberty principle over the second principle and his argument for the rationality of *maximin* decision-making (which yields the second principle of justice) are the only justifications Rawls gives for the rationality of preferring such principles over one of average utility. Both fail to justify using such principles to govern our treatment of animals. It is true that Rawls's theory, when consistently applied, does entail a seat for the representatives of animals behind the Veil of Ignorance. It is possible that other reasons exist that could justify a preference for Rawls's two principles over consequentialism for governing our treatment of animals. However, Rawls's contractarian theory of justice cannot provide us with reason to favour his two principles of justice over a utilitarian principle for governing our treatment of animals.

A society governed by the hybrid of (a) Rawls's two principles of justice for people, with the priority of the first, and (b) some utilitarian principle of justice for our treatment of animals would look unlike Rawls's contractarianism *and* unlike a society governed by the use of a strict utilitarian principle. Such a hybrid theory of justice would amount to a set of utilitarian-based laws made up of defeasible protections and distributional prescriptions with the *limitation* of Rawls's two principles (with priority of the former limitation): (1) humans' basic liberties must never be violated, and (2) any inequality must be attached to offices and positions open to all under conditions of fair equality of opportunity *between the sufficiently rational humans* and such inequality should only be allowed if it benefits the worst-off *sufficiently rational humans*.

Up until now I have, like Rawls, compared the two principles to policies formed to maximize average utility. Serious distributive problems arise when policies aim to maximize average utility; these problems would arise even if the policies were constrained by the security of Rawls's two principles for humans. Since Rawls ruled in favour of his two principles over utility maximization for the members of society he counted as being owed justice, there was never any reason for him to address the problems of average utility maximization. Indeed, if he had failed to adequately show that his two principles were what representatives of only humans would choose behind the Veil, then it might have been necessary for him to investigate the problems of utility averaging.

Derek Parfit compares the maximization of average utility with the maximization of overall utility.⁴³ Maximizing overall utility results in what Parfit calls the ‘repugnant conclusion’. For any distribution of individuals and their welfare that could exist, no matter how high that welfare might be, there would be *a* better world in which there were a much larger group of people all living lives barely (but still) worth living. If the maximization of overall utility were constrained only by Rawls’s two principles for governing our treatment of humans, then we’d have to pursue the generation of as many humans and animals as could live worthwhile lives before humans’ basic liberties were compromised. I shall refer to this hybrid possibility as Hybrid Max.

While maximizing overall utility looks undesirable, maximizing average utility is also problematic. For any distribution of individuals and their welfare that could exist, no matter how high that welfare might be, there is *a* better world with only one person living at a higher degree of welfare. Since Rawls’s two principles guarantee the basic right to life as well as, probably, basic reproductive liberties, a hybrid view that combined the two principles for humans with utility averaging more generally would not result in a serious reduction of human beings, especially since a fair number are needed to promote each other’s welfare and primary goods acquisition. However, policies formed to maximize average utility might demand the termination or preclusion of those animal lives that reduce average welfare (whether this reduction is caused by aggravating the welfare of others or by having less-than-average welfare that independently drags down the overall average). Ascertaining such experiential welfare among animals and enforcing such terminations and preclusions of life would be almost impossible, as well as undesirable. I shall refer to this hybrid possibility as Hybrid Average.

Owing to its utilitarian component, an adequate hybrid theory will offer different levels of protective justice to different types of animals. For instance, Peter Singer thinks that the interests various creatures have, and the range of experiential welfare of which they are capable, grounds a difference in moral regard for their lives. This equal respect for equal interests, and the commitment to maximize the interests of individuals, makes Singer an Interest Utilitarian.

While self-awareness, the capacity to think ahead and have hopes and aspirations for the future, the capacity for meaningful relations with others and so on are not relevant to the question of inflicting pain – since pain is pain,

⁴³ Derek Parfit, ‘Overpopulation and the Quality of Life’, *Applied Ethics*, ed. Peter Singer (Oxford, 1986), pp. 145-64, at 145-54.

whatever capacities, beyond the capacity to feel pain, the being may have – these capacities are relevant to the question of taking life. It is not arbitrary to hold that the life of a self-aware being, capable of abstract thought, of planning for the future, of complex acts of communication, and so on, is more valuable than the life of a being without these capacities.⁴⁴

Singer thinks that killing a human is worse than killing a dog, which is worse than killing a lizard. A dog experiences pain just as we do, might be self-aware, develops relationships with gradations of social standing with other (dog or human) individuals, and his means of communication are quite complex (if not as complex as our own). So, a dog has an interest in its own life, and interest in not suffering, and interest in some social status or recognition within its pack (or human family), and an interest in communicating with the other individuals with which he has developed relationships. We can assume that many more interests are lost in the death or deprived life circumstances of a dog than are lost with the death of a lizard.

Interest utilitarianism could be the form of utility incorporated into a hybrid that also offered the protections of Rawls's two principles for moral persons. Policies that favoured the qualitative life circumstances of dogs over lizards, provided they did not infringe on the basic liberties of moral persons, would be preferred by agents in the original position.

Even on the Hybrid view, the resulting policies adopted by agents behind the Veil will look dissimilar to what Rawls himself imagined. A utilitarian principle must govern the distribution of goods and protections among humans and animals, except that humans' 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 well be worse off than they are in a Rawlsian ideal that excludes duties of justice from animal recipients. This result will depend on empirical facts related to the comparative health and environmental benefits of a vegetarian vs omnivorous diet, and how much in the way of financial resources would be required to secure the required protections for animals.

CONCLUSIONS

In this article I have, first, offered an assessment of Rowlands's claim that a consistent application of Rawls's contractarianism entails duties of justice to animals. Though I have found his case for entailment to be somewhat lacking, I have agreed that Rawls's theory is open to the inclusion of these duties of justice and that the most satisfying application of his theory would indeed include such duties. Second, I

⁴⁴ Singer, *Animal Liberation*, p. 20.

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. That is to say, though we might have thought that contractarianism could give us animal rights, like those championed by Tom Regan, we instead are left with animal welfare obligations, like those advanced by Peter Singer. 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 described what I take to be some possibilities.⁴⁵

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⁴⁵ For valuable comments and discussion, I owe thanks to Robert Streiffer, Benjamin Hale and Mylan Engel.