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NON-RATIONAL PERSONS AND THE ORIGINAL POSITION: A RAWLSIAN DEFENSE OF ANIMAL  
CITIZENSHIP

by

Michael Corazza

A thesis submitted in partial fulfillment of the requirements  
for graduation with Honors in the Philosophy

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# Non-Rational Persons and the Original Position: A Rawlsian Defense of Animal Citizenship

Michael Corazza

*John Rawls's approach to political philosophy, like other contractarian theories, is non-sympathetic to those who don't qualify as moral persons.<sup>1</sup> Mark Rowlands challenges this position in "Contractarianism and Animal Rights" by arguing that species, as well as strength, class, intelligence et al. is a natural asset that ought to be hidden behind the veil of ignorance. As such, parties in the original position must extend the principles of justice to non-human animals as a matter of personal interest. I argue that criticisms of Rowlands' claim are based on a fundamental misunderstanding of personhood, and so what it means to be a proper recipient of justice. The aims of this paper are threefold: first, to discuss various criticisms of Rowlands' essay; second, to establish an alternative definition of personhood; and lastly, to explore the implications of what an expanded account of rights might entail.<sup>2</sup>*

## The Original Position/Two Principles of Justice:

At the heart of Rawls's theory of justice is a mode of reflection called *the original position*. What makes the original position so important to the project of this paper – and, more broadly, the study of political philosophy in general – is its power to facilitate an unbiased, rational

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<sup>1</sup> Moral personhood in the Rawlsian sense will be discussed at greater length later on

<sup>2</sup> Of course, this account is not meant to reflect Rawls's interpretation of the original position. In fact, it is clear that on a number of occasions he outwardly rejects the claim that animals ought to receive justice via his theory—the goal of this paper is to show that Rawls's theory of justice is incompatible with his preclusion of non-rational beings, and that, on the contrary, it entails basic citizenship rights for all individuals, human and non-human.

consideration of the foundations of justice. An independent segment is devoted to this concept because of its central importance. Furthermore, it is important to keep in mind that throughout his discussion of justice, Rawls is referring primarily to justice as it applies to social institutions. That is, what it means for a political organization to justly distribute the various advantages and restrictions, positive and negative rights, it grants to its constituents.

At the beginning of *Theory of Justice*, Rawls claims that justice is the highest virtue a social institution can possess. He calls this “our intuitive conviction of the primacy of justice” (Theory, 4). The key to discovering whether this is a well-founded intuition lies in a mode of reflection called *the original position*. The original position is a hypothetical device to help us understand what some of the fundamental assumptions of a just society might be. In order to do this we must imagine a number of persons who must formulate the governing principles of their society.

Rawls describes these persons as being “rational and mutually disinterested.” That is, they are concerned solely with the advancement of their own interests, and neither positively nor negatively motivated by the interests of others. In this context, those who wish to advance their interests are those who are intent on acquiring a larger share of the *primary social goods* (Theory, 123). Primary social goods – described in *Theory of Justice* as consisting of “rights and liberties, powers and opportunities, [and] income and wealth,” as well as self-respect (Theory, 54, 386)<sup>3</sup> – are what every rational person strives for, no matter what their broader conception of the good might be. This is because the primary social goods are thought to be implicitly included in most conceptions of the good, and so are acknowledged by each member of the original position as worth ensuring.

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<sup>3</sup> In *Political Liberalism* Rawls offers an expanded list (181)

Crucial to the idea of the original position is what Rawls calls *the veil of ignorance*. The veil of ignorance ensures that each of the parties is unaware of certain facts about themselves and their place in society. Each person is unaware of her social position, her intelligence, her physical abilities, and so on. Furthermore, she isn't aware of her conception of the good, nor the level of economic or political advancement her society has reached.<sup>4</sup> By remaining ignorant of these facts, members of the original position have no motivation to give special consideration to any one class or group, because they are unaware of what position they might find themselves in once the veil has lifted.

Based on these limitations (what I shall hereon refer to as *epistemic restrictions*) rational agents in the original position are expected to arrive at a set of principles that ensures their highest share of the primary goods. Inherent in the character of rational personhood is the desire to minimize risk and ensure a result preferable to the worst outcome. This precaution is founded on a socio-economic theory of decision-making called *the maximin rule*: rational persons will in uncertain positions choose “the alternative the worst outcome of which is superior to the worst outcomes of the others” (Theory, 133).<sup>5</sup> In other words, one rationally makes choices when she chooses what is likely to be the best outcome out of all the worst possible outcomes. Such a strategy is thought to be preferable among rational persons because it guarantees protection against the worst outcome of all possible decisions.

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<sup>4</sup> This isn't to say that general political, economic, and psychological facts are hidden from the parties. On the contrary, Rawls says explicitly that parties in the original position are at least basically versed in these basic facts

<sup>5</sup> The credibility of the maximin rule has been disputed at length; however, this paper isn't concerned with the overall credibility of Rawls's contractarianism as much as it is with the theory's implications for animal rights

With all this in mind, Rawls posits that the members of the original position would reach two principles of justice.<sup>6</sup> He defines his first principle as follows

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all (Theory, 266)

According to this principle, each member of society ought to have certain basic liberties regardless of their social position, race, intellectual or physical capabilities, etc. Rawls understands a system of liberties as consisting of several basic rights, among which are the freedom of expression, freedom to vote, freedom from assault, freedom from psychological oppression, and so on (Theory, 53).

The second principle has two major components: first, that any social or economic inequalities can only exist if they leave the worst-off in society in a better position than they would be otherwise; and second, that there is a “fair equality of opportunity”.

This first component of the second principle is called *the difference principle*, and is crucial to Rawls’s justification of the inequalities of society. For instance, it would only be acceptable for doctors to receive a greater share of wealth than the average person if allowing this difference would lead to the worst-off being in a better position than if the inequality didn’t exist. Assuming that an increased salary would raise the supply of doctors, and doctors are needed in society, the resulting material inequality would be acceptable according to the difference principle.

The second component – Rawls’s “fair equality of opportunity” clause – has a number of interesting implications for animal citizenship. For now, it shall suffice to say that for Rawls, fair

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<sup>6</sup> I shall not discuss Rawls’s rejection of the principle of average utility, nor alternative principles besides the two discussed above. My intention is to show that a proper theory of justice *as Rawls construes it* is not only compatible with, but entails an equal consideration of non-rational persons

equality of opportunity isn't just in reference to occupational availability, but an allusion to a broader claim about the individual pursuit of the good. In regards to this latter claim, Rawls argues that the cultivation of one's talents results in a personal fulfillment that is essential to achieving the primary good of self-respect (Theory, 372).

Though these two principles are fundamental to any just society, Rawls is careful to note that the first principle has "lexical priority" over the second. That is to say, in a situation where one principle comes into conflict with the other, the first principle is to be preferred.<sup>7</sup> As Rawls discusses at the beginning of *Theory of Justice*, a proper intuition about the primacy of justice entails a certain "inviolability" of each individuals' rights, which the first principle protects. (Theory, 3).<sup>8</sup>

#### **A Note on the Metaphysics of Liberalism and Morality:**

Between *Theory of Justice* and *Political Liberalism* there is an apparent evolution of Rawls's conception of the moral person. In *Theory*, Rawls describes the moral person in a Kantian sense, having inviolable rights but varying capacities for rational thought (Theory, 297). This assumption of moral nature seems to rest on larger metaphysical assumptions that Rawls isn't inclined to defend. By the time he publishes *Political Liberalism*, "moral personality" is described not from the position of a moral realist, but someone concerned with the *political* implications of his theory. Put another way, Rawls is not concerned with delineating ethical truths in the sense that Kant might. His task is to formulate a system of reflection that coincides with common intuitions concerning justice in a democratic state:

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<sup>7</sup> Keep in mind that the second principle includes the difference principle

<sup>8</sup> Though it won't be discussed here, Rawls also gives lexical priority to fair equality of opportunity over the difference principle

In justice as fairness the aim is to work out a conception of political and social justice which is congenial to the most deep-seated convictions and traditions of the modern democratic state... Thus, from the start the conception of the person is regarded as part of a conception of political and social justice... This ideal is not to be mistaken for an ideal for personal life... much less as a moral ideal such as the Stoic ideal of a wise man (*PL*, 300).

This is a difficult task, considering any theory that aims at a conception of justice which is “congenial to the most deep-seated convictions” of society sounds like a moral one.

Nevertheless, the goal of this paper isn't to challenge Rawls's aim to design a political account of justice. Thus, any following considerations of an expansion of the principles of justice shall be without reference to any moral claims outside of the ones implicit in Rawls's theory.

As we will see, philosophers like Mark Rowlands wish to use the original position in a broader sense. At the beginning of “Contractarianism and Animal Rights,” Rowlands argues that the original position can be used as a means to arrive at a “general theory of morality” (Rowlands, 236). Regardless of whether Rawls's mode of contractarianism has this function, I will not presume that it does. The claim that parties in the original position can arrive at general moral principles is beyond the scope of this paper, and unnecessary to achieving its purpose. Rowland's argument can still be applied to Rawls in a way that shows the original position requires equal consideration of non-rational persons without being instrument for discovering broader moral truths.

### **The Intuitive Equality Argument:**

In “Contractarianism and Animal Rights,” Mark Rowlands argues that Rawls implicitly endorses some notion of moral entitlement in his construction of the original position. He calls this the *Intuitive Equality Argument*:

P1: If any individual S has done nothing to merit possession of a property P, then S is not morally entitled to P.

P2: If S is not morally entitled to P, then S is not morally entitled to whatever benefits accrue from the possession of P.

P3: For any individual F, there is a set S of properties ( $P_1, P_2 \dots P_n$ ) that S possesses without having done anything to merit possession.

C: Therefore, for any individual S, there is a set Z of properties such that S is not morally entitled to the benefits which accrue from possession of Z (Rowlands, 237).

If someone enters into a position of material wealth as a matter of good fortune, she's done nothing to earn it and so is neither morally entitled to its possession nor to any of its directly accumulated benefits.<sup>9</sup> Rawls expands this claim to include a range of capacities a member of society might have. In addition to social status, no person has a special entitlement to her intelligence, athletic ability, charm, etc. Merely winning the genetic lottery is not sufficient for being entitled to a larger share of primary goods. So, for any person who enjoys the benefits of social or biological advantages outside of her control, she is not entitled to any benefits that might accrue as a result.

However, this fact does not entail that anyone has the right or duty to deprive other people of these advantages. What permits acceptable inequalities in society – whether via social or genetic advantage – is that any course of action pursued with these advantages is to the benefit of the worst-off.

### **Application to Animal Rights:**

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<sup>9</sup> Rawls does endorse some notion of inheritance, but I will not discuss it in this paper

Rowlands argues that the intuitive equality principle requires us to allow for the possibility of parties in the original position to incarnate as any individual in society—including non-human animals. Recall that when we consider the original position, each person behind the veil of ignorance has no knowledge of her natural assets, including intellectual and physical abilities. Non-human animals may lack the cognitive complexity enjoyed by most adult humans, but are nonetheless inextricably tied to the state’s legal system.

An expanded application of the principles of justice needn’t rely on human compassion, but would be chosen by members of the original position out of necessity. Recall Rawls’s maximin rule: no rational agent intent on achieving an acceptable share of primary goods would risk incarnating as an animal if the principles of justice only applied to humans. So, members of the original position must expand the principles of justice to include non-rational beings in order to avoid risk.<sup>10</sup> Rawls’s epistemic restrictions require race, gender, intellect, and class all to be hidden behind the veil of ignorance—why not species?

### **Is IEP Compatible with the Original Position?**

David Svoboda argues that Rawls sets an intuitive foundation for his two principles of justice, but that the intuitive equality argument (or *IEP*) does not adequately capture what this foundation

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<sup>10</sup> Given the inherently political nature of these principles, I will assume that this extension only pertains to animals who are integrated into human society. Will Kimlicka suggests in *Zoopolis* that wild animals ought to be treated as members of a distinct sovereign state, and so would entail several negative duties on the part of humans; namely, to refrain from further encroaching on the “uninhabited” parts of the world. On the other hand, some might argue that society’s influence on the wild entails the two principles of justice ought to apply to all creatures within the boundaries of the state—including animals that aren’t directly integrated into human society. It is unclear where Rowlands falls on this issue, but for the purposes of this paper I will only focus on institutional justice as it pertains to domesticated animals.

is. Svolba offers an alternative account, which he calls the intuitive equality of persons principle, or IEPP:

For any person P, in a political society, S, if P possesses a property, Y, and if P's possession of Y is *undeserved*, in the sense that P is not responsible for, or has done nothing to merit, Y, then P's possession of Y cannot justify assigning to P a greater or lesser share of primary goods relative to other persons in S (Svolba, 977)

Three major distinctions can be drawn between this account and Rowland's original formulation. Foremost is the IEPP's inclusion of "person." As we will see, Svolba wishes to define personhood in terms of Rawls's definition of moral personhood. Secondly, in Svolba's account differences in primary goods that result from differences in natural assets are undeserved, whereas in Rowland's account the mere differences in natural assets alone are enough to be considered undeserved. Finally, the IEPP specifies that such inequalities must pertain to individuals who are "co-members of [the political society]" in order to be considered undeserved (Svolba, 977). As in the case of persons, Svolba implicitly claims animals aren't members of society, and so cannot be recipients of the principles of justice.

Throughout this paper, I will discuss Svolba's justifications for these amendments, and why he thinks they limit considerations of justice to rational persons.

First, I will introduce Svolba's argument from moral personhood. After finding that this view is both incompatible with Rawls's theory of justice and implausible on its own, I will argue for an expanded view of the person.

### **The Argument from Moral Personhood:**

Immediately apparent in the IEPP is Svoboda's addition of "person". As we will see, this amendment is compatible with Rawls's final conclusion but requires a different reading of personhood. In "Political Liberalism" Rawls defines the moral person as being rational and reasonable. Svoboda glosses over these two terms, but it is important to specify what they mean in the Rawlsian sense. Rationality is defined as the ability to have a conception of the good which is open to revision and pursuit. However, rationality manifests differently under the constraints of the original position. Parties behind the veil of ignorance are unaware of any personal conception of the good, but do have an abstract notion of the primary goods, which include liberty, income and wealth, equality, and the like. Thus, the fact of rationality in the original position ensures an optimal share of primary goods for each individual (Theory, 79). Outside of the original position, rationality manifests as a person's ability to create a plan of life that most efficiently achieves what she perceives as her greatest achievable end (PL, 302). The quality of reasonableness entails that a person is intrinsically motivated to maintain the stability of her society. Rawls calls this a "sense of justice": "the capacity to understand, to apply, and normally to be moved by an effective desire to act from...the principles of justice" (PL, 302).

It is these two attributes of the moral person that Rawls argues enables individuals to participate in large-scale social cooperation (PL, 301). Svoboda argues that the equality inherent in the intuitive equality principle arises by virtue of moral personhood, and so is a necessary condition for equality between persons. Since the IEPP is essential to Rawls's two principles of justice, any reference to equality in the first or second principle assumes equality among moral persons.

If this is the case, undeserved inequalities between animals and moral persons are not protected by the IEPP or the two principles of justice:

...undeserved inequalities are morally objectionable *if and only if* the subjects of these inequalities are *moral equals*, and that not all individuals are equal from a moral point of view...Rawls held that human beings are moral equals by virtue of their status as *moral persons*... (Svolba, 978)

Non-reasonable and non-rational individuals cannot possess the sense of justice necessary to maintaining a just society, and so never enter into the fair terms of cooperation that accord each citizen her right to just treatment.

There are a number of problems with this reading of moral personhood. If society restricted considerations of equality only to those who possessed certain intellectual abilities, it would exclude other persons commonly regarded as possessing the same rights. Consider a man who has a severe intellectual disorder and lives in poverty. Without sharing in the fair equality of opportunity, employers could justly deny him work; without the protection of the difference principle, economic stratification could drive him into deeper poverty; without equal liberties, he could be denied the right to vote, and so on.

Given that Rawls's aim is to isolate our deepest convictions of equality in democratic society, a lower threshold for equality is required if it is to include people commonly thought to be proper recipients of justice. Though it is true Rawls regards moral personality as *sufficient* for determining equality between persons, he notes that "whether moral personality is also a necessary condition I shall leave aside." He goes on to stress that among individuals who lack the requisite capacities for moral personhood, there is no reason for "depriving" them of the "full protection of justice" (Theory, 443). This stands in direct contrast to Svolba's implication that society ought to accord justice to individuals *solely based on* certain capacities. It might be said that those who have the capacity to possess a sense of justice must exercise it, but there is no

indication that this fact renders the two principles of justice inapplicable to society's non-rational members.

Thus far, there are two major flaws in Svobda's argument. First, it doesn't reflect Rawls's criterion for assigning equality as he claims it does, and second, by itself such a strict criteria would leave out far too many kinds of people.

### **The Fairness Problem:**

Svobda's second objection relies on Rawls's notion of the fair terms of cooperation: Each person in the well-ordered society is driven to comply with its laws, even when doing so isn't to their direct advantage. Rawls claims that this motivation comes from a sense of justice that is inherent in every moral person, and creates a disposition protects against the possibility of people benefiting from society and failing to contribute:

The most fundamental idea in [my] conception of justice is the idea of society as a fair system of social cooperation over time...Fair terms of cooperation specify an idea of reciprocity or mutuality: all who do their part as the recognized rules require are to benefit as specified by a public and agreed-upon standard (Rawls, 2003, 5-6)

Svobda's worry lies in the presumption that the fair terms of cooperation rest on the sole presence of moral persons in society. Animals don't possess the ability to conceive of mutual reciprocity or justice, so they cannot engage in the fair terms of cooperation.

Moreover, the fair terms of cooperation dictate rights and duties meant to fairly distribute the burdens of society. Since these are concepts only humans can be expected to understand, animals lack the ability to contribute in similar ways. Svobda asks us to consider the example of "free-riders," who benefit from opportunities accorded to them on an institutional level, but are unwilling to share in the collective burdens of society. Imagine someone who is content living

off of his welfare checks indefinitely without looking for work, and after a period of time finds a way to avoid paying taxes.

Svolba reminds us that such a character couldn't exist in a well-ordered society, because each of its members have a sense of justice that discourages them from failing to contribute. If we were to accord rights of citizenship to those who do not share this capacity to reason, such a society couldn't be just, because not all its members would be willing to share in its benefits and burdens.

There are three major problems with this claim. First is the immediate implication for persons who are commonly accepted as deserving recipients of justice. Second is a failure to make a distinction between persons who have the intellectual complexity to willingly support society but choose not to, and those who do not support society because they lack the ability to conceive of what society is. Third is the claim that Rawls thinks moral personality is a necessary condition for societal membership.

Just as in his discussion of moral personhood, Svolba argues for a conception of justice that has serious implications for non-rational persons. If having the capacity to appreciate fair terms of cooperation is necessary for being a subject to the benefits of justice, only those who pass a certain level of cognitive ability qualify. Consider a society in which, as Svolba suggests, the necessary condition for according justice is possessing a certain level of intellectual complexity. Since those who pass this threshold are the only ones protected by the principles of justice, an entire class of people who would be otherwise considered as deserving of institutional justice would be completely ignored: children, the mentally disabled, the mentally ill, and so on.

Svolba also seems to be equating the accordance of institutional benefits to those who can't share in the burdens of society to the accordance of institutional benefits to those who *consciously refrain* from doing so.<sup>11</sup> Svolba argues that one who enjoys an "equal share of the benefits without accepting an equal share of the burdens" can't exist in Rawls's just society because of the sense of justice that would predominate its members. It is true that the original position places constraints on the individual such that all *who are able* embrace the fair terms of cooperation; however, this is not the case for those who lack the ability to conceive of such principles in the first place.

After all, we aren't inclined to brand those incapable of agreeing to fair terms of cooperation as "free-riders." Imagine characterizing a bedridden man with severe Alzheimer's as someone who unjustly receives the benefits of society. Here any lack of desire to share in the burdens of society doesn't stem from a conscious rejection of the fair terms of cooperation; rather, it is due to the lack of an ability to conceive of such an abstract concept in the first place.

A more plausible reading is not that all members of society must accept the fair terms of cooperation, but that all members who are able to abide by them will do so. Construed this way, the fair terms of cooperation accommodate the importance of moral personhood without excluding non-rational members of society from its benefits and protections.<sup>12</sup> Thus, the just

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<sup>11</sup> There is something to say for the possibility the certain animals engage in a kind of mutual reciprocity with human beings. Consider a farmer who humanely harvests his eggs and allows his chickens to freely explore around the property. In this case, both parties seem to be gaining from the arrangement: the chickens enjoy both freedom and protection, and farmer is allowed to harvest some of their eggs. However, one might respond that the notion of mutual reciprocity requires a conscious recognition of whatever agreement is being made between the two parties. Since this objection raises scientific and epistemological questions about the degree to which an animal can understand the arrangements it has with its human cohabitants, I shall assume that—by and large--they cannot share in the burdens of society.

<sup>12</sup> One might object that such an account allows for psychopaths, who are psychologically incapable of having a sense of justice, to be accorded the same basic liberties as everyone else. This raises an interesting question about what it means to forfeit one's rights. If a person is aware of a widely held moral belief or law, should she be punished for some crime if she cannot conceive of wrongness in the same sense someone with a 'normal'

society relies on a faithfulness to the fair terms of cooperation *among its rational members*, but does not confine the principles of justice only to the rational.

Svolba's final goal is to argue that the IEP does not adequately reflect Rawls's theory. But would Rawls endorse Svolba's alternative? As previously noted, he isn't willing to take this stance as it pertains to moral personhood being a *necessary* condition for the accordance of justice. Rawls's hesitance is likely rooted in the controversial implications of limiting justice to those who possess certain rational capacities. As in the case of moral personhood, if we only accord the rights of membership to those who pass a certain intellectual threshold, an entire class of people who are commonly thought to deserve justice would be ignored.

### **Animals as Persons:**

In order to avoid the dangerous implications of restricting justice to moral persons, the two principles of justice must apply to a wider range of individuals. But if the quality of moral personhood isn't a necessary condition for assigning justice, what is? In this section I argue that the common notion of "personhood" ought to take on a new meaning. This change isn't necessitated by any larger moral claim, but can be understood as a re-construal that better captures our intuitions concerning the proper recipients of justice.

Personhood is commonly thought of as a quality exclusive to human beings, but philosophers avoid the claim that this exclusion is based on species membership alone. Theories will isolate characteristics unique to human beings, and use them as the sole criterion for determining the

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psychology can? This is a question pursuing on its own, but for the purposes of this paper I shall assume that psychopaths might be accorded rights, but stand to lose them in light of some offense that merits their abolition.

quality of personhood. One such argument, common both among philosophers and in the popular sphere, is that personhood relies on some capacity for rational thought. Though definitions of rationality vary, here we can understand it as the ability to reflect on, revise, and efficiently pursue various ends and desires.

Since rationality in this sense is a capacity that is unique to the human race, it is commonly thought to be the basis of personhood. After all, human beings possess abilities to think, reason, and reflect unlike any other animal on Earth. However, as Will Kymlicka points out in *Zoopolis*, if we were to adopt this view of personhood, it would exclude a significant segment of humanity, and may only be applicable for a limited duration over the course of a person's life:

If personhood is defined as the capacity to engage in rational argumentation and to conform to consciously understood principles, then it is a fluctuating characteristic that varies not only across human beings, but also across time within a life (Kymlicka, 27)

Young children, the severely intellectually disabled, and those in advanced stages of Dementia all lack the requisite capacities to be considered rational, and so by this view would not merit the same moral consideration as fully functional adults. To understand personhood in this sense is to see it as a continuum; an impermanent status of the individual that never obtains *via* anything other than the attribute of rationality (Kymlicka, 26).

For some philosophers, this implication isn't a problem. According to Raymond Frey, practices like animal experimentation are only morally blameworthy insofar as the test subject has the capacity for possessing a high quality of life (Frey, 1983).<sup>13</sup> In "Moral Standing, the Value of

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<sup>13</sup> It should be noted that Frey doesn't understand cognitive complexity as a necessary condition for personhood, but as a metric for moral consideration. This is an important distinction, but for the purposes of this essay is irrelevant. Since personhood in the context we're using it is what determines whether members of a society ought to be protected by the principles of justice, the implications for denying moral consideration on the part of Frey are similar enough to the implications of denying personhood on the part of Rawls and Svoboda.

Lives, and Speciesism” Frey introduces the “unequal value thesis,” which asserts that human lives are generally more worthy of moral consideration than non-human lives. This claim is based on the assumption that the value of a life is directly proportional to its quality. Moral consideration is only attributable to the extent an individual possesses, or can possess, certain characteristics. Since the highest quality lives are those led by individuals with greater cognitive complexity, human lives are typically worth the most.

Other arguments concerning linguistic ability and long-term planning exist in the literature, but I will not discuss them here. What is characteristic of nearly all these theories is their reliance on capacities possessed exclusively among human beings. The problem is, each fails to account for *all* humans, and so lead to the same unstable moral landscape described by Frey. A theory like this invariably creates a “patchwork quilt” of moral status that constantly shifts according to the varied capacities of different individuals (Kymlicka, 26).

Another problem with what we might call the “threshold view” (that is, the position that an individual must pass some threshold of intellectual or linguistic ability in order to have rights) is that it seems to base its standard of moral consideration on human capacities. But on what grounds is this standard established? Suppose hostile aliens invade Planet Earth and enslave the human race. Their justification is that only those who possess the ability to kinetically levitate can be accorded rights. To cite rationality as a quality rendering humans morally superior to animals is to overlook the same point: that there are certain facts common across all forms of sentient life that are enough to justify basic moral consideration.

In order to confine considerations of justice to the human race, one must overtly embrace a theory that places value on *homo sapiens qua homo sapiens*. According to philosophers like Margaret Somerville:

Universal human personhood means that every human being has an ‘intrinsic dignity’ that comes simply with being human; having that dignity does not depend on having any other attribute or functional capacity (Kymlicka, 29)

Here is where we reach what Kymlicka calls the “nadir of appeals to personhood,” or *speciesism* (Kymlicka, 29). Speciesism is a school in philosophy that asserts species membership is enough to determine an individual’s political or moral status. In Somerville’s argument, there appears to be an implicit assumption about the ontology of being human: by possessing an “intrinsic dignity”, we are more deserving of justice and respect than other creatures. So, regardless of any disparities in natural ability, personhood rises solely from the quality of being human. But on what grounds can one make this argument? If the differences among individuals *within* a species don’t merit special moral consideration, why would differences among individuals of different species merit consideration?

Any serious reflection should render this assertion as the logical equivalent to the claim that whites are intrinsically superior to Hispanics or African-Americans—ascribing intrinsic superiority in this sense isn’t based on anything but the whims and biases of the theorist ascribing it. The only significant distinction that can be made between humans and animals is the human tendency to have higher-order thoughts and experiences, but to use this as the sole criterion for assigning personhood would be to revert back to Frey’s claim. Thus, if one wishes to confine personhood solely to *all* humans, he must argue that humans are worthy of personhood by virtue of being human. But basing personhood on something as arbitrary and ontologically meaningless as genetic kinship shouldn’t require any refutation beyond the *prima facie* absurdity of the claim itself.

Once we’ve determined personhood is not confined to the human race, to whom can we reasonably ascribe it? Before answering this question, it will be helpful to distinguish between

the second-order relationship between *experience* and *awareness*. Experience is the subjective, conscious registration of various external and internal stimuli. These stimuli may include physical sensations such as sight, touch, smell, and emotions like pleasure, fear, and boredom. Awareness in contrast is second-order experience. We are aware when we perceive the phenomenon of experience—it is the acknowledgement of an “experiencer” “experiencing.”<sup>14</sup>

Critics of animal rights theory will often reference this distinction--consider how livestock are often characterized as ‘mindless’ or ‘unaware of what’s happening to them’ as a way to justify their confinement and slaughter. Many feel uncomfortable with the idea of eating intelligent, sensitive creatures, and so characterize them as being objects or commodities. Since non-human animals aren’t “aware” of their experience, the quality of the experience itself is somehow negated.

Setting aside the fact that this is merely another iteration of Frey’s unequal value thesis, there is another implicit claim here worth exploring: that experience without awareness is insufficient for ascribing moral consideration.

If this were true, society would have no obligation to accord equal justice to non-human animals. But does the unacknowledged experience of an emotion—say, love—negate its significance? If a mother loses sight of her child at the farmer’s market, it isn’t after a lengthy philosophical investigation that she feels panic and anxiety. In fact, she reverts back to what’s hardwired in every sentient creature on earth.

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<sup>14</sup> For the purposes of this paper I assume that humans are the only animals on earth who possess this latter quality. Whether other species have this capacity remains a mystery; however, research in recent years shows it might be possible

In the case of maternal love, whether it is the attachment of a human mother to her child, or a squirrel to her litter, both experience a release of oxytocin<sup>15</sup> at the moment of birth, which immediately establishes a strong attachment on the part of the mother. Even if the brains of two individuals process information differently, is the essential experience any less valuable?<sup>16</sup> Subjective experience doesn't need to be consciously acknowledged in order for it to be *real*—in the words of scientist and author Peter Wohlleben, “Instinctive maternal love cannot be second-rate, because no other kind of maternal love exists” (Wohlleben, 15).

To be sure, humans possess a kind of cognitive complexity that allows for a deeper understanding of experience that other animals don't possess; to a limited extent the human brain can even suppress and facilitate various emotional states. But are these capacities necessary for moral consideration? Most would agree that if a man terrorizes someone with Alzheimer's, he would be just as much at fault as he would be for attacking someone else who could remember the assault for a longer period of time. A mother cow may only temporarily be in a state of grief when her calf is taken away, but does this fact nullify the wrongness of the separation? Even if awareness leads us to ascribe more extensive rights to the individual,<sup>17</sup> the absence of awareness doesn't seem to justify otherwise unacceptable treatment.

Following Tom Regan, I suggest that sentience is necessary and sufficient for according the status of personhood (Wellman, 109). To possess sentience, to feel, to fear, to have motivations, entails an inherent value that's worth respecting as an end in itself. Notwithstanding the ability to understand experience, the reality of experience itself should be enough to merit moral

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<sup>15</sup> The chemical most commonly associated with extreme affection and even love

<sup>16</sup> It is true that many animals possess abilities that affect their experience in ways we cannot imagine (such as the hearing of a cat or sight of a hawk), but a difference in experience doesn't imply a negation of its existence

<sup>17</sup> Such as the right to vote, to own land, to equal opportunity, etc.

consideration. Jeremy Bentham famously summarizes this point in *An Introduction to the Principles of Morals and Legislation*:

The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. It may come one day to be recognized, the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate...The question is not, can they *reason*? Nor, can they *talk*? But, can they *suffer*?

(Wellman, 116)

Bentham doesn't endorse a theory of natural rights, but neither does Rawls. Remember that any reference to moral consideration in this discussion is a mere extension of the most basic dispositions members of a liberal society are expected to possess.<sup>18</sup>

One might object that this claim does not specify which individuals have a complex enough psychology to possess sentience. If we use the term too broadly, we risk including organisms that likely don't possess a sense of self, like plants and insects. Though the discovery of what cognitive threshold must be passed in order to achieve sentience is important, it isn't necessary for the project of this paper. All that needs to be established is that a large number of animals *do* possess sentience, and therefore require many of the same institutional protections that society accords to human beings (Kymlicka, 31)

Especially relevant to this discussion are the animals directly subject to human exploitation. The average life expectancy of a pig is roughly 25 years, but most are no more than a few months old when they are sent to the slaughterhouse. Until then, huge numbers are confined to spaces too small to turn around, and never see the outdoors. Given the number of pigs at an average factory farm, drainage systems are often overwhelmed, and leave hundreds forced to live

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<sup>18</sup> That is, all those who *can* possess such dispositions

in their own filth. These practices are commonplace among animal feeding operations, which dominate an industry that slaughters 115 million pigs a year in the United States alone (PETA).

Despite this fact, we know that wild hogs not only exhibit sentience, but have the intelligence to outwit many of the hunters who track them. Whenever boar are culled in the wild, others in the area will take notice and collect food during times of day they know the trappers won't be searching for them. Like humans, mothers will form bonds with their young that may last a lifetime. In a study conducted by the University of Veterinary Medicine in Vienna, researchers tracked the behavior of a sow who gave birth to a total of roughly 160 piglets. Over the course of her life, the mother pig engaged in activities like teaching her young to build dens, and even served as a midwife for younger sows in the community (Wohlleben, 38-41).

If Rawls's goal is to arrive at a theory of justice that coincides with our most deep-seated convictions of a fair society, so too must any theory pertaining to those who qualify as recipients of justice. Though most are disinclined to see non-human animals as deserving of moral consideration, deeper inquiry reveals biases rather than reasons for holding this belief. For any theory that ties personhood to capacity, a volatility of moral status arises that leaves us making implausible conclusions about the nature of personhood.

As has been stated frequently throughout this paper, Rawls is careful to construct a political theory rather than a moral one. His goal is to design a system of rules that best captures common intuitions about what constitutes a just society. In *Political Liberalism* he avoids endorsing any comprehensive meta-ethical theory, and seeks only to establish a "weak" conception of the good. Therefore, any expanded definition of personhood is no more of a moral statement than the IEPP is.

If we extend the IEPP to include all persons, the principle has a stronger intuitive viability. Not only does it eliminate criticisms posed to Rawls's theory concerning the severely intellectually disabled, it also accounts for the intuition that would arise in any person rationally contemplating the shared quality of sentience across human and animal selves: that as long as justice ought to be accorded to the most disabled of humanity, so too must it be accorded to animal kind.

### **The “Tendentious” Nature of Animal Justice:**

In the sections above I addressed Svolba's claim that the IEP isn't compatible with a proper interpretation of Rawls's theory of justice. Here I consider the claim that the IEP is not a tenable theory by itself. Svolba has two supporting reasons for this argument, and both are relevant to the IEPP argument if it is to be construed as I've outlined.<sup>19</sup>

Svolba's first argument references the nature of revision and agreement concerning the governing principles formulated in the original position. In *Theory of Justice*, Rawls predicts that those behind the veil of ignorance will arrive at “widely accepted premises to more specific conclusions...” concerning the formulation of the two principles of justice. Since even the most general principles are likely to have at least implicit assumptions about which individuals they pertain to, members of the original position must have an understanding of who the recipients are.

When confronted with this dilemma, Svolba claims that members of the original position are unlikely to endorse principles of justice that apply to anyone other than human beings:

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<sup>19</sup> Recall that this re-construal entails that any reference to persons in the IEPP must extend to include all sentient life rather than only humans

The principle would be roundly rejected by those who—like Rawls—subscribe to the traditional and still pervasive moral view that persons, by virtue of their distinctive capacities for rationality and moral agency, are owed special moral consideration and respect. Proponents of this view...will reject the idea that a fair and impartial idea of what the moral rules should be would omit consideration of properties like rationality and moral agency (Svolba, 981)

Since this belief is thought to be universally held by parties in the original position, any institutional rules they agree on can only be accorded to rational persons. Thus, given the “tendentious nature” regarding Rowlands’ definition of personhood, the IEP (and my revision of the IEPP) cannot be an assumption among parties in the original position.

The essential problem with this objection is its failure to acknowledge the “thickness” of the veil of ignorance. Among the attributes of wealth and class, parties in the original position are ignorant of their various conceptions of the good. Included in these conceptions are morality and religion; after all, *goodness* for many is defined within the parameters of spiritual or moralistic frameworks. If this is the case, then parties in the original position can’t have any notion of moral rules<sup>20</sup> in the first place. Though restrictions in the original position are designed in such a way that its members possess the quality of rationality, it doesn’t follow that they can be expected to confine justice to human beings *on moral grounds*.

Since all religious, moral and philosophical doctrines are unknown to those in the original position, any beliefs concerning the moral worth of humans are also hidden. The notion that humans are morally unique is a philosophical position that exists along with many others; it does *not* entail a set of beliefs we can presume to be inherent in every person.

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<sup>20</sup> As Svolba characterizes them above

If, as I suggest, any conception of humanity having a special moral status is hidden behind the veil of ignorance, there is no indication that parties of the original position would place the same weight on the capacities of moral personhood as what Svobda would expect.<sup>21</sup>

### **Animals as Recipients of Justice:**

Svobda's final objection to the IEP is that there is no reason why members of the original position would consider being incarnated as animals in the first place. Making such an assumption would only be possible for someone who is "already predisposed to affirm animal rights" (Svobda, 983).

This objection has already been partially dealt with in the last section. Members of the original position will neither be predisposed to believe that the principles of justice apply exclusively to humans, nor all animal life. To think that anyone in the original position *starts* with either of these beliefs is to assume they've adopted a moral position. Of course, this is impossible since moral positions are hidden behind the veil of ignorance.

This leads us to an impasse: how can parties in the original position know who recipients of justice are if they lack any conception of personhood? To answer this question, we must recall that the purpose of the IEP/IEPP is to capture a fundamental assumption in Rawls's theory:

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<sup>21</sup> One might respond that the parties must hold beliefs like the ones Svobda describes in order to ensure a stable society. However, as I have already discussed, there is no reason to believe that a stable society must consist solely of moral persons; to make such a claim would entail that Rawls's just society would be without infants, children, the mentally ill, the mentally disabled, and anyone else who lacks the ability to possess moral personhood.

For any person P, in a political society, S, if P possesses a property, Y, and if P's possession of Y is *undeserved*, in the sense that P is not responsible for, or has done nothing to merit, Y, then P's possession of Y cannot justify assigning to P a greater or lesser share of primary goods relative to other persons in S (Svolba, 977)

If we understand this principle as implicit in Rawls's theory of justice, then the subjects of the principles of justice are also the subjects of the IEPP.

In the IEPP, if "person" is to be construed as "human", then the principles of justice can only apply to human beings. However, in our alternative interpretation personhood cannot plausibly be confined to humanity—recall that doing so involves either a reliance on speciesism, or the kind of volatile moral landscape Frey endorses. To correct misconceptions about the moral status of animals, we must understand them as being persons deserving of the same basic advantages as humans. So, in order for the IEPP to remain intuitively viable, it must include all sentient animal-kind; therefore, parties in the original position would expect to be incarnated as any sentient creature, and so would prudentially expand the principles of justice to include non-human animals.

### **The Implications of Animal Citizenship:**

If my interpretation of the IEPP is correct, the two principles of justice must apply to all sentient life. But what implications does this have for traditional liberal society? Recall that the first principle of justice dictates that all persons must have access to a comprehensive set of liberties compatible with a similar set of liberties for all. Any institution that imprisons or takes

advantage of a person against his will violates this principle. If we are to understand non-human animals as persons, all of the basic protections we accord to humans must also apply to animals. It follows that *any* form of animal exploitation, whether it be the collection of dairy products or the production of meat, must be abolished.<sup>22</sup>

There is a less obvious question pertaining to the ethicality of owning domestic pets. Some philosophers have raised the issue that by breeding animals to be reliant on humans for food and shelter, humans render them unable to survive in the wild. By imposing this kind of dependence, animals lose their ability to be free and self-sufficient. Since to continue this cycle would be to perpetuate the wrongdoing, some argue that humans should work towards the eventual end of preventing the repopulation of domestic species.

However, to preclude the continued existence of a species seems to compound the wrong rather than abate it. It seems more plausible that humans have a duty to sustain and care for the animals we have rendered unable to take care of themselves. To this end, we must accord animals certain basic rights that enable them to lead fulfilling lives.<sup>23</sup> Though it is unclear exactly how humans might exercise these duties, it is certain that a new understanding of animals as persons would entail a significant shift both in our culture and law (Kymlicka, 7).

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<sup>22</sup> There might be circumstances in which there can be reciprocal arrangements between humans and animals. Consider the example of a clutch of chickens who allow their human caretaker to harvest some of their eggs, and in turn enjoy the accompanying benefits of shelter and protection; indeed, such an arrangement is entirely possible for any household with the (fairly modest) resources needed to keep chickens. The worry here is that this kind of reciprocity is difficult to achieve on an industrial level, and so would be extremely difficult to properly implement in society. As such, though it is theoretically possible to enjoy the products of certain animals without exploiting them, the possibility of abuses being carried out once animal products are commercialized merit enough reason to ban animal production on the industrial scale.

<sup>23</sup> Kimlicka borrows from Martha Nussbaum's capabilities approach, which understands fulfillment as the development of certain essential capacities in the individual. However, for the purposes of this paper, no specific theory outside of Rawls's is necessary (Kymlicka, 96)

Consider Gary Francione's discussion of animal rights in the American legal system. In his book *Animals, Property and the Law*, Francione argues that the law treats animals as the equivalent of property. If someone kidnaps and abuses a dog, the attacker is prosecuted, but any compensation cannot be earned on the basis of the animal's suffering. Rather, the law dictates that an animal's owner can only receive financial redress to the extent the animal has decreased in its market value (Wellman, 113).

Naturally, a revised notion of personhood on the institutional level would entail a radically different set of laws in society. Animal owners would no longer be considered "owners," but guardians or protectors of animals who share their living space.<sup>24</sup> Animals wouldn't be subject to fights or competitions against their will, nor would they be victims of abuse and neglect without receiving the same compensation as someone with the legal status of person.

One concern is the degree to which such an approach to Rawls's theory would implement the various rights. Should animals have access to all the places humans do? Should they be ensured the same basic standard of material well-being guaranteed to the worst-off in society? Should they be allowed to vote?

Before addressing these problems, it is important to note that members of a just society can't have identical privileges. Children are accorded the basic rights of life and material well-being, but lack the privilege to vote until later in life. Freedom of equal opportunity for a human could translate to having a fair shot at applying to the local bakery, while the same principle for a dog might simply entail affording it the ability to explore its surroundings.

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<sup>24</sup> There might be circumstances in which humans play a paternalistic role for their animals—consider a domestic cat who wishes to leave the house but is prevented from doing so because of the dangerous traffic outside. In this case, there appears to be sufficient reason for denying the animal this particular choice. Of course, the topic of limiting rights to less intellectually capable beings is a difficult one, and will not be pursued here.

As the Rawlsian properties of moral personhood develop in the individual, new liberties arise. It is only after achieving a certain level of cognitive development that a person is given the right to vote. As a person's rational capacities develop, new abilities emerge. Once these abilities have fully matured, new liberties are accorded to those who can exercise them. If the principles of justice are expanded to include all non-rational persons, then in the case of humans, certain liberties might come and go according to age. Nevertheless, the status of personhood entails basic protections for all sentient life, regardless of cognitive complexity.

So, we may say that the principles of justice apply *insofar as they are relevant to the case of the individual*.<sup>25</sup> In certain climates, dogs might be satisfied sleeping outdoors, while most humans need shelter to stay comfortable—if the difference principle requires that any social or material inequality must make the worst off in society better off than they would be otherwise, the conditions under which a non-human animal would be better-off might follow a less strict criterion.

### **Conclusion:**

At its heart, an expansion of justice to non-human animals relies on their status as persons. If the personhood of all sentient creatures is institutionally acknowledged, there is no morally relevant reason to confine liberty only to those who possess rationality. Though the actualization

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<sup>25</sup> The question raised earlier about the degree to which domesticated animals ought to be allowed access to public areas is a difficult one. On one hand it seems that every person has some basic right to mobility, but on the other human beings have special obligations to domesticated animals to ensure they aren't harmed. Naturally, some balance between freedom and protection would have to be achieved, and this would vary from location to location.

of these liberties may vary across individuals, the basic rights that concern everyone apply to all persons.

Many assume that humanity has some quality that makes it worth greater moral consideration than the rest of animal kind. Once this claim is interrogated, we see that it is reduced either to some iteration of the unequal value thesis, or a blatant appeal to speciesism. Assuming that neither of these doctrines is morally tenable, the natural conclusion seems to be that rational persons are no more deserving of institutional rights than non-rational persons. Thus, a truly just society can only be one that extends its liberties to all its members.

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