

LOCATING LIVESTOCK IN RAWLS' BASIC STRUCTURE:  
A NOVEL APPROACH TO DISTRIBUTIVE JUSTICE FOR FARMED ANIMALS

By

CLAIRE WORTHINGTON MILLS

(Under the Direction of Piers H.G. Stephens)

ABSTRACT

In this dissertation I advance a novel strategy of inclusion in Rawls' theory of distributive justice for livestock animals. I argue that the restriction that consideration is only given to free and equal moral persons in the generation of principles in Rawls' ideal theory, does not prevent these principles from being applied to nonmoral persons in the decisions of how to structure the institutions of the basic structure of society. Livestock animals, due to their intertwined nature with humans and their location within the basic structure, force decisions to be made as to how the principles would apply to structuring their institutionalized lives in the animal product use industry. Animal welfare science and the historical account of animal husbandry provides the knowledge base necessary for the participants in Rawls' original position to determine what is owed to this dependent portion of society. I suggest a conclusion for how this determination would be made and analyze its support through the secondary justification structure Rawls provides for the application of the generated principles to a democratic society, characterized by pluralism.

INDEX WORDS: Political Theory, Animal Ethics, Livestock Animals, Animal Welfare, John Rawls, Theory of Justice, Political Liberalism

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CLAIRE WORTHINGTON MILLS

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CLAIRE WORTHINGTON MILLS

Major Professor: Piers H.G. Stephens

Committee: Chris J. Cuomo

Alexander Kaufman

Electronic Version Approved:

Ron Walcott  
Vice Provost for Graduate Education and Dean of the Graduate School  
The University of Georgia  
August 2022

## DEDICATION

I would like to dedicate my dissertation to the late Dr. Victoria Davion, who was a major inspiration to me and did me the great honor of agreeing to be a part of my committee. I wish that I could have benefited from your tutelage for much longer, but thank you for all that you shared.

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## **Introduction**

In this dissertation I advance a novel strategy of inclusion in Rawls' theory of distributive justice for livestock animals. I argue that the restriction that consideration is only given to free and equal moral persons in the generation of principles in Rawls' ideal theory, does not prevent these principles from being applied to nonmoral persons in the decisions of how to structure the institutions of the basic structure of society. Livestock animals, due to their intertwined nature with humans and their location within the basic structure, force decisions to be made as to how the principles would apply to structuring their institutionalized lives in the animal product use industry. Animal welfare science and the historical account of animal husbandry provides the knowledge base necessary for the participants in Rawls' original position to determine what is owed to this dependent portion of society. I suggest a conclusion for how this determination would be made and analyze its support through the secondary justification structure Rawls provides for the application of the generated principles to a democratic society, characterized by pluralism. In order for reasoned conclusions to be made regarding the application of principles to the industries in which livestock are kept, practical knowledge related to livestock animal welfare and the societal importance of livestock inclusion needs to be presented. This includes information about what kinds of beings livestock are, including a determination of their ability to suffer, if there is a practical way to reduce their suffering, through what methods this can be achieved, and if such treatment is generally publicly desired. In the first chapter I present the

welfare related information that will be relevant in making my analysis of livestock's inclusion in Rawlsian theory in the following chapters.

In chapter one I discuss the motivation for the transition from the norms of animal husbandry present through much of history transitions through a combination of technology with the academic ideological popularity of behaviorism to the modern intensive confinement system in which livestock welfare is near totally unregulated. I then provide a scientific overview of the knowledge of animal suffering, which identifies neural and spinal similarities in livestock animals to the human pathways for pain and consciousness. These similarities are not sufficient to fully prove that animals can suffer, which leads me to Marian Stamp Dawkins' argument for why the lack of positive proof of animal consciousness, due to the limits of our knowledge of the mechanisms of consciousness, does not prevent the conclusion of scientific support for the value of animal welfare. I conclude by explaining the techniques we can use and the proof we have for finding out what constitutes animal welfare, including an overview of actual welfare issues livestock animals face in our modern industry (US focused), and the research we have related to better methods. I also go through what welfare at slaughter looks like, and how welfare can be evaluated in a straightforward and quantitative method (using Temple Grandin's research.) This information will be relevant in my argument regarding the knowledge present in the original position from which participants will make choices applying idealized principles to the basic structure, in which livestock animals are located.

I will then present evidence for the implication of the historical and scientific realities of animal welfare for societal application, arguing that this level of welfare is not unrealistic and would not cause exorbitant raises in price of animal products which could cause human suffering. I also go through instrumental reasons for caring about welfare, outside of intrinsic

valuation of animal welfare, such as the causal relationship of anxiety to disease susceptibility and meat quality. I discuss data related to the public's desire for better welfare for livestock and their willingness to pay (to a certain extent) for this to happen. Last, I argue that a lack of information about livestock treatment affects the public's ability to make choices in line with their ethics and in how their market decisions play out in the grocery store. This information will be relevant when I discuss the implementation of Rawls' ideal theory into an actualized society.

In chapter two, I introduce the project Rawls' undertakes in his work *Political Liberalism* and present a careful textual analysis of the role of cooperation, the two moral powers, being free and equal, the original position and the motivation of primary goods, all of which will be relevant in demonstrating my thesis argument regarding the distinction between the generation of principles and their application. I argue that Rawls' uses many different terms synonymously, such as citizen, person, everyone and all, which obscures the fully ideal nature of this part of his theory. This obfuscation, I believe, is what influences Rawls' conclusion in a narrower application of his theory than is warranted, once he moves to considering how it would be applied in our non-ideal society. I then talk about the distinction between ideal theory compared to what he says about our real, non-ideal society, which leads me to my next main argument for this chapter, that the principles generated in the original position do not require individuals to have both moral powers in order to have the principles apply to them. While it is true that only moral persons are considered with the generation of the principles, once we reach the stage of applying them to the institutions of society (even just the well-ordered society), nonmoral persons and livestock animals, would be a part of this application.

Livestock's location as a part of the basic structure, a claim that I support with textual evidence, leads them to be subjects of justice in the sense that they must be considered in how

the principles will structure their lives. Whatever is the answer to this question would be the end result of deliberation from the original position, following the generation of the content of the principles. I argue that continuing our current practice (inaction with regards to livestock regulation) in the well-ordered society could only be justified as part of a positive argument; unlike how we currently think of it as the standard one must argue against. The principles apply, as they are relevant, to the capacities of all who are a part of society. Such capacities would be known within the original position, considering the participants' access to basic scientific facts of biology and societal makeup. When applying ideal principles to nonideal circumstances, reasonable changes will need to be made based on the different categories of inhabitants' abilities. I think a reasonable determination, from the impartial and rational standpoint of the participants in the original position, would be that rights related to the distribution of primary goods are given to all who can use that category of good, as long as such distribution fits into the basic structure as designed for justice of moral persons. The list of primary goods is also determined only through consideration of full and equal persons, because that is how Rawls' theory generates the content of justice, the limitations in this sense are built in from the beginning. But once generated, I argue that they need to be applied to a broader category of members of society than just moral persons. The reasonable way to apply this, it seems to me, is to distinguish categories of property between those that can't experience bad welfare and those that can, and provide minimal welfare rights for those that can, out of respect of their shared participation in a subset of primary goods such as health and preference satisfaction.

In Chapter three, I continue to examine my suggested principles from the second chapter, as it would fit into Rawls' arguments for overlapping consensus, public reason, intergenerational justice and the conditions for stability. I examine elements of Rawls' process of justification as

they relate to my claim that livestock animals are subjects of justice and owed consideration of how the principles of justice would affect their treatment. While the set of primary goods and distribution principles are determined through consideration only of those with the full moral powers, they apply to all beings in society to the extent that they have relevant participatory capacities for the goods which are distributed. Livestock animals have the capacity for a subset of primary goods, which are health and the fulfilment of their natural desires, which maps entirely to Dawkins' definition of welfare. While I am not making a moral argument regarding livestock welfare, the widespread support of this claim from many reasonable comprehensive doctrines gives it the support of overlapping consensus and the stability that comes from such consensus. Chapter two and three combined are broadly representative of Rawls' first and second stages in his account of justice as fairness. In chapter two, I provide first stage reasoning for livestock inclusion based on freestanding arguments related to the fundamental conceptions of a democratic society. In chapter three, I continue with second stage reasoning related to the stability of such principles when brought into a society characterized by moral pluralism, as Rawls says that the freestanding argument is not complete until this can be shown. While the details of the content of the principle regarding the just treatment of livestock is not thoroughly proven in this project, which would require thorough and extensive reasoning from the standpoint of someone in the original position with the restrictions of the veil of ignorance, it does fit with the second stage supporting reasoning.

In the final chapter, I include a literature review of other theorists who have written on the topic of animal inclusion in Rawls' theory, starting with *Theory of Justice* and continuing with his modifications in *Political Liberalism*. I distinguish my position from these discussed, justifying the claim that my dissertation represents a novel approach to animal inclusion in

Rawlsian literature. By restricting the subject of inclusion to the structure of human use of livestock, my argument preserves the focus on institutions and their role in providing access and determining opportunities available to citizens in their pursuit of their own conceptions of the good. Unlike the majority of the theories discussed in this chapter, the restrictions on the representatives in the original position are not modified at all, I keep Rawls' description and justification for the original position completely unchanged. Only the interests of free and equal citizens are considered when generating the content of the principles, the inclusion of animal rights happens at the level of applying the generated principles to all aspects of the basic structure. Further, the examination of second stage support adds to the departures from previous attempts at animal inclusion in Rawls' theory of justice. While I do attempt to argue that minimal welfare rights for livestock is a reasonable suggestion for what would be determined through Rawls' theory, this part of my dissertation failing does not detract from the importance of the conclusion that considering how the principles of justice structure the rights related to livestock would be an unavoidable aspect to Rawls' theory.

## **Chapter One: Livestock Welfare**

The goal of the following chapters will be to argue that we have a novel avenue, through a Rawlsian framework, to include livestock welfare considerations in a part of our distributive justice schemas. To motivate that argument and set up several claims I need to make, this chapter will document the welfare issues facing livestock today and the science available to support their welfare mattering in a significant way. Livestock are the biggest non-human part of our society,<sup>1</sup> and they are the animals that humans have most contact with worldwide; “of all animals that have contact with humans, 98% are farm animals” (Norwood and Lusk, 4). In the United States, there are an estimated 200 million household pets, but over 9 billion livestock animals are raised and killed annually.<sup>2</sup> How we treat this large part of our society is important, but the details of how we treat them are intentionally kept out of the public’s view, with a lack of publicly available data and a near complete lack of oversight of their care and slaughter. How we got to this point is historically motivated and the history of inclusion of livestock is important to my argument that livestock-human relations are a part of the basic structure, an essential aspect of Rawls’ theory. My data and the historical and contemporary account of livestock welfare is US-focused, but a parallel account could be given for any democratic society and will fit into my argument in the ensuing two chapters related to Rawls’ theory.

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<sup>1</sup> Insects are more numerous, but I use the term ‘society’ here to focus on the shared and purposeful cohabitation of individuals, and while insects play an important role in the maintenance of society’s environmental location, they are not a *part* of society understood in this way.

<sup>2</sup> Pet ownership statistics come from the 2021-2022 “National Pet Owners Survey” conducted by the American Pet Products Association (APPA), and the American Veterinary Medical Association’s U.S. Pet Ownership Statistics. Livestock totals are from USDA’s “Livestock and Meat Domestic Data” sets.

## **Historical Welfare to Contemporary Conditions**

While there weren't welfare laws explicitly recorded in Europe or America until the 1800s, it would be unfair to say that treating animals well was not a part of being ethical. Husbandry, the practice of raising animals, comes from the old Norse words *hus* and *bond*, with the word meaning 'house bonded' (Rollin and Thompson 2011, 3). Any livestock the family had were an essential part of the household, and so they were cared for as members deserving of that status of shared, contributing, household members. Abusing them would be an insult to your household's status. Roman legal theorists in the third century even came to the consensus that the *jus naturae*, or natural law, applied to all animals, including human, which was quoted by Aquinas when he wrote his medieval Christian philosophy (Rodman 1979, 3). The beginnings of Christianity and Judaism include in their texts references to appropriate care for livestock, resting animals on the sabbath (Exod. 23:12), being kind to animals and avoiding acts of cruelty (Gen. 24:19), and even requiring that humans help "raise to its feet an animal that is down, even if it belongs to our enemy" (Exod. 23:5). The metaphor of God as my shepherd could not invoke the right meaning and emotional connection that it has if there wasn't the idea of the shepherd being attentive and caring to his flock. (Rollin 2001). The Talmud prohibits many acts of cruelty for livestock, requiring feeding one's livestock before oneself, prohibiting striking an animal for not moving when it is carrying too heavy a load, and even deprecates hunting for sport (US Congress 1957). While legal restrictions on animal abuse didn't exist until the 1800s, Rollin and Thompson argue that the lack of legal codified ethical writings is due to how unnecessary it would have been. Treating animals well was already the moral choice in all religions, which were the primary ethical systems throughout the last two thousand years (Rollin and Thompson



2011, 4). Treating livestock well also led to better production from those animals. “Viewed from the perspective of agricultural ethics, the singular beauty of husbandry is that it was both an ethical and prudential doctrine” (Rollin and Thompson 2011, 4). If you treated animals badly, you suffered from their well-being declining and their production. Not knowing their needs and nature would similarly lessen production. When seventeenth century political philosophers, starting with Grotius, redefined *jus naturae* to give humans sole jurisdiction, it supported removing moral limitations of human’s treatment of non-human animals. (Rodman 1979, 18). The writings moving forward from that time continued to remove moral responsibility towards animals from secular political regulation, which prompted the necessity for animal activists, who worked to add specific welfare regulations back into law.

According to the *Encyclopedia of Animal Rights and Animal Welfare*, the first piece of animal welfare legislation was introduced in England in 1822 (Bekoff 2009, 635); the Cruel Treatment of Cattle Act allowed prosecution for any person who “wantonly and cruelly beat, abuse, or ill-treat” any livestock animal, with the penalty being a fine of no less than 10 shillings and no more than 5 pounds, which would be roughly five hundred to five thousand dollars in 2020 US dollars (3 George 4 c.71). The American Society for Prevention of Cruelty to Animals (ASPCA) was officially recognized in 1866, and within a few years had some success (66 people in 119 cases) at prosecuting cases of animal abuse, even when laws against it weren’t formally on the books (Norwood and Lusk 2011, 35). While many of these first cases involved the abusive treatment of carriage horses, and the torture of street dogs and cats, the ASPCA also tried to change the methods being used to transport livestock. In the mid to late 1800s, livestock were primarily transported by rail car; they would have their legs bound and be packed tightly into rail cars without access to food or water for days at a time. This resulted in many animals

losing up to 20% of their body weight by the time they reached their destination, most suffered injuries, and it wasn't uncommon for entire carts to arrive filled with dead animals (Norwood and Lusk 2011, 35). The first federal law regarding animal cruelty was established due to their efforts; the Twenty-Eight Hour Law required animals to be fed, watered and rested every 28 hours, but a lack of consequences, the large number of exceptions included, and zero oversight meant this law had no real effect on livestock animal welfare. While methods of slaughter and transportation had serious welfare concerns, what stayed the same all the way up until 1950, was that the actual raising of animals had comparably low levels of welfare problems for the animals, due to the inherent connection between an animal's wellbeing and their ability to grow and produce. Before moving on to address the changes that happened for livestock production after 1950, due to technical innovations in agricultural science, I want to provide some reasoning for why these advances in technology coincided with a change in scientific theory that ends up having disastrous results for the welfare of animals.

The belief that animal suffering is less important than human suffering has been written of by many different philosophers. And while some wrote that animal suffering matters in its own right (Plutarch, Bentham and Mill being some examples), more often it was for human-centered reasons that gave importance to treating animals well. Even still, throughout this time there was the belief that animals could feel a kind of pain. Descartes is frequently cited in animal ethics as a writer who has caused great harm to animals through his claim that they are just like machines and can be treated as such. Not everyone agreed with this conclusion following Descartes, Voltaire (a French philosopher from the following century) wrote a scathing reply to Descartes' idea of animals as machines, part of which reads "Answer me, machinist, has nature arranged all the means of feeling in this animal, so that it may not feel?" (Voltaire, 1924).

However, contrary to how he is viewed, even Descartes believed that while animals did not have consciousness, they could still feel, writing “all the things which dogs, horses, and monkeys are made to do are merely expressions of their fear, their hope, or their joy; and consequently, they can do these things without any thought” (Cottingham, 1978). Descartes quote here shows the theoretical privileging of autonomy and reason over bodily desires and feelings common in western thought over the past few hundred years. While animals can feel, they cannot think (is the claim), and thus are a lower kind of creature than humans. This belief is also shown in the claims regarding women and children being weak-willed and sentimental, and thus deserve less power than men. This so far is an incredibly brief summary of a large swath of philosophical writing, but the purpose in including it is to distinguish the theories that led to a consensus of the elevated position of human over animal, from the transition I will discuss next, wherein any discussion of animal’s feelings is considered anti-scientific.

When Charles Darwin published his works on evolutionary theory, he too said that humans are able to consciously decide on certain trait expression, but he also emphasized how similar we are to other species, and how much of what is involved in the biology of humans, is present in other species as well. Darwin’s theory of evolution showed that feelings played an important role in how animals develop and guides their evolution. For example, feeling hungry lets an animal know it needs food and feeling pain instructs an animal not to repeat that action. Considering the fundamental importance of continuity between species to evolutionary theory, including continuity of consciousness, Darwin’s work gave animal sentience a sound scientific grounding. It is surprising therefore, that only 50 years later, the meteoric rise of behaviorism would undo this scientific consensus, with severe repercussions for animal welfare.

J. B. Watson published “Psychology as the Behaviorist Views It” in 1913, wherein he asserts that the problem with psychology is its preoccupation with consciousness and feelings. Watson argued that for psychology to become a respected, hard science, or a ‘real science’ as he puts it, psychologists needed to focus instead on behaviors as a connected series of stimulus and response. Rollins describes Watson as selling his behaviorist theory, rather than arguing for it; Watson never gives proof against consciousness or feelings being observable, nor does he offer any rebuttal to evolutionary consciousness. Behaviorism was not introduced to fix a flaw in the reasoning of evolutionary theory, and Watson did not provide any reason for why one should think that consciousness does not exist. He instead offered a new system of valuation for psychological concepts and claimed that it was the better, historically inevitable, and correct method. “Watson in essence, paradoxically held that ‘We don’t have thoughts, we only think that we do.’ Subjective mental states are at best dispensable psychic trash, at worst non-existent” (Rollins 1998, 99). As these states did not exist, they are distracting nonsense and have no place in any serious work. In Watson’s own words, “The behaviorist sweeps aside all medieval conceptions. He drops from his scientific vocabulary all subjective terms such as sensation, perception, image, desire, and even thinking and emotion” (Watson, 1928). Watson’s ideas quickly became the dominant view in America and subsequently Britain, which meant that any academic writers using these terms faced wide-spread criticism for being un-scientific. The effects of this valuation change were not limited to psychology, scientists across all disciplines began avoiding mentalist language to be taken seriously.

The results of this were widespread; consider the example of research being done on laboratory animals. Studies involving rewards and punishments, such as bits of food or electric shocks, are discussed solely in terms of their effects on the subject. Certain stimuli would

increase or decrease particular behaviors and these results are recorded. The common-sense fact that the subject avoids the shocks, because they feel bad, is considered irrelevant and meaningless. By excluding feelings and consciousness from the kinds of input that is relevant to science, it resulted in not needing to consider animal suffering as important to any decision.

There are anecdotal examples of students, who balk when asked for the first time to cause pain to an animal subject for the purposes of learning, only to be told that their discomfort is unscientific and displays a lack of fitness for their field. The consequence of behaviorism's discounting of mental states overrules what would seem obvious about animal suffering and declares it irrelevant, without having proven that it is so. "It made researchers' jobs much easier by allowing them to dismiss claims about animals' feeling pain, experiencing fear, suffering, and so on as non-scientific, unverifiable, *meaningless* rubbish" (Rollins 1998, 103).

While behaviorism itself has fallen out of favor and is no longer the leading school of psychological thought, the scientific bias against the inclusion of mental states lives on in what Rollins calls 'scientific ideology'. Scientific ideology states that the only category of things that can be subjects of study are the mechanistic workings of things in the world, which leads to the belief that science is value-free, and separate from ethical judgements. This belief is wrong, science is not value-free, and scientific study can involve both mechanistic and ethical determinations. The behaviorist overturning of Darwinian acceptance of animal consciousness and sentience is an example of how a value determination changes scientific beliefs, rather than the other way around. Scientific research involves making decisions about what will be done and to whom; determining how much of a risk is acceptable when trialing new medicines, determining what methods of anesthesia will or will not be used when performing an operation, decisions must be made all the time to questions that cannot be answered if science was truly

value-free. Like all ideologies, the scientific ideology is indoctrinated and deeply-held, overruling what would otherwise be a scientist's natural inclinations and preventing relevant lines of questioning. Ignoring ethical aspects of scientific processes "deflects from the obvious, everyday level onto the realm of abstract, far-fetched thinking, and in doing so becomes incapable of offering credible accounts concerning our understanding of the reality" (Aaltola 2012, 57). In this quote Aaltola is making the point that science is restricted, to its detriment, from being able to engage with important public concerns, which leaves the public and the scientific community at odds with each other. If scientists believe that science is value-free and thus refuse to engage with any ethical matter, such as informed consent policies or what counts as minimum welfare for test subjects, those ethical decisions will still need to be made by someone. And unfortunately, the people in the best position and with the most knowledge to make those ethical decisions are the ones refusing to acknowledge that they are relevant.

Relating this back to animal welfare, the denial of conscious states directly led to a lack of research into animal welfare. Since it was believed to be impossible to study states of awareness like pain, loneliness and fear, and these states are so closely tied to the idea of welfare, engaging with animal welfare at all was considered not the realm of scientific study. For example, the first textbook of veterinary anesthesia (in 1973) did not include pain-relief as a reason to use it, instead it was considered a chemical restraint, due to its effects on reducing animal movement (Rollins, 1998, 117). The alarming welfare consequence of this is that if it was not detrimental for the animal to move, then there would be no reason to administer anesthesia. For laboratory animals, the people directly in charge of their welfare are the scientists who hold this view, making the consequences of the scientific ideology obvious for those animals. But for livestock, throughout the first half of the 20<sup>th</sup> century the farmers in charge of raising the animals

would largely not have shared in that ideology. Those farmers would have had the common-sense ideas relating to animal consciousness; animals can feel pain and providing them with adequate welfare was a part of their job as their caretakers (in line with the history of husbandry previously discussed.) For livestock, the scientific community's rejection of their consciousness connects to their welfare status because of the singular focus of increased production through technological innovation. By leaving welfare considerations to some other, non-scientific, discipline, the development of agricultural science did not have to restrict itself with concerns for animal wellbeing. In the second half of the 20<sup>th</sup> century, following the trajectory of many industries, farming began using new technology to streamline and increase production and address consumer desires for cheaper and safer meat. In the thirty years following World War II, animal agricultural production increased 500% (Taylor, 1992, 6).

Ruminant livestock traditionally spent much of their time outdoors; this gave them a free food source and it also allowed humans to turn grass and vegetation into a consumable energy source, through eating the animal's byproducts (including its meat.) Pigs would be raised on pastures or through table-scraps and waste; anything that was locally available, due to their ability to digest most organic material. It was the simultaneous advancement of the rail systems (including the invention of refrigerated boxcars) and the discovery that pigs raised on crops common in the mid-west (corn and soybeans) produced the most meat and least fat for the lowest cost, that caused pig raising to be centralized in these midwestern states in large-scale facilities and then shipped by train to the rest of the country. While this caused production to rise and the cost per animal to decrease, new issues were created by attempting to house so many animals in the same, indoor facility. The facilities were indoor due to the management problems that solved; trichinosis and other diseases could be better monitored for and quarantined once discovered,

animals burned less calories by restricting movement and foraging, food and watering stations are easier to refill and monitor, and animal excrement is able to be periodically removed. Densely packed indoor facilities do cause issues for the animal as well, both in terms of their health and their overall wellbeing. However, in terms of animal survival, these issues are overcome through agricultural science advancements such as prophylactic antibiotics, farrowing crates, artificial insemination, and indoor temperature control. (Detzel 2019).

For chickens, up until 1950 farms had small flocks of no more than 200 chickens, which is about the size at which chickens lose the ability to determine a pecking order, resulting in aggressive infighting behavior. This same size was recommended as far back as ancient Rome, by agricultural writer Columella in his work *De re rustica* circa 50 CE (Lawler 2014; Diedrich 2016). The same point about vaccines and antibiotics preventing the widespread destruction of a flock due to disease applies when all are closely packed together (Rollin 1995, 9). As did the ability for temperature control over winters (chickens health is poorly affected by the cold) and increased availability of soy and corn-based feed during non-foraging-friendly winter months. The price of these livestock food sources became incredibly cheap as well, due to increased production; in 1920 it took an average of 147 hours of labor to produce 100 bushels of corn, while in 2010 this has reduced by 98%, down to only 3 hour of labor (Norwood and Lusk, 2011, 39). Nutritional science developed more extensive knowledge about vitamins, facilitating the addition of supplements to chickens' diets, decreasing their mortality rates. The invention of the industrial incubator, and ease of access to it, facilitated industrial sized hatcheries, rather than the previous method of on-the-farm replacement approaches.

In 1946 and 47 there were state and regional contests held, called "Chicken of Tomorrow," which offered a prize for the chicken that best resembled the perfect carcass, as



imagined by agricultural scientists. “One bird, chunky enough for the whole family—a chicken with breast meat so thick you can carve it into steaks, with drumsticks that contain a minimum of bone buried in layers of juicy dark meat, all costing less instead of more” (McKenna 2017).

Lawler, in his 2014 essay about the contest and its effects, describe the industry boom following this contest (in combination with the other technological forces I described), as an unprecedented expansion event, with no other food source of any kind expanding in volume so quickly and at such a scale. In 1920 it took 85 hours of labor per 1000 pounds of chicken growth, with the new broiler breed and intensive raising processes, this has been reduced to only a single hour of labor per 1000 pounds. American’s consumption of chicken actually needed to catch up with supply. From the earliest data we have until the 1940s, the consumption of chicken stayed flat at 10 pounds per capita. There was a slow rise from 1940 to the 28 pounds in 1960, but this was still much lower than the 85 pounds of beef and 55 pounds of pork consumed per person that year. However, marketing campaigns linking white meat to heart healthy eating and the low cost due to the increased production methods caused consumption habits to change. By 1985, chicken consumption outpaced pork and 1992 was the first year Americans consumed more chicken than beef. By 2020 it is nearly as high as beef and pig combined (98 pounds chicken, and 58 pounds beef, 52 pounds pork) (NCC, 2021).

Individual producers cannot be blamed for this shift towards large-scale, industrialized, or intensive confinement-based system of livestock production. The US government, wanting to maintain globally competitive, had an active interest in consolidating farms to boost production and reduce cost; its policy for farmers in the 19<sup>th</sup> century was “get big or get out” (Rollin and Thompson 2011, 6). When a new process or technology came out that boosted production, early adopters would have the ability to sell more product at the previous rate, increasing their profits.

However, as more and more farms adopt the process and similarly boost their production, the market is flooded and rates go down, causing those who adopt later to have a much harder time regaining their expenditures in adopting the technology. Those too who skip the technology altogether then have the problem of having a reduced production compared to the new market norm, and lower prices due to that increase in production. Late adopters tend to go bankrupt, selling their farms to the early adopters who have plenty of capital from before the market price reduced. None of this is unique to farming, the technological treadmill I've described would be covered in any introductory economics course on supply and demand. Every time a new technology or process (or breed of animal) comes out that increases production, the cycle repeats. While historically, farms would produce small amounts of many types of products (some crops, some chickens, some pigs, some cows); the cost of adopting each new technology that comes out means that it would be impossible to invest in the production of multiple goods. The outcome of these forces combined is that farms got much bigger, much smaller in number (30% of Americans were employed as farmers in 1920, compared to 1% in 2010) (Norwood and Lusk 2011, 40) and focused on producing as much as they could of one kind of product/animal. Individual farmers have little choice but to accept the lower welfare standards that come with intensive confinement production, any who refused to put these practices into place would likely be put out of business and subsequently bought by an industrial farm.

Overtime, the market price for each individual full-grown farm animal became so low, it is outstripped, by far, by the cost for the materials to house them. This is a big part of the drive for the crowding of cages and pens; remember that the size and density of animals in traditional agriculture would have been naturally limited, as animals are less productive and more likely to become ill when crowded with other animals. "Though each hen is less productive when

crowded, the operation as a whole makes more money with a high stock density: chickens are cheap, cages are expensive” (Rollins 1995, 119). Pig space allotments have also decreased, with the recommended space per full-grown hog reducing from 32 square feet in 1920 to just 8.

To tie this back to the discussion of behaviorism’s lasting effects on scientific research, agricultural animal science has focused on measurable outcomes that are not tied to mental states, which are production values. Explicitly left out is any consideration of, or even research into the welfare that comes along with different methods of production. Productivity and animal welfare have historically been largely one and the same; “The husbandman put the animal into optimal conditions of the sort the animal was evolved for, and then augmented the animal’s natural ability to survive and thrive by providing [for it] not only was husbandry reinforced by practicality, it was also taught as an articulated ethic” (Rollin 2004, 3). As technological advances sever that connection, it has not been replaced by any new way of making sure welfare is maintained; scientific ideology prevents the consideration of such things as relevant to their field of study. Compromised welfare is therefore not viewed as a loss when comparing systems, as it cannot enter the type of calculus used to judge processes as good or bad. The winner of the Chicken of Tomorrow contest led to the few broiler breeds grown for meat today, a genetic species that is fast growing, top heavy, with weak and brittle bones and congenital heart problems. This type of bird was considered the winner of the contest because the agricultural scientists who were judging would not have considered the greatly reduced welfare of the birds to be a relevant aspect of success or failure. The welfare consequences of the choice of broiler breed is near incalculable. Fragile bones, coupled with a lack of movement and rough treatment when being removed from their cage has led to 80% of chickens going to slaughter with bruises and fractures, which equates to affecting roughly 6 billion birds per year. (Rollin 2004, 10)

A total of 10 billion animals (not counting aquatic animals, which are tallied by weight and not as individuals) are killed every year in America, with the vast majority of these being raised in industrial, confinement operations (Williams 2009, 247) The focus on productivity and denial of animal consciousness by the academic community has combined to cause a large amount of welfare issues for these animals, which I will cover more in depth later in this chapter. Technological advances have allowed animal well-being to be disconnected from productivity, and the ideology of the academic and industrial experts has worked against instituting a replacement for the husbandry ethic that has been in place for most of human history. The sheer scale of animals raised per year also lends itself to the bias of polyism. When applied to animals specifically, “polyism is the phenomenon whereby a given standard of care is lower because of the number of animals involved, and also partly because of the size of the animal” (Morton 2009, 422). This is shown in the level of welfare still given to cows, which are bigger and raised in smaller numbers. Steer face lower levels of serious welfare issues when compared with hogs and chickens.

The goal of the first part of this chapter was to provide a brief account of the compounding factors that led to the transition from the way livestock human interactions have gone for millennia, to the intensive confinement system in place today. A major component to the acceptance of the development of intensive systems was the removal of animal suffering from the realm of human consideration. This started with a removal from the political sphere, continued with the behaviorist’s denial of their consciousness or suffering being relevant to science, to a complete denial of their subjective feelings at all. What is next for the historical account of animal welfare is to go through the laws that were instituted after the rise of behaviorism and the connection that these laws’ introduction has to the public’s personal ethics.

An account of modern welfare laws is relevant to setting up my larger argument in this dissertation in a couple of ways. If the reader concludes, due to the arguments contained here or for other reasons, that a certain minimum for livestock welfare is desirable, then understanding that we do not currently have oversight or regulation protecting livestock animal welfare is relevant to determining if or how this should be assured. Also, proving how important public knowledge and visibility is to the history of animal welfare rights, motivates my appeal to overlapping consensus and public reason in Rawlsian theory as a relevant method of inclusive theory.

The first federal legislation for livestock welfare in the United States was the Humane Methods of Slaughter Act of 1958 (HMSA). It was the result of a three-year campaign from animal-advocacy groups and the bill (and eventual subcommittee) was headed by Senator Humphrey. It required some added acts robustly defending ritual (religious) slaughter to succeed, but once these were added it passed easily. The act declared that “no slaughterer shall hoist, cut, scald, bleed, or slaughter any livestock unless such livestock has first been rendered insensible by mechanical, electrical, chemical, or other means determined by the Secretary [of Agriculture] to be rapid, effective, and humane” (HMSA 1958). This sounds like robust welfare protection, at least for the process of slaughter, however the act was devoid of real consequences for violations. The single consequence slaughterhouses would face is that the federal government resolved to only buy their meat from processors who would use human methods of slaughter, although there were no inspectors to ensure facilities met the standards listed within the act. However, over the next 20 years, 90% of slaughterhouses switched to methods that largely met the standards of rendering insensible before slaughter, since these methods became cost-effective anyways (Welty 2007).

What is perhaps more interesting about the HMSA, related to what I've discussed so far in this chapter, is the snapshot of public sentiment in 1958 it provides through the accompanying transcript of the expert testimonies given and ensuing debate when the bill was presented for consideration. It is clear that the general public, whose opinions are given through their representatives, believe that livestock animals can feel pain and that it is important to avoid suffering when possible. The reason given for the motivation of the committee members in drafting this legislation is due to the perception that the US is behind the rest of the "free world" in enacting humane slaughter. In the introductory statement of the HMSA, Representative Griffiths said that "Of course, if slaughterhouses had glass walls we would have had humane slaughter a long time ago. But they do not have" (HMSA 1958) This comment shows that the public is of the opinion that animals can suffer, and inhumane methods have been allowed in the past more out of ignorance than the belief that animals cannot be harmed. Throughout the discussion there is repeated mention of the considerable amount of interest there is by "everyone" for humane treatment. Much of the discussion revolves around the need for further research as to what counts as humane methods; "Much fundamental knowledge is lacking upon which to base an opinion of the acceptability of one method over another from the standpoint of humaneness. Research is needed to develop information which may shed light on this aspect of the problem. H.R. 5820 would provide for this type of approach" (HMSA 1958). The wording of the bill that passed authorized the Secretary of Agriculture to assign funding for research into the topic of animal sentience and welfare, but despite the repeated calls to the necessity of this research during the debate of this bill, there was never a federal grant or request for this research to be undertaken following the passing of the HMSA.

The pervasive belief of the representatives that livestock can feel pain and ought to be guaranteed a level of welfare is contrasted with the views expressed by the testimonials of veterinarians during the bill's debate. Dr. Ralph Barner, a professor of veterinary pathology in east Lansing, MI, gave testimony that in his work they need to "destroy living animals rather frequently, using the dead cadaver as a means of arriving at a diagnosis" and that in their lab it does have a glass window in which the people who accompany their animals to be killed (pet owners and farmers) watch. He states that the viewing of the public is what caused a change in his institute to need to use humane methods, saying "commonsense public opinion has compelled us to use humane methods" (HMSA 1958). In this testimony we find a clear admission that when it is up to the scientists, the advancement of knowledge precludes considerations of animal consciousness; it is only when faced with the public eye that are forced to care for animal welfare.

The influence of public outcry against practices they believe are against their common ethic have historically been a catalyst for adopted regulations. The sanitation issues in meat packing plants depicted in Upton Sinclair's 1904 novel *The Jungle*, disgusted the public and led to President Theodore Roosevelt and congress to pass the Federal Meat Inspection Act and the Pure Food and Drug Act in 1906, eventually becoming the Food and Drug Administration. The presence of the FDA and other regulatory bodies assured Americans that if things were bad, they wouldn't be allowed. Rachel Carson's 1962 book *Silent Spring* challenged that belief, exposing the adverse environmental effects resulting from pesticides as well as warning against unquestioning belief in industry claims. Taking advantage of the public realization that things can be worse than they seem, Ruth Harrison's book *Animal Machines* was published in 1964. Harrison was hoping to spur the same public outrage over livestock housing conditions in

intensive farming as Carson was able to generate a couple of years earlier. The novel gave much of the public their first realization that farming no longer resembled the idyllic pastoral landscape of their parent's generation. One of the primary points Harrison makes in her book is that suffering for animals cannot be reduced to the single factor of pain; the conditions livestock animals were kept in might not be harming them to the point of ill-health, but they still experienced discomfort, boredom and the ability to express their instinctual behaviors, that the "animal is not allowed to live before it dies" (Harrison 1965, 3). The public reaction to *Animal Machines* was especially strong in the UK, where the book was published. The scale of public concern led the UK government to form a committee to study livestock welfare concerns, and a year later the committee issued its now famous 1965 report, *Report of the Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Livestock Husbandry Systems*, colloquially known as the Brambell Report.

When generating their report, Brambell's committee had to walk a political tightrope between industry and scientific experts and social opinion on animal welfare. Harrison, animal welfare societies, and the public who was sympathetic to their views, argued that there was an ethical dimension to animal welfare. They claimed that scientific knowledge of animal welfare was near non-existent, and the industry experts were economically motivated to define good welfare as conditions that cause the growth of animals, while ignoring mental suffering, which makes it the duty of the public to prevent cruel conditions. The opponents to this claim were the veterinarians, scientists and farmers who attacked Harrison's book and her supporters as emotional and irrational. There was no evidence that animals suffered due to things like boredom or a lack of room to move, and there was a lot of evidence that these practices caused good growth, therefore productivity *is* welfare. "Couching their views of welfare in the language of



stress, they argued that ‘effect on protein metabolism’ – in other words, the ability to grow and produce – was the best available indicator of a stressful situation” (Woods 2011, 20). The lack of research into animal mental states was put forth as evidence that they did not exist, rather than as evidence of the bias these groups. The Brambell committee accepted the arguments related to the necessity of intensive farming practices and did not categorically condemn these in their report. Instead, they offered recommendations aimed at improving future animal welfare within the intensive system.

These recommendations were guided by an account of animal welfare that was much closer to Harrison’s position than the industry’s growth-as-welfare definition. They argued that there was sufficient evidence, despite the lack of dedicated scientific research into the matter, to say that it was likely that animals suffered, considering the animal’s physiology, behavior and expressions. “In the absence of any scientific method of evaluating whether an animal is suffering, its continued productivity should be taken as decisive evidence that it is not. . . [is] an over-simplified and incomplete view and we reject it” (Brambell 1965, 10). The report was clear that the presence of animal consciousness had not been proven, but that it was “morally incumbent upon us to give the animal the benefit of the doubt” (Brambell 1965, 11), until sufficient research had been done. The recommendations of this report agreed with Harrison’s claim that there are factors beyond pain that contribute towards the broader conception of animal welfare, and importantly, that these factors are both physical *and mental*. The Brambell Report said animals have good welfare if they are “free to standup, lie down, turn around, groom themselves and stretch their limbs” (Brambell 1965, 13). It also recommended the creation of an advisory committee for farm animal welfare, which was created in 1967, and is now the Farm Animal Welfare Council (FAWC). The FAWC is important in the history of animal welfare due

to their creation and publishing of the Five Freedoms in 1979. The Five Freedoms are the most widely used animal welfare framework globally today (OIE 2021, Sec. 7) and come from the 1965 Brambell Report. The Five Freedoms are; freedom from hunger or thirst, freedom from discomfort (appropriate shelter and resting environment), freedom from pain, injury and disease (diagnosis and treatment), freedom to express normal behaviors, and freedom from fear and distress. The UK and EU have more robust regulations for livestock welfare than the United States, due to the widespread support of the recommendations in the Brambell Report and the ensuing Five Freedoms.

A more recent example of the role of journalistic exposé in motivating public outcry is the 2008 movie *Food Inc.*, an American documentary criticizing industrial farming and the fast-food industry. It might seem like this movie is not on the same scale of importance when compared to the effects of *Animal Machines*, but the popularity of the movie was a PR nightmare for McDonalds in particular, and fast-food corporations more generally. In a move to rectify their corporate image, McDonalds publicly committed to sourcing animal products with higher welfare standards. They will source 100% of their pork from facilities that do not use gestation stalls (small, enclosed stalls for pregnant sows) by 2022, 100% cage-free eggs by 2025 (currently at 60%), and demanded welfare audits for the slaughtering facilities they source their meat from starting within a couple of years of the release of *Food Inc* (McDonalds Co.) These welfare audits have been set into place with the help of animal ethicist, Temple Grandin, who worked with the company to set measurable standards for what counts as failing a welfare audit. I will discuss these more in depth later in this chapter, but relevant point here is that the desire of McDonalds and other fast-food corporations to appease the negative press generated by *Food Inc*

has resulted in immense improvements in welfare for livestock animals in America, due to the purchasing power of these corporations.

Majority consensus in scientific communities of the denial of animal consciousness persisted until 1976, when Donald Griffin published *The Question of Animal Awareness*, which strongly argued for the inclusion of animal awareness as a field of scientific study. Giving credit to his book was Griffin's reputation as a respected member of the 'hard sciences', his previous work was on animal navigation, he was one of the scientists to discover that bats navigate using echolocation (a term he coined) (Dewsbury 2004). *The Question of Animal Awareness* identified the behaviorist way of thinking as a taboo that needed to be discarded to advance the study of behavior. "He believed that the law of parsimony was best served not by denying animal consciousness but by denying the alleged uniqueness of human mental experiences." (Dewsbury 2004). Following the release of this book a new field of animal research emerged, cognitive ethology. While many scientists disagreed with Griffin's conclusions, he nonetheless legitimized scientific research into animal consciousness, resulting in studies that previously would not have been undertaken. It is not the case however, that Griffin's work reversed the dominant scientific position on animal sentience; the behaviorism bias remains today. One example, the 2017 version of the *Veterinary Medicine: A Textbook of the Diseases of Cattle* has only 6 pages on pain of the 2278 pages total, in which the author ends the section by stating that it is not scientific to assume cows suffer due to pain; "In humans, there is an additional psychological parameter to pain and, although it is customary to transpose attitudes from pain in humans to animals, this is a courtesy rather than an established scientific principle" (Constable et al. 2017, 78).

Two years after Griffin's first book on animal consciousness, in 1978, an expanded version of the Humane Methods of Slaughter Act was passed. While the original, 1958 version only covered plants that sold to the federal government, now all federally inspected plants (those that deal in inter-state commerce) would also be inspected for humane-slaughter by the USDA inspectors already stationed in these facilities. When the HMSA was originally written, there wasn't a reasonable way to ensure welfare compliance, because a system of federal inspectors didn't exist. By 1978 this had changed, increased public pressure for the government to guarantee food safety meant that the USDA had inspectors performing audits of meat safety in all of these slaughter plants. Adding on a welfare inspection to the existing food and health safety inspections was an achievable addition. For the first time there could be teeth to a welfare law for livestock; a \$1000 penalty for the first offense and increased monetary penalties and even a year of jail time can be levied against owners of facilities that don't abide by the welfare standards for slaughter. The 1978 wording was also changed to include the phrase "and handling in connection with such slaughtering" to expand the scope of the act to include the entire processing facility (Becker 2008.) The revised HMSA is intended to ensure that all livestock, excluding poultry, are rendered insensible prior to slaughter, and have minimal standards of welfare while in the slaughtering facility. And this is still the entirety of the welfare laws in place for livestock animals in 2022, the HMSA is the only piece of federal or state legislation that regulates the treatment of livestock animals. Setting aside that any issues of welfare at locations prior to slaughter facilities are not illegal, the reality is that the HMSA itself is not effectively enforced and is frequently violated, despite the welfare inspection process put in place in the 1978 revision.

One issue is the kind of training the inspectors receive. The written guidelines focus on the procedures for ensuring meat safety, with over 350 pages dedicated to this compared to only 6 pages for welfare checks. When it comes to the inspection of post-slaughter meat, there are incredibly specific ways to pass and fail, but the welfare guidelines are vague, requiring the inspector to use their own judgement on what counts as poor enough welfare to fail (Welty 2007). Unfortunately, the inspectors do not have adequate knowledge to make these judgement calls; neither in their expertise coming into the job, nor in the training they receive. The primary task of the inspectors is to ensure food safety and that is what they are hired to do, the welfare audits is seen as a small extra task. The inspectors have their expertise from a science background, they are trained to conduct the chemical tests necessary to ensure bacterial and chemical safety in food. What the inspectors do not have is knowledge of livestock animals, their normal behaviors and physiology, facts essential to assessing if certain practices are examples of egregious abuse or not, considering the vague guidelines that rely on inspector knowledge. “For example, inspectors at half of the plants did not correctly answer basic facts about signs of sensibility” (US GAO 2010). Even the physical location of the inspectors prevents effective welfare auditing: “One USDA inspector explained, [T]he way the plants are physically laid out, meat inspection is way down the line. A lot of times, inspectors can't even see the slaughter area from their stations. It's virtually impossible for them to monitor the slaughter area when they're trying to detect diseases and abnormalities in carcasses that are whizzing by”(Welty 2007). Inspectors are meant to visit other parts of the facility as well, remember the language says that all parts of the facility connected to the actual time of slaughter are also under the HMSA, but a 2008 CRS report investigating HMSA compliance issues showed that this was regularly being skipped. Inspectors would be instructed to leave the pre-slaughter welfare inspection to the FSIS (Food Safety

Inspection Service) veterinarian, but these veterinarians do not have the same requirements as the inspectors and therefore regularly wouldn't even be on the premise, meaning no one performed pre-slaughter welfare assessments (Becker 2008). Inspectors meant to be the 'off-line inspector' and therefore able to move to other points and inspect for welfare are regularly pulled to post-mortem inspections, which are considered essential as opposed to the welfare checks which are to be undertaken as time permits. "When they are so deployed, plant employees know there is no chance that a government official will be able to visit the pens to do any checks, until the slaughter line is stopped" (Becker 2008). While the official statement from FSIS states that inspectors should devote 80% of their time to food safety and 20% to humane handling, the CRS report found the true percentage devoted to HMSA enforcement is only 1% (Becker 2008).

A lack of training, knowledge, time, and physical location barriers are not the only factors preventing enforcement of HMSA compliance. Another issue is the way in which inspectors respond to the violations they see in facilities. The inspector can decide to take one of three actions when they witness an animal being treated inhumanely; they can issue a noncompliance report (a write up that an issue took place and a recommendation to fix this in the future), issue a regulatory control action (stopping that piece of equipment from being used temporarily), or suspend plant operations until the violation is rectified. There are several problems with this set of responses to HMSA violations, the first being the inconsistency of which action an inspector would take following the same violation. A survey was given to inspectors asking which action they would take to two welfare violations, a facility using an electric prod on over 50% of all animals moved, and witnessing an employee deliberately electrically prod an animal anally, both of which are considered egregious violations within the industry. For the first case, only 9% of inspectors would suspend processing until resolved, and

the remained were evenly split between regulatory action, noncompliance report only, and no action at all. In the second case only 7% would take no action, and the remainder were evenly split between taking one of the three actions (US GAO, 2010). These surveys show that inspector response is inconsistent when violations are witnessed, and even severe HMSA violations will often be allowed completely, or only given a noncompliance report, which does not escalate to any further penalties. In 2007, across all slaughter facilities, production was suspended 12 times and 700 noncompliance reports were written (Becker 2008). While the wording of the HMSA includes the potential for jail time and fines, no jail time has ever been served, and the fines assessed are not tracked by the agency and thus difficult to determine. A 2004 report by the Government Accountability Office (GAO), concluded that “inspection records had made it difficult to determine the extent of humane handling and slaughter violations” (US GAO, 2004.)

Further interpretive issues have harmed the ability of the HMSA to ensure livestock welfare, even if the procedures and training were performed to a much higher standard. Bruce Friedrich, a Georgetown Law scholar, argues that there are three interpretive decisions made by the USDA after the law was written have gone against the intent of the authors of the HMSA. The first is the USDA’s decision not to include welfare inspection at any religious slaughter facility, instructing inspectors that welfare violations are outside of their field of responsibility at these facilities. While the HMSA does explicitly allow religiously motivated ritual slaughter, it specifies that these must be done in a manner that instantaneously causes insensibility, such as through the efficient slicing of carotid arteries. The wording of the HMSA, both in 1958 and 1978, intended to safeguard religious freedom in method of slaughter, but not to exempt them from any oversight. The testimonial given when the religious exemption was being debated all centered around the fact that when done appropriately, ritual slaughter is humane. Included in the

bill is explicit mention that religious slaughter is not ‘exempted’ at all, as that would “imply that the ritual is actually inhumane, but that Congress will allow it to continue nonetheless” (HMSA 1958). There is nothing included within the act that justifies the USDA decision to not conduct welfare inspections in religious facilities, and by doing so has unilaterally decided that religious slaughter does not need to be done humanely.

The second interpretive decision was made early in the USDA’s enforcement of the HMSA, as the slaughter of poultry have never been considered as part of the act. Original versions of the act had poultry explicitly name alongside other livestock and methods of humane execution for chickens are discussed during the debate of the bill. However, the term poultry was left out of the final copy, potentially because at the time ‘livestock’ meant all animals raised on a farm, and thus included poultry. The USDA has argued that because the finalized version removed poultry by name, they are correct in interpreting it as exempting this category of animal. Due to their status as exempt, chickens do not need to be stunned before slaughter, and no amount of abuse or welfare violations seen at facilities by inspectors would result in penalties or documentation. In 2018 the United States slaughtered 33 million cattle, 125 million hogs and 2 million sheep, for a total of under 200 million total livestock that are counted under the HMSA. Compare this to the nearly 9 billion chickens that were slaughtered that year, it means that exempted animals make up 98% of all animals slaughtered annually (USDA 2018 Statistics). Further, individual states whose voters would want to regulate welfare for chickens, or increase the protections given to other livestock are not able to. The final interpretation of the HMSA that has stymied improved welfare efforts for the slaughter of animals is a ruling by the supreme court on the side of the USDA restricting states from granting greater slaughterhouse protections that those offered by the HMSA. Friedrich argues this was not contemplated by nor the intent of



Congress when it incorporated humane slaughter into the federal meat inspection act (Friedrich 2018, 168).

The public could demand a change to the HMSA, or for the introduction of other legislation to protect farm animals or improve their conditions, like they did for laboratory animals requiring pain management. In that case public opinion motivated the legislation, which overtime changed the ideology within the discipline. While scientists of the early 1900s largely had no problem operating on animals without anesthesia, researchers today would not choose to do so even if the Animal Welfare Act was repealed. Ideological bias against recognition of pain has been pervasive through all disenfranchised groups, including humans. The use of Black and Indigenous communities in painful medical studies without the use of anesthesia or their consent was pervasive throughout our country's medical history (Rollin 1998, 132). Continuing into today, racial disparities in the prescription of analgesics continues, including for "fracture treatment, cancer pain, and postoperative pain" which reflect a diminished belief from the physician as to the testimony of pain from non-white patients (Tamayo-Sarver et al. 2003). It is clear that ideological bias has affected the trajectory of animal welfare historically, but the last thirty years of research into cognitive ethology and animal physiology has yielded substantial insight into the question of if animals can feel pain, which I will discuss next.

### **Animal Consciousness**

If you do not believe that animals feel pain, then guaranteeing them welfare standards would be unattractive unless it relates to something you do value, such as increasing profits. The common-sense idea is that they can feel pain, but is that true? As I said in the previous section, research on animal consciousness and sentience only started after Griffin argued for its place in

scientific study. I will present the existing evidence that animals can suffer, or rather, I will present an introductory-level account of the science of animal consciousness. First though, I want to point out why this will be relevant to my argument for livestock's inclusion in a distributive schema of justice. Considering Rawls effort to distinguish his account as non-utilitarian, and his general labeling as a neo-Kantian, why would livestock's ability to suffer bear relevance to an argument using his theory? While the idealized conception of the people who determine the principles of justice are rational and reasonable, ahistorical and outside of their specific bodily attachments, the circumstances they must consider when making the principles are taken from the historical and bodily circumstances of the society they are governing. Rawls says that the consideration done behind the veil of ignorance have access to biological facts. Therefore, the science of animal consciousness would be accessible to these participants. If livestock animals are subjects of justice as fairness, as I will argue in the following chapter, it becomes an incredibly relevant part of determining what they are owed through the distributive schema to know what is good or bad for them. Animal suffering isn't relevant because it is suffering, like it would in a utilitarian framework, it is relevant because of what it tells us about the physical bodies and determinations of the good certain beings have, whose lives are fundamentally intertwined with the basic structure.

For Darwin, the evolutionary congruence and biologic similarity of humans compared to other animals was what convinced him of animal sentience, and this remains the best evidence we can give for animal suffering. The Brambell Report of 1965 assumes this is true, stating "all mammals may be presumed to have the same nervous apparatus which in humans mediates pain. Animals suffer pain in the same way as humans" (Brambell). Since the release of the Brambell Report, there have been more studies done on the pain pathways in animals and we can say with

more confidence than was presumed in 1965 that these are the same as in humans. The basis of pain is in nociception, which is “reception, conduction, and central nervous processing of nerve signals generated by the stimulation of nociceptors” (Benson, 2004, 65). The complete psychological process is what transfers nociception stimuli into conscious perception of pain; for example, if a flame touches the skin, that sensation is registered by nerve endings, the nerve endings generating a nerve impulse, which is processed by the brain to stimulate either unconscious response (nociception) and/or conscious recognition of pain. The nociceptor threshold, the minimum stimuli needed to generate a nerve impulse, is lower than the pain detection threshold, but both are consistent across almost all species, including humans (Benson 2004, 65).

“There are differences in these systems among species; however, the similarities outweigh the differences. The lateral ascending pathways (spinothalamic tracts) transmit nociceptive information leading to the sensory-discriminative aspects of pain. They terminate in the ventrobasal thalamus, which in turn relays the activity to the somatosensory cortex. The medial pathways (spinoreticular) subserve the motivational-affective aspect of pain. They terminate in the reticular formation, the periaqueductal gray matter, hypothalamus and thalamus” (Benson 2004, 67).

While this is a complicated passage to understand to anyone without neurobiology training, it still only constitutes a broad overview of how the pain pathways work in humans, mammals, and many other animals. The point Benson makes in his account of the physiology of pain is that many animals (and relevant to my point, all livestock animals) have the same biologic makeup as humans do, when it comes to the systems relevant to pain pathways. Further proof that these pathways work in the same way in animals as for humans, comes from studying the behavior animals display in response to painful stimuli when they have lesions in their brain that interfere with specific pathways. When humans have lesions in their lateral ascending nociceptive tracts have greater difficulty reporting where their pain is located or what type of pain it is (stabbing,

aching, burning, etc.) but the pain itself is not diminished at all. Lesions in the medial ascending nociceptive tracts create the opposite effect, humans with these lesions are able to localize the pain with precision and describe what kind of pain it is but find it tolerable. Animals with these medial lesions similarly display reduced aversive behaviors to painful stimuli compared to animals without the lesions (Benso, 2004, 65). One of the differences in the systems of primates and humans compared to other animals is that the lateral tracts are more developed in humans, while the medial tracts of other mammals are larger in comparison to humans; “thus, it would appear that nonhuman mammals may experience a greater degree of suffering and stronger motivational drive from noxious stimuli while being able to less precisely locate and characterize the pain” (Benson 2004, 65).

Benson’s account of pain pathways focuses on comparing mammals to humans, which leaves out a large proportion of all food animals, namely the chicken. However, chickens (and other avian animals) share the same circulatory, immune, and nervous systems as mammals. A 2014 study on the nociceptor threshold testing of broiler chickens mentions several studies that conclude there are “many similarities between avian and mammalian pain related neurophysiology,” including that chickens’ nervous system contains nociceptors that are “indistinguishable, structurally and functionally, from mammalian primary afferent fibers” (Hothershall et al. 2014). There are differences in the structural regions and makeup of avian brains compared to mammals, however there are also fundamental anatomical similarities and the functional role of the brain stays the same. A research article in *Frontiers of Computational Neuroscience* described their work conducting the first large-scale brain connectivity mapping of a bird, the pigeon, and concluded that “despite the absence of cortical layers and close to 300

million years of separate evolution, the connectivity of the avian brain conforms to the same organizational principles as the mammalian brain” (Shanahan et al. 2013).

Scientific and medical research makes use of the fact that animal and human physiology are similar constantly, to perform research for human benefit. Just in the UK during the year of 2019, 1.73 million procedures were carried out on living animals for experimental purposes and the top two categories of research were basic research on the immune system and the nervous system (gov.uk, 2020). The fact that animal nervous systems follow the same pathways gives researchers the ability to learn about how different procedures and drugs might affect humans, and the same would be true in reverse. While we would not choose to use humans as research subjects for the benefit of animals, the knowledge we gave from human reporting, combined with observation of atypical behaviors from animals, can give us confidence that drugs that have an effect on humans have the same effect on animals. Apomorphine is an emetic for a wide variety of species, meaning they cause stomach upset and vomiting. When animals take these drugs, they have similar periods of distressed behaviors, followed by vomiting, that we see in humans (Gregory 2004, 8). Knowing that animals have the same biological pathways, it is reasonable to make a parallel from human experiences of the same drug, just like how we make inferences from animals to humans. One benefit to this kind of research is it increases our understanding of the behavior animals display when suffering specific forms of distress, through inducing it pharmacologically (Gregory 2004, 8). Pharmacological substances can demonstrate more conscious states than pain; “Many animals respond to mood-enhancing drugs, such as benzodiazepine, used to relieve anxiety and related forms of mental distress in human beings, and (conversely) animals will also begin to act anxiously if administered anxiety-inducing drugs” (Altola 2012, 17)

The information I have included so far about nociceptor pathways and pharmacological inducement of atypical behaviors in some instances reference pain rather than nociception, but it is important to be clear about the difference. The term ‘valence’ is the word used for the value an action (or freedom from a stimulus) has for the subject, human or animal. Nociception would not matter if we did not suffer (or experience positive states) as a result of it. Pain is the subjective, or conscious, experience of unpleasant and painful nociceptive stimuli. A sensation has a certain level of positive or negative valence, depending on how much it is desired to obtain or avoid. The fact that animals have been demonstrated to learn from pain, specifically in what they need to do to avoid it, shows that the painful events have valence; animals do not want to be in pain and are to use sensory inputs to learn how to manipulate their environment to avoid it. Livestock animals show a preference for avoiding pain, including through analgesic medication. Lame chickens and uninjured (sound) chickens were selected from commercial flocks and presented with two differently colored food choices, one containing the analgesic Carprofen. The study showed “lame birds selected significantly more drugged feed than sound birds, and that as the severity of the lameness increased, lame birds consumed a significantly higher proportion of the drugged feed” (Danbury et al. 2000). The preference for pain relief, only when injured, has been shown in other species as well, including rats and sheep (Colpaert et al. 2001; Villalba et al. 2006). It isn’t just pain related medication that animals recognize the effects of use, they have also been shown to self-administer medication to reduce negative emotional states. Laboratory mice will choose to drink water laced with benzodiazepine, an anti-anxiety drug used to treat anxiety and depression in humans, more frequently when they live in standard barren cages as opposed to the frequency of mice housed in an enriched environment (Sherwin and Olsoon, 2004). These studies give evidence towards conscious pain in animals due to the source of the

motivation. When animals are experiencing their normal and healthy status, the presence of the drugs does not provide any positive (or negative) reinforcement following consumption. For animals to learn to choose the dosed material, they need to identify it as something desirable enough to motivate the continuation of the behavior or sequence of behaviors required to obtain it. The lame chickens identified the drug-laced food as desirable, while the healthy chickens did not, which shows that the food is evaluated after the effects take place based on some level of recognition that being in less pain is desirable. This preference for pain-relief held true even in a study that had the drugged solution altered to taste bitter, and the alternative solution was sweet, something the rats without arthritis greatly preferred. The arthritic rats, who were injected with a solution that causes temporary arthritis, choose the solution containing the fentanyl analgesic for the same period as the known duration of the induced arthritis (Colpaert et al. 2001). This means that the rats were motivated to choose a temporary disgust for the benefit of reduced pain, during the period of time that they would be in pain. It seems that the animals in these cases have an awareness of their pain, at the least at the level of assessment awareness, which is a definition of awareness where “the individual is able to assess and deduce the significance of a situation in relation to itself over a short time span” (Sommerville and Broom, 1998). These studies on pain-relief choices by animals have been influential to the point that renowned livestock welfare expert Temple Grandin, the leading industry expert who designed the welfare auditing system I spoke of in the previous section, said that in her opinion “A reasonable criteria for assessing pain induced suffering is does the animal actively seek pain relief” in a symposium she gave to the American Board of Veterinary Practitioners on distinguishing types of distress in animals (Grandin, 2003).

Michel Cabanac, an expert in thermal physiology, believes that the similarity in the physiological responses of many species of animals to human responses in the same scenarios, offers good evidence that animals have subjective emotional experiences. Rats will display different facial expressions and gestures in response to having different stimuli injected into their mouths, these motor patterns resemble human behavioral responses when feeling pleased or disgusted with what is put in their mouths (Cabanac et al. 2009, 268). Cabanac also references studies done regarding temperature preferences in animals. Rats will press a lever that gives them no reward aside from additional heat, but only when the cage is colder than their body temperature. The further away from body temperature the ambient temperature of the cage is, the more time the rats spend pressing the lever for heat, and conversely rats in a warm cage will not press the lever for heat (Lipton et al. 1970). Cabanac groups behavioral and physiological signs of consciousness into four categories: emotion, sensory pleas, REM sleep, and play, and points out that while there is evidence of all four in mammals, birds and reptiles, amphibians and mollusks do not show the same abilities. Taste-aversion learning does not happen in amphibians, they will continue to eat something that was previously laced with a toxic substance. Cabanac concludes that consciousness is a widely shared trait of brain connections; “a common mental pathway that uses pleasure, or its counterpart displeasure, as a means to optimize behavior” (Cabanac et al. 2009, 271).

These studies show that experiences of pain or discomfort are a relevant part of learning, rather than a straightforward response behavior in the presence of a stimuli. “Experiences and sentience, on the other hand [opposed to mechanist response], enable quick and creative decisions. The animal has access to sensory information and, instead of repeating certain restricted responses, makes ‘higher-order’ choices on the basis of this information” (Kirkwood



2007). At the end of this section on animal consciousness I will discuss the relevance of the lack of certainty regarding conclusive statements on consciousness, animal and human, but the goal in describing these studies is to offer evidence that animals have at the least a valuing system related to their internal status. Pursuing or avoiding certain preferences regarding the presence of external stimuli in their environment shapes animals' future behavioral actions. Not all animals' behavior is shaped in this way, through learning based on some sort of internal recognition, but it is present in all livestock animals we have historically and contemporarily made use of.

Animals also demonstrate varying pain response depending on psychological factors, unrelated to the duration and intensity of the painful stimuli itself. Humans tend to find pain more manageable when it is within their control and follows predictable patterns, both qualities are psychological in nature but affect the experience of pain (NRC, 2009). A psychological pain management technique that has been tested in animals, including chickens, is redirection. By occupying the attention of chickens through a variety of motivational actions (nesting, feeding, exploration and social interaction) after an injection of the sodium urate injection that induces temporary localized arthritis, the chickens were monitored for pain-related behaviors and the physical characteristics of the injected joint was assessed (Gentle, 2001). "The degree of pain suppression ranged from marked hypoalgesia to complete analgesia and as such demonstrates a remarkable ability to suppress tonic pain. These shifts in attention not only reduced pain but also significantly reduced peripheral inflammation" (Gentle, 2001, 187). The study's author concludes that redirection resulted in near complete to complete absence of pain signaling in the chickens, plus reduced inflammation, which is a bodies' response to pain and injury. The success redirection had in this and other studies for animals, suggests that pain has a conscious element. If pain operated only at the level of the unconscious, then it seems less likely that a shift in an

animal's conscious attention would have such a large impact on pain signaling behavior.

Another aspect to suffering that is separate from pain, and considered psychological in humans, is fear. Grandin advocates for consideration of fear as an equal, if not greater, contributor towards animal suffering. The fear pathways connect multiple regions of the brain, but central to the ability to learn fear conditions and in the expression of long-term memory of fear is the amygdala, the source of the 'fight or flight' response in humans and animals (Rosen and Donley, 2006). The amygdala, or its equivalent anatomical structure, is present in all vertebrates (Vargas et al. 2012), while the neural regions related to pain are found mostly in the 'upper vertebrates' discussed earlier. An article on the interaction between fear-induced stress and pain states that "stress can exert modulatory effects on pain perception in animals, as exposure to a stressor can result in either the reduction or amplification of the perceived severity of pain." (Baker 2019, 457). Stress due to fear and due to anxiety can mask normal pain signaling behaviors in animals, and therefore it is important to not rely on an absence of such behaviors to indicate good welfare. While it is common to refer to stress without a distinction, fear-stress and anxiety-stress follow different pathways in the brain and lead to different responses for nociceptive processing, and therefore they are distinct types of negative states for an animal (Yilmaz et al., 2010). When evaluating good and poor welfare for livestock animals, which I will cover more in depth in the following section, fear and anxiety will be important aspects of suffering to minimize. For example, cattle need to be branded to maintain herd integrity for the purposes of clear ownership while grazing and moving. Wild cattle, who are not used to being handled or near humans, had tested levels of fear-induced cortisol (a stress hormone) from just being restrained nearly as high as from the hot iron branding itself (Lay et al. 1992).

Neville Gregory, a leading expert in applied welfare aspects of physiology in meat production, argues that there are seven physiological capacities that cumulatively determine an animal's ability to feel pain at a conscious level. These capacities match the research presented so far in this chapter;

“1) it possesses receptors sensitive to noxious stimuli; 2) its brain has structures analogous to the human cerebral cortex; 3) nervous pathways link the receptors to the higher brain; 4) painkillers modify the response to noxious stimuli; 5) the animal responds to noxious stimuli by consistently avoiding them; 6) the animal can learn to associate neutral events with noxious stimuli; and 7) it chooses a pain killer when given access to one, when pain is otherwise unavoidable” (Gregory 2004, 5).

Livestock animals display these seven capacities, and while Gregory does not provide a conclusive argument for these conditions as sufficient for conscious pain, I think it is a good summary of the level of evidence that we now have. Tom Regan, in his landmark book *The Case for Animal Rights*, gives the ‘Cumulative Argument for Animal Consciousness,’ which begins with the sum physiologic evidence, albeit less detailed than here, due in part to being written in the early 80s. The cumulative argument works for any animal who has as brain and nervous system resembling humans, who appears to exhibit intelligence, appears to make rational calculated tradeoffs [I will go through some studies showing this in the following section], and who live in social groups that can communicate in sophisticated ways (Regan, 2004). Regan states that if a species of animal has these traits, then any theory that denies consciousness for them but grants it to humans is less consistent with the observable world, more complicated with more assumptions, and more likely contrived, than the theory that consciousness arose through shared evolution between humans and the animals for whom satisfy these requirements. This again does not prove that animals can feel pain, but Regan sets up three conditions for theories that wish to deny it need to fulfil.

Part of the strength of the claim that animals have conscious experience of pain and other suffering, is the role that conscious ability plays in human learning. “It appears that certain kinds of associative learning are strongly correlated with phenomenal consciousness in humans, thus strengthening the basic argument by analogy when similar forms of learning are described in nonhuman animals” (Allen 2004.) It is possible that animals have a separate mechanism for learning in these scenarios that closely mimics the role of phenomenal consciousness, but we don’t have evidence of this. The most accurate statement would be that we have strong evidence for animal consciousness, but no definitive proof that it does or does not exist. This agnostic standpoint is what Marian Stamp Dawkins argues for in her work on animal welfare over the last couple of decades. I will go through an overview of her objection to definitive claims of animal sentience, which I do not refute, before tying this section together to what it all means for my project’s overall aim.

Research has exploded over the last thirty years on human consciousness. Since the invention of the fMRI (functional magnetic resonance imaging) machine in 1990 it has been used in over 250,000 studies (Glover 2011). One thing that the fMRI machine is being used to search for are neural correlates of consciousness (NCCs), which stems from the intuition that since consciousness arises from the brain, evidence of that consciousness should be found in tracking brain processes. The fMRI machine works by detecting blood flow in different regions of the brain. When a part of the brain is used, or is more active, nearby arteries are told to deliver more blood to that area. Blood is partly made up of oxygen, and as this oxygen is delivered to the active part of the brain, it becomes more magnetic, which the fMRI machine registers and shows in different colors. This colormap of the brain would indicate which broad areas of the brain had the most activity, a few seconds prior (as the process of blood delivery and imaging does not

happen instantaneously) (Dawkins 2021, 89). Consciousness research has shown that many behaviors and tasks can be performed despite the subjects reporting no conscious awareness, which complicates the understanding of the function of consciousness. No NCCs have been identified yet that appear in all conscious or unconscious episodes, and there is a lack of agreement for how to measure consciousness in an empirical manner outside of asking someone for their first-person perspective (Ovengård 2017.) Consciousness research has increased the understanding of how important unconscious behavior is for humans. Stanislas Dehaene, an award-winning cognitive neuroscientist for his work on consciousness, concludes that consciousness is brain-wide information sharing. Evidence for this includes that a neural stimulus will not spread through the brain of someone in a vegetative state or in non-REM sleep, but it will for an awake and conscious human. He says that neural stimulation will begin the same in conscious and unconscious processing, but the response from other areas of the brain is what separates these into two discreet processes (Dehaene 2014). Dehaene's theory is a type of integrative processing theory, that identified consciousness as arising when multiple parts of the brain are used simultaneously (as opposed to a single focused location of activity.) The problem when translating these theories to animals is that there is no consensus on how the transfer of information works or "how much 'integration is needed to move from unconscious gathering of information to conscious perception" (Dawkins 2021, 94.) This means that any animal that uses multiple parts of its brain could be claimed to be conscious, a conclusion that might not match up with the behavioral or learning displays that animal shows.

Dawkins says that identifying particular brain structures, or abilities for what determines if an animal has consciousness is "often highly plausible, particularly when there seems to be some functional difference between those with and without the structure or ability in question.

However, they remain inferential and open to challenge” (Dawkins 2021, 95.) This statement represents Dawkins’ main argument against animal consciousness; without definite knowledge into what consciousness is or how it works in humans, it cannot be conclusively determined that any animal species does or does not have it. The study of consciousness still contains vast diversity in ideas for how it arises and how it works, there is still substantial disagreement related to all aspects of these concerns, even when restricting the subject matter to humans. Using any specific theory to claim that certain animals must have consciousness, invites criticism from adherents of alternative determinants of consciousness. “Our knowledge of human consciousness is therefore of limited value in illuminating consciousness in other species” (Dawkins 2021, 96.) The lack of definitive knowledge does not prove that animals do not have consciousness, the evidence that I have included in this chapter still seems to point towards animals’ ability to have a conscious awareness of being in pain, but it would be a mistake to claim that it has been scientifically proven.

Dawkins argues that the claim animal consciousness has been proven is not only technically incorrect, but it is also damaging animal welfare improvement efforts. By claiming that the difficult questions related to consciousness (of all kinds, but in this case animal consciousness) have been resolved when they have not, allows those who resist animal welfare improvements to easily attack the central claim of animal sentience for its weak scientific foundation. Basing a foundational claim on a premise that isn’t able to be proven with the scientific knowledge of neuroscience and other related fields that currently exists, can lead to the perception of animal welfare science as not being a science at all. While the level of evidence that exists is convincing for many people, to those who doubt it or “to the many people who put human welfare as the top priority, using unconvincing evidence that animals ‘most probably’

have consciousness experiences is not the best way to make them take animals more seriously.” (Dawkins 2012,112). Consciousness is one of the hardest problems in biology, which means that it ought not be so essentially wrapped up with animal welfare. By doing so, it forces those who rely on that proof to wait until the nature and method of consciousness are determined before animal consciousness could be conclusively proven.

Is a robust and useful definition of welfare possible without referring to animal consciousness or any mental states? I will go through the definitions of welfare in the following section, keeping in mind the evidence in this section of animal physiology and studies of animal preferences. To summarize, the goal for this section was not to claim that evidence exists proving that animals experience the conscious pain and fear that would be required for suffering. I offer a summary of the evidence that we have gathered, which is sufficient evidence for many people to conclude that animals do have conscious experience of pain, but it is not sufficient evidence to prove it scientifically. At the end of this chapter, I will return to this point and explain how this information can be used in a theory of distributive justice, without requiring scientific conclusiveness.

## **Welfare Definition**

Considering my overarching thesis in this dissertation is to argue for livestock animal welfare considerations as a subject of distributive justice, a clear understanding of what is meant by better animal welfare is essential for this claim. The previous section provides a background of the scientific realities an appropriate understanding of animal welfare must incorporate. The idea of good welfare is having a state in which one is doing well, but this type of definition is tautological. Doing well or badly needs to be decided in reference to some other set of

qualifications or objectives. There are three broad approaches for identifying these criteria in literature that mentions animal welfare, which are to either consider the: affective states of the animals, the biological functioning of the animals, or the telos/natural lives of the animals (Fraser 2009, 47). In this section I will go through three approaches to defining welfare that are common in animal rights literature and discuss why certain elements of these assessments are not sufficient for determining levels of welfare, especially within the domain of animal products industries. I then present Dawkins' definition of animal welfare as not only a practical and desirable definition, but one that fits well within the scope of Rawls theory of justice as fairness.

Definitions of animal welfare that center on affective states, state that positive welfare is associated with low amounts of negative internal feelings such as pain, hunger, fear, distress, and loneliness. Also sometimes included in a welfare assessment of this sort is a complementary focus on the presence of positive emotions in the animal, such as contentment, comfort, and pleasure. For each of these three definitions, there is a reason why they have been proposed; it is not unreasonable to assume that a lack of negative internal states and an increase of positive ones would lead to good welfare. Pain, hunger, fear and loneliness, all of these states have been associated with increased behavioral and physiological signs of suffering. But to define welfare on the basis of affective states leaves the assessment of these states open to interpretation, due to our inability to measure affective state levels. Imagine what a welfare audit would look like on this interpretation; a facility might need to maintain levels of affective states above 50% to pass, or maybe each kind of feeling would have its own level required. Perhaps this would be doable with states related to access to food and water (did animals try to go for these resources and were stymied), but we lack any objective method for measuring fear experienced. Available methods all rely on non-subjective state avenues of assessment (such as dopamine levels, etc.) Some



affective states could conflict with each other as well, which feelings are ranked higher than others when it comes to fulfilling them for an animal's welfare. Further, there seems to be something missing from even a perfect scenario of internal state satisfaction. In a parallel to Nozick's classic thought experiment of the pleasure machine, if we could keep livestock animals in a small barren box, with a drug that allows them to feel pleasure and contentment with this situation, would we be satisfied that they had a high level of welfare? Those that place value in behaviors naturally occurring to an animal would not agree that this represents good welfare, but those who define it only in reference to how the animal is feeling would seem to need to conclude this scenario is ideal.

Considering the affective states category has a measurement issue without using biological markers of conscious feelings, it might seem natural to define animal welfare purely on the basis of how well they are functioning biologically. From the point of view of adherents to this definition of animal welfare, good welfare is ensured when an animal grows well, reproduces well and is free from disease and fatal or physically detrimental injuries (is healthy). This definition has been used historically by the animal production and processing industries, as evidenced by the 1981 CAST report (Council for Agricultural Science and Technology) which "affirmed that the necessary and sufficient conditions for attributing positive welfare to an animal were represented by the animals' productivity" (Rollin 2015b, 760). Apart from the data collection issues I will cover momentarily, the main issue is that an animal can be physically thriving and still be doing poorly. On a positive note from the industry standpoint, the most recent CAST report, which came out in 2018, has updated their definition to acknowledge the importance of mental states to overall well-being; it now defines welfare as a codependent combination of physical and mental health: "In short, evaluating an animal's welfare essentially

involves a complete assessment of the animal's physical and mental health. When both are good, the animal's welfare is good" (CAST 2018,16).

The data collection, even when based around an internal state such as stress, is measured through a test of some biologic aspect of the animal. These tests have practical support; urine, saliva, hair or blood can be inexpensively gathered and easily tested for the presence or level of certain hormones. For example, one known type of stress hormone are glucocorticoids, which can be tested for in any of those animal products just mentioned to give a snapshot of the animal's hormone levels at the time of testing. The problem is that hormone levels don't correlate to how an animal values something, which is our indication of if they enjoy it or not. "Many energetically demanding but rewarding behaviors, such as sexual activity, voluntary exercise and winning a social encounter have been shown to involve large increases in glucocorticoid levels and other measures of so-called 'stress'" (Dawkins 2021, 78.) Experiences that animals want to avoid produce high levels of stress hormones, but so do a range of activities they seek out, so keeping glucocorticoid levels as low as possible does not match up with the evidence of states and activities that an animal enjoys compared to those they do not (Ralph and Tillbrook 2016). The presence of pleasure hormones has the same conflicting occurrence as stress hormones. It would be tempting to be able to show the presence of oxytocin as evidence that an animal is enjoying their circumstances, considering that oxytocin "has an anti-stress effect [and] is produced during enjoyable events, and has positive feedback on its own release as well" (Chen and Sato, 2017). However, studies have also shown that the levels of oxytocin in rats being shaken for ten minutes rose, and also that heifer calves with elevated oxytocin levels displayed more fearful behaviors than those with lower levels of oxytocin (Dawkins 2021, 81). An overview of oxytocin research in domesticated animals pointed out that there is a bias in the

research towards showing positive valence, with fewer studies investigating negative valence links (Rault et al. 2017). This same review found that the oxytocinergic system (the way in which oxytocin is generated and causes effects in the body and brain) is not yet understood, which makes it a poor candidate for accurate welfare assessment. Dopamine and serotonin have these same downfalls of being increased by seemingly obvious negative situations such as pain and aversive tasting foods. (Dawkins 2021, 81). It is hard to determine better or worse when looking at physiology, rather than just value or output. In summary, physiological measures are an effective tool for determining that something has changed for the animal, but not whether those changes are positive or negative. “Physiological measurements are good for indicating arousal but not so good for indicating valence” (Dawkins 2021, 71).

Another problem with biologic functioning definitions of welfare becomes apparent when considering the breeding animals of species selected for their rapid growth, like pigs and broiler chickens. The female animals used to breed these species have the same desire for food that fuels the growth of the species, however eating until they are satiated would be detrimental to their reproductive abilities. It is healthier for the breeding animals of these high-growth species to have their food restricted, however this leads to constant hunger (Vargovic et al. 2021). From a biological functioning definition of welfare, there is no welfare concern here; the animal is healthy and production hasn't been detrimentally affected. There is no reason, from within this welfare definition, to identify the constant hunger state of the entire population of breeders as a problem that should be investigated. This issue escalates with considerations of which breed could have better welfare on average. Choices can be made for which traits to develop in each species. It could be the case that the breeding population does not have this kind of hunger, but by only taking into account productivity and health, there is no impetus for this kind of change.

Going back to the example of the animal in a small cage, kept artificially happy and healthy, neither of the two previous categories of welfare definitions would be able to account for the animal in this scenario not having good welfare. A third category of welfare definition focuses on animals' natural environment or natural behavior expressions. Since both of these are lacking in the artificial cage example, this definition of welfare would support the conclusion that the animal is experiencing poor welfare. The natural functioning definition is also sometimes called the *telos* view, as it mirrors the Aristotelian term that describes the inherent purpose or ideal potential in each thing. Bernard Rollin, a leading expert in veterinary ethics and the co-author of the 1980s enacted federal legislation that required pain control for research animals, supports this definition. He defines an animal's *telos* as, "a multiplicity of needs and interests constitutive of its [this animal's] biological and psychological nature" (Rollins 2015b, 762). It is the job of an animal welfare scientist to determine what these interests and needs are for each animal in human care. The natural functioning version of animal welfare will require the study of the interplay between evolutionarily developed adaptations for past (or 'natural') circumstances, and which of those succeed for the current artificial circumstances of the livestock industry. "To allow animals to live in accordance with their natures would mean allowing them to live in a manner to which they are adapted and to develop in a manner that is normal for the species." (Fraser and Weary, 2004, 41.) Sometimes the natural adaptations evolved by the animal to deal with their environment fit with the industrial circumstances they are now in, but there are many challenges the animal faces for which they do not have a corresponding adaptation. To advance animal welfare, animals should be placed into circumstances for which they have the necessary abilities to deal with their surroundings effectively.

Beyond the ability to cope with circumstances, animals' *telos* requires meeting certain innate goals for behaviors to display, social lives and health. Martha Nussbaum defines well-being (and thus welfare) through a capabilities approach, which identifies the same Aristotelian conception of *telos* as what it requires for a being to flourish. Nonhuman animals, according to Nussbaum, can flourish or not flourish, which determines whether their lives are poor or good. "If we have entitlements to be treated in certain ways, based on our capability to function in corresponding central ways, then it is at least plausible that nonhuman animals, who share many of those capabilities, have entitlements of their own" (Cripps, 2010, 3). A chicken has natural tendencies to perform the following capabilities, besides drinking and eating; preening, fighting (establishing a pecking order), foraging, nesting, dust bathing and perching (Jacob 2022; Wood-Gush, 1955). With this definition, a chicken's welfare is determined by the extent to which it can perform these functions.

One of the problems with effectively evaluating animal welfare according to this definition is the lack of guidance for which function or functions are most important to fulfil. For example, is being housed outside or inside better for livestock animals? It might seem that being outside, 'in nature', would be the obvious choice for better welfare according to a natural lives definition, but there is a problem with potential bias arising from the description or terminology used to describe animal conditions and care. Free-range or indoor is one way to phrase this option, but so is a climate-controlled space or exposure to the elements. Would a chicken flourish more, or have more natural lives, in an indoor, climate-controlled space with enrichment opportunities or a natural outdoor space that has no modifications from being a natural paddock, including potentially no shade, dust or roosting spots? To assess which set of natural behaviors and circumstances is better, it seems that there would need to be a determination made from

outside of the considerations of natural/flourishing or not. Another potential problem is how natural lives are elevated over captivity. While it is not the case in animals sent to slaughter when reaching their full size, generally captive animals live significantly longer lives than their wild counterparts, with less anxiety and fear, and greater food security and safety. Further, domesticated animals are not the same creature as their wild counterparts. Dairy cows yielded 2074 kg/year of milk in 1944, while modern dairy cows produce more than 9333kg of milk per year (Rollin et al. 2011, 155). While the most natural thing would be to allow a calf to nurse a mother cow without supplementing with pumping, it would take multiple calves to deal with the modern cow's output, making the most natural method unsustainable and harmful to the cow. Considering the modern breeds' significant differences, should the behaviors be assessed by the average behaviors of the breed humans have created through genetic engineering, or should these engineered breed's welfare be judged by the average behaviors and functioning of their ancestors?

While all three categories of welfare definitions will agree on certain points, the solution to many issues will diverge depending on what is valued. For example, piglets have a high natural mortality rate. Due to the immense size difference between them and the mother pig, there is a high likelihood of crushing deaths when nursing and sleeping. Evolutionarily that is likely why pigs have large litters; in America pigs had an average of 10.4 surviving piglets per litter (13 piglets total) with the ability to have two litters each year (USDA, 2017; Verona et al. 2007). The welfare issue that arises from the likelihood of crushing deaths is how to balance the welfare of the piglets with the welfare of the sow (along with the allocation of resources and productivity) during pregnancy and up until the piglets are weaned. Gestation crates (used for the entire pregnancy and nursing period) and farrowing crates (used for the last days of pregnancy

through to when the piglets are weaned), are small pens that restrict the sow from moving around at all, beyond standing up and laying down. The piglets are housed in a larger pen next to the mother's small pen, and thus are much less likely to get crushed, but can still nurse. Alternatives to this set up exist, usually set up around providing the piglets a warm place to retreat to that the sow cannot access due to her size. Depending on how we define welfare, the steps taken to increase welfare in this situation would change. As the health of the sow is not affected by the restrictive pen, and the health of the piglets is increased, a biological perspective to welfare would likely encourage the use of these crates, and this has certainly been the industry's response, considering the widescale usage of these crates. Definitions of welfare that have more consideration towards displaying natural behavior, or the discomfort of restraint, would have good reason to push for a bigger pen that allows movement and rooting, with modifications added for reducing piglet mortality through a heated escape area for them. These conceptions of welfare notably led California to vote to ban the use of gestation crates in 2008, a move widely decried by pork producers as not understanding what good welfare required (NPPC, 2008.)

The definition of welfare will determine how success is measured when performing welfare studies and assessment on real cases of livestock management, as Rollin puts it; "Thus, in a real sense, sounds science does not determine your concept of welfare; rather, your concept of welfare determines what counts as sound science!" (Rollin, 2015b, 762) In this discussion, I do not criticize each definition of welfare simply by appealing to a different definition. By its own terms each camp's supporters could respond to any criticism of ways their definition includes examples of bad welfare by simply maintaining that aspects outside of its definition don't decrease welfare. I think it is more helpful to instead consider the definitions in light of the previous section on the physiologic realities of animal consciousness and experience, which give

us insight into animals' pain pathways and what type of circumstances they display preference for or against. Taking this science seriously is at the core of Dawkins' suggestion for a welfare definition.

The definition of welfare that Dawkins' defends is deceptively simple. Welfare consists of animal health combined with what animals want. Having better health and more of what they want is better welfare than having less health and less of what they want. The best possible welfare would consist of having everything they want while maintaining their health. The contents of this definition, health and what the animal wants, are not novel. Even the Five Freedoms I mentioned in the first section contain roughly this concept, with the first three freedoms relating to animal health and the second two (displaying natural behaviors and avoiding stress) relate to things the animal would want. However, the wording Dawkins uses is beneficial for a few reasons. The first is that it unites many definitions into one; health is explicitly a part of the definition, which matches the biological functioning definitions, and what an animal wants will have much to do with the things the animal naturally desires to do and what type of things make them happy (if you believe such mental states exist.) It would not be enough to simply combine definitions if the resulting conception of welfare was not achievable or measurable. Another benefit to this definition is that the welfare is defines is testable; it is possible to determine what different species of animals want and what makes them health, which I will cover more momentarily. This definition also makes sense to a wide variety of parties involved with animal lives; scientists and the public, politicians, and production farmers, all can understand what is meant by an animal being healthy or not, and an animal getting what they want or being frustrated from doing so.



By testing what animals want, we can categorize that in terms of its valence and arousal. Determining if “the animal regards a given situation as positive (to be approached and repeated) or negative (to be avoided)” (Dawkins 2021, 8) gives us the valence, which is a categorization of positive or negative. The strength of that desire when measured gives the arousal level, or the intensity of that desire, which allows us to rank competing desires according to how much the animal values having or avoiding each. With humans, we can test how people feel about circumstances and categorize their verbal answers into these same categories of valence and intensity. Without access to verbal confirmation, other types of testing has been designed to determine how much animals want something, the results of which combine together towards building up a database of answers to ‘what an animal wants and what is healthy for it.’

Tests need to be carefully constructed so to avoid the potential for unintended factors obscuring animal preference. For example, animals given a choice for the first time might not choose it based on being cautious of something new, rather than not liking it. Further, an animal choosing something, when presented with limited choices, does not necessarily mean they desire it, as it could just be their least disliked choice of the options presented. But better designed experiments can give reliable insight into what animals want. A runway trial can give a quantitative measurement of the reluctance or desire an animal feels towards something (Dawkins 2012, 160). In a runway trial, the animal is led to the beginning of a runway with access to see what is at the end. The time it takes for the animal to move from the beginning to the end of the runway is measured, and then the animal interacts with whatever the thing being tested is once they reach the end (being stroked, having access to grass, and being struck are all examples of experiences that might be tested in this way). Then the animal is brought back to the beginning of the runway and the time it takes for them to walk the runway is recorded again, and

this test is repeated many times. The comparative timings as the animal learns what is expected when it reaches the end of the runway give an objective measurement of the animal's change in eagerness; if the times decreases it indicates the animal finds it rewarding and if the time increases, or the animal is reluctant to finish the runway at all, it indicates they dislike the outcome.

Y-maze tests can be used to determine which version of something an animal prefers, once they have an informed choice (Dawkins 2021, 24). A Y-maze test is a version of a repeated choice test, with a different object or treatments at the end of each branch of the Y (with two choices, this can be used with more branches as well). The animal experiences each choice enough times to learn which branch leads to which outcome, then the animal is given the freedom to choose which branch they want to take. Dawkins' gives several examples of Y-maze tests that have been run on livestock animals; chickens and pigs will both choose to avoid the smell of ammonia, even at the level determined safe for human safety (Jones et al. 2005; Jones et al. 1996), and chickens choose to roost higher up even if the quality of roosts was worse than the lower ones (Schrader and Mueller 2009). All of these are evidence of animal wants, which can enable the design of housing and practices that increase their welfare. Knowing that an animal wants something is not in itself sufficient to prove their welfare is affected by being deprived it; a human could prefer raspberries to blueberries but not have their welfare harmed by being refused their choice. Testing the intensity of the valence is necessary as well, and this can through a cost-benefit examination by either increasing the 'cost' of an activity or reward, or by decreasing the 'funds' the animal has available to spend. How hard an animal is willing to work to either achieve something desirable or avoid something negative can help to measure how important it is to them; this is the equivalent of increasing the cost. If the time an animal has

available to spend performing desired behaviors is thought of as their total funds, then this can be manipulated by increasing or decreasing the amount of time they have when it is light out (which has been shown to correspond to behavioral activity in species such as chickens) (Duncan 2004, 96.) When the light hours reduced from 23 down to 6, chickens still performed all of the same behaviors as in the control group, but faster, “suggesting that they were all very important to the birds” (Duncan et al. 1991).

On the other side of the cost/funds divide is how much something costs the animal to perform. Operant conditioning involves teaching an animal to perform an unnatural behavior for a reward, and “a large body of evidence shows that all vertebrates and some invertebrates do indeed have the flexibility of behavior to work out how to get what they want when their innate behaviour fails to achieve their goals and they have to learn to do something completely different.” (Dawkins 2021, 27.) A task can be made progressively more difficult to determine the point at which the effort it takes overrides the desire for the reward. For example, a study done by Widowski and Duncan hypothesized that chickens have a need for their natural behavior of dust bathing, and so designed an obstruction test to see if chickens would push open a weighted door when deprived of dust-bathing substances and compared their rate to chickens who were not deprived. To their surprise, the results did not match their assumption that preventing dustbathing led to a state of suffering. They instead concluded that dustbathing is “more consistent with an 'opportunity' model of motivation in which performance of the behaviour, when the opportunity presents itself, leads to a state of pleasure” (Widowski and Duncan 2020). There is a growing abundance of literature that tracks animal preferences through different methods of operant learning and choice-based experiments. The ability of animals to make informed choices in the face of changing incentives gives more support to Dawkins’ claim that

the outcome of these tests represents what is good for animals in a way that mimics how we learn what is good for other humans. So much so, that a book called *Economic Choice Theory: An Experimental Analysis of Animal* found that animals make the same kind of irrational choices that humans make in similar circumstances, which they think shows the biological origin of certain principles for economic theory (Kagel et al. 1995).

The use of these tests is important because it gives measurable data by which to make determinations for methods of practice in the industry. One example comes from a study published by Dr. Jeffrey Rushen, an agricultural research scientist, giving a comparative welfare assessment of two industry standard methods of restraint for shearing sheep (Rushen 1990; Rushen 1986). Rushen used both the y-maze test and the runway test to assess if one method was worse for the other for sheep to experience. The sheep were separated into four groups for the runway test; one group was allowed straight back into their pen after the runway (the control group), the next were physically restrained by a sheep-handling machine (a standard practice), the third group were electro-immobilized with a needle electrode and alligator-clip electrode on two points near their spine and a moderate current applied (this is also a standard industry practice), and the last group had the electrodes applied but were manually restrained rather than immobilized through current. Each group ran the runway twice a day for four days, and the last trial was twelve weeks later. The group that had no restraint applied at the end took under ten seconds to walk the runway into the pen, the group that was physically restrained averaged between 2 and 3 minutes to walk the runway and it took some manual encouragement, and the same timing was true for the group that was physically restrained along with the electrodes being applied. The group that was electro-mobilized took between 6-7 minutes to walk the runway, and required significant pushing to get them to the end (Rushen 1986). The Y-shape maze also

showed significant preference in sheep for physical restraint over electro-mobilization. (Rushen 1990). The results of Rushen's study are clear, the electro-immobilization of sheep is a significant welfare issue due to their great desire to avoid it. I believe this example is a good one for recognizing the advantages of Dawkins' definition for genuine welfare improvement. By explicitly defining welfare through what an animal wants, it sets up the type of experiments that should be done (testing what animals want and what they don't want, and how strong this wanting is) and it gives a clear conclusion that can be drawn from these tests; if sheep need to be shorn, physical restraint is the way to do so while maintaining a higher level of welfare for animals. The wide-spread use of electro-immobilization is justified with claims that animals aren't caused pain due to it, which could be a convincing argument for other definitions of welfare. But sheep have clearly expressed that they would rather experience more pain through physical restraint over the stress of not being able to move through paralysis.

A potential criticism of Dawkins' definition of welfare is that animals sometimes want things that are not good for their health, or potentially even their welfare. Chickens will pluck out their own feathers, many animals will overeat if food is abundant, and pigs can damage their snout rooting on concrete. How can a definition that incorporates what they want as partially definitive of welfare resolve that contradiction? All animals, including humans, have evolved their desires due to past environments and what traits were successful many generations prior; it is understandable why desires no longer match with what is best for the health and success of animals in a modern confinement system. It would be a mistake to blindly follow what animals want to ensure their long-term health, but it would similarly be a mistake to only take into account what makes animals physically healthy, as discussed before. This is why Dawkins' definition includes both components as equal halves, 'health and what animals want.' Further,

the things that animals want do often give good indication into what is good for their health, mentally as well as physically. Chickens want to eat gravel, which counter-intuitively leads to better health, having small stones in their stomach helps replace their lack of teeth to improve digestion. Chicks kept at the temperature they desire (quite warm), are healthier than those who are kept in colder conditions (Dawkins 2021, 20). While there are things animals desire that would be bad for their health, considering what is healthy for them and what it is that they want are still both the important and relevant factors to consider. “Taken together, these two elements form a team, a comprehensive and comprehensible definition of welfare and one that is, most importantly, firmly rooted in what we can actually demonstrate about an animal’s behaviour and physiology” (Dawkins 2021, 22). The belief that a definition of welfare including certain mental states for animals, such as their being happy, would be better than the one that Dawkins’ proposes leads to clarity issues on how to measure animal welfare and how to research better practices. By leaving it out, it restricts welfare research to measurable outcomes (are the animals happier, are the animals getting what they want). Dawkins is not denying that animals can feel by leaving mental states out of the definition of welfare. “It is simply a statement that animal welfare science is more rigorous, more scientific and therefore in a better position to promote animal welfare if it does not *define* animal welfare to include something as elusive, confusing and difficult to define as consciousness” (Dawkins 2021, 96). Rollins’ point that there is an abundance of evidence indicative of the common sense understanding that animals can feel pain and can be scared or content, can remain *likely true*, but animal welfare is improved more by leaving it out of the definition.

If you are someone who cares about animal happiness and suffering, and think these experiences exist for livestock animals, then you can see how likely it is that measures taken to

keep the animal in good health and give them access to things they want will improve their happiness and reduce their suffering. But for those who do not believe that animals have the ability to consciously experience their own suffering, there are other, human-centric, reasons to desire the kind of welfare identified by Dawkins' definition. The causal method of improved welfare and immune function is complicated, but studies have consistently shown that higher welfare conditions improve animal health and productivity (Belcha 2000; Berghman 2016). Better welfare also increases livestock's ability to resist disease and pathogens that end up affecting human health (animal-borne diseases) (Dawkins 2021, 97). By recognizing the important connection animal welfare has to food security, environmental concerns and economic production, more people are included in the group advocating for and supporting increased animal welfare. Furthermore, by removing the premise that animals experience pain from the argument for improving animal welfare, animals can get better welfare without waiting for one of the hardest biological issues to be resolved. It is pragmatic to remove it, and is better without it, for now.

## **Better Welfare**

With a definition of welfare established, I can now discuss the welfare issues that modern livestock animals face. In this section I will give a non-comprehensive array of widespread welfare concerns for each species of animal intensively raised. It would be impossible to include all the research that has been done on what livestock animals want, what practices result in worse or better welfare, or every 'health and what animals want' related problem in their standard care. The goal of this section instead is to offer an introductory survey of some of the answers we have to what animals do and do not want, and what could be changed to improve welfare on animal

farms. The larger point to remember for the remainder of this project is that answers to how to raise animals with higher welfare standards are obtainable and many suggestions have already been determined but are not implemented.

It would be unrealistic to expect animal producers and everyone in charge of animal lives to be an expert on animal welfare science. I will soon be discussing the modification of certain practices for higher welfare in those circumstances, but how can the welfare of animals when taken as a whole be measured? An animal has good welfare when it gets more of what makes it healthy and more of what it wants, but if every person in charge of farm animals needed to know all of the science that has been generated about what this species wants and needs to be healthy mentally and physically, it would be impossible to create enough experts to ensure welfare at the mass amount of animal raising and processing facilities that exist in the United States. I have personally spent hundreds of hours reading studies on determinants of livestock welfare and health, but that would still not enable me to judge the welfare of a barn full of animals. Even assuming every farmer and facility manager wanted to provide good welfare, there needs to be a more realistic avenue for them to do that successfully. Dawkins suggests that the results of studies into what animals want and what promotes animal health be combined with physical and behavioural correlates of welfare to create a sort of ‘code-book’ (Dawkins 2012, 167).

Correlates of welfare are “Behaviors, sounds or physiological changes that are so closely correlated with either health or what animals want [the definition of welfare] that they can be used as substitutes or diagnostics for the two core elements” (Dawkins 2021, 43). Certain actions taken by animals are signs that things are going well or poorly for the animal. For example, chicks (of the domestic chicken) use only four vocalizations in an incredibly standardized way; 91% of their total vocalizations consist of one of these four types of calls, and each is associated



with a type of experience (Marx et al. 2001, 72). Pleasure twitters and warblers are social calls, used when the chicks have the things they want, like food and warmth, and have other chicks or hens nearby. Distress peeps are made when the chick is exposed to a ‘conflict situation’, such as a lack of food or isolation, and fear trills are used when the chick anticipates danger, such as when they are suddenly or roughly handled (Marx et al. 2001, 62). Each type of call is distinct and recognizable to human ears as well as having a distinct audio signature that could be recognized and sorted by computer algorithm, if there was an audio recording made. The vocalizations of a chick do not determine if they have good or bad welfare, but they are correlated with having more or less of what they want, which means they can be used in part to assess their welfare. In cows, vigilance (what percentage of their time is spent looking around) is a reliable measure of their level of fear (Welp et al. 2004). These sorts of welfare correlates could be collected and turned into a codebook for each species we raise. It would need to be species specific because every type of animal has different ways of communicating.

The generation of these codebooks would be complicated and require dedicated testing from animal welfare scientists as well as input from experienced animal handlers. Some animals have an evolutionary desire to hide evidence of suffering, as signs of weakness could allow a predator to single them out (Aaltola 2012, 11), so accurate behavioral correlates need to be carefully determined. The same behavior can often be used by animals in two, conflicting ways. Being frustrated (wanting something and being denied it), has been associated in cows with the extent to which you can see the whites of their eyes. But more recently studies have shown that cows open their eyes to the same extent when excited or aroused about being given something they desire (Dawkins 2021, 56). If a pig is trying to break down a barrier, they might be attempting to reach something on the other side or they might be trying to escape something on

their side. Any behavioral correlates identified must be considered alongside an assessment of their circumstances and environment. The benefit of developing this sort of resource is that one wouldn't need to be an expert to survey for correlates, it is achievable and reliable for the average person to carry out. While the codebook could develop into how welfare is assessed and, for many people, how it is understood, the fact that the correlates get their status from what animals want and need is what justifies their association with animal welfare.

Before I describe species-specific welfare issues, there is a shared list of states that all the animals we raise do not want to experience. Negative physical states for all animals include; cold discomfort and pain, heat and burns, thirst/hunger, acute trauma/injury, sickness/disease, malfunctioning digestive system, poisoning, respiratory system issues (breathlessness, asthma, carbon dioxide inhalation, altitude sickness), overcrowding, confinement discomfort and experiencing aggression from other individuals of their species. Negative mental states shared across the animal species discussed in this chapter, include; stress, anxiety and fear, depression, isolation and boredom or frustration from barren environments (Gregory 2004, v-vii). There are also some desired states that are shared across livestock species, beyond wanting to not experience the states previously listed. These include sleep, play, grooming, exploration, and enrichment (Dawkins 2021, 55). However, compared to the negative states, these have been studied much less in livestock animals and it is more difficult to determine what amount of each is required for sufficient welfare. This is not the case in a different field of animal expertise; zoologists (also called zookeepers or habitat managers when working with animals in a zoo) are tasked with maximizing the welfare of animals in their care and therefore have done more research into what each species wants with regards to things like enrichment and play. The lessons learned in this field could be applied to livestock animal welfare research.

## Better Welfare for Cows

The overview of welfare for cows must be split into two parts, one regarding the issues for cattle and another for dairy cows. The circumstances of their housing, treatment, and life cycle are completely different, and thus the largest welfare concerns for cattle do not match with those for dairy cows. Cattle are born at a cow-calf facility where cows and calves have access to outside grazing fields, and calves are allowed to stay with their mother and nurse. (Meisinger and Goodsir 1994) They are separated when the calves are sold, which generally happens when they are between six and ten months old, at which point they are shipped to a feedlot. Feedlots are the ‘finishing’ facility where calves are kept in herds either inside or outside and fed grains until they reach their full weight 100-300 days later. Grass-fed only cows stay at these facilities for longer, as it takes more time to reach market weight through grazing. (Endres and Schwartzkopf-Genswein 2018) Once they reach market weight, the cows are sold through a market and shipped to a slaughter facility. Compared to the lives of other animals I will discuss, cattle are able to get more of what they want and what is good for them through their industrialized system. They have access to graze for a significant portion of their life, which means that a large amount of land is used by the beef industry; “In the USA, about 320 million hectares are used for livestock grazing, which is equivalent to 41% of the total land area of the continental USA.” (Drouillard 2018). The calf-cow rearing process means that beef cows stay in a familiar herd with other cows and experience natural social behavior. Valence testing has shown that cows like to be around other cows they know; calves will learn to push past a heavy panel to have a few minutes of social contact with another familiar calf. (Dawkins 2021, 29) The main welfare issues for beef cows happen during the transition period between cow-calf to feedlots and then to the

slaughterhouse, in addition to three production practices that cause pain: branding dehorning and castration.

During transportation cows can become bruised and injured from jostling and crowding in the transport truck and the amount of time spent in transport can be quite long. While cow-calf operations are present in all 50 states, three quarters of feedlots are concentrated into only five states; Nebraska (19.8%), Texas (18.9%), Kansas (17.5%), Iowa (9.0%), and Colorado (7.1%) (Drouillard 2018). The drive from where the calves are born and raised to the feedlot can take up to two days. It significantly adds to the stress when the transfer to the feedlot facility coincides with weaning (being separated from the mother cow and moving to 100% solid food). Two step weaning is a process that can be initiated at the cow-calf farm, in which a temporary plastic clip is inserted into the calf's nose which prevents nursing. Doing this allows the stress of weaning to be separated from the stress of transport, and studies have shown calves weaned in this way vocalize (a behavioral indication of stress) 95% less than traditionally weaned calves (Stookey and Watts 2004, 198) While this is the welfare preferred method, only 5-10% of northwestern cow-calf operations use it. (AgriBeef 2016). When calves arrive at the finishing facility they are "put through a crush for vaccination, anthelmintic treatment, dehorning, castrating, branding and tagging" (Gregory 2007, 62). The combined stress of weaning, transport, and these procedures is so much that it is common to have a rubber mat in front of the crush to give some protection to the calves who pass out immediately upon being released due to the cumulative stress. (Gregory 2007, 62) The transition to the feedlot, especially when coincided with weaning, leads to a 3 day to two week eating delay and is the time when morbidity is at its highest for cattle (Gregory 2007, 62).

There are higher welfare solutions to the common painful management procedures performed on cattle, including dehorning, branding and castration. Dehorning cattle protects them from injuring each other, but the procedure can be prevented by using hornless varieties, which exist for all breeds and have been shown to have the same level of production and growth (Stookey and Watts 2004, 191) For dehorning and castration, procedures that cause initial pain as well as residual pain for the following 24-72 hours, it is possible to manage pain with medication. Using lidocaine as a local anesthetic and supplementing with ketoprofen (a longer acting pain relief) mixed into the meal directly beforehand showed greatly reduced signs of pain and agitation post operation than those who did not. (Weary and Fraser 2004b, 331). Managing pain in this way can be simple and cost effective while making a real difference for welfare. While beef cows do not have their tails docked, most dairy cows go through this procedure with the purported goals of cleanliness and reducing mastitis and udder infections (Weary and Fraser 2004b, 327). However, a study of roughly 400 milk cows, half docked and half undocked, showed no difference in cleanliness or infections between the two groups (Tucker et al. 2001) and further studies have reinforced this result. The procedure causes pain and lifelong frustration by preventing cows from removing the flies that land on them; considering the lack of any benefit for production or welfare it is a straightforward improvement to stop performing the procedure. However, a 2008 survey of 113 dairies in the Midwest found 82 percent of dairies docked tails (Fulwider et al. 2008).

Another potential welfare issue for dairy cows is the immediate separation of newborn calves from their mothers. It has been suggested that due to the separation taking place before either have a chance to bond, this doesn't cause stress or suffering for either party, but research needs to be undertaken to determine if this is true. (Garry 2004, 227). The motivation to separate

the calves comes from wanting to control the feeding of the calves, minimizing production losses of milking, and worries that nursing leads to mastitis. The last reason has been shown to be unfounded, eighteen different studies have shown that nursing does not increase rates of mastitis (Beaver et al. 2019). Production loss is a valid concern however, particularly with the type of milking machinery most readily accessible. Calves nurse from one teat at a time and might leave one or more of the quadrants full when they are done nursing, especially considering how much milk modern dairy cows can produce. Farms could milk the cows regularly to get the remaining milk, but milk machines that detect the flow of each quadrant and only milk from those that remain full are expensive, due in part to the lack of demand, and being milked from an empty quadrant causes pain. While technological advances could respond to the productivity concerns, the desire to control and monitor each calf's intake remains. Unfortunately, the amount that producers think is the best amount to feed them leads to another major welfare issue. Common belief is that calves should intake no more than 2 l (liters) of milk, three times a day; more than this could lead to an overflow from their stomach to their rumen, causing major health issues (Ellingsen et al. 2016). A study in 2016 investigated this claim and found that calves who nursed, and thus self-regulate their intake, ingest over 5 l per feeding session. Due to the high elasticity of the stomach, overflow to the rumen was never observed, even with intake volumes approaching 7 l. The study concluded that calves are being drastically underfed compared to their desired intake (Ellingsen et al. 2016). While underfeeding is partially motivated by the unfounded fear of calf stomach limits, it is also motivated financially. Not only does feeding calves more cost more money, but by keeping the calves hungry while on a liquid diet, the idea is that they will be more motivated to start solids sooner. "The observation that calves grow better after weaning is probably less a tribute to the benefits of solid feed than the fact that before

weaning the calves are relatively starved” (Garry 2004, 230). Research since the 90s has shown that increased pre-weaning feeding is a worthwhile investment for the long-term return in future productivity of the dairy cow, as well as an increase to their welfare (Davis and Drackley 1998). However, as with most of the welfare research I discuss, producers largely ignore the recommendations, due to both a lack of knowledge regarding the research and the barriers of initial investment costs.

Other common welfare issues for dairy cows include mastitis, which occurs in 16.5% of all dairy cows at any given time (USDA 2007, Dairy), and is both a painful condition and interferes with production volumes. Mastitis ranks second on the list for reasons dairy cows are culled, after lameness (USDA 2007, Dairy.) Therefore reducing mastitis and lameness frequency are two of the most important areas for welfare research for dairy cows, and several suggestions have been recommended for each already. Mastitis can be prevented with better stall conditions for dairy cows related to hygiene before and after being milked, and better stall conditions also would help prevent lameness; specifically in size and flooring (Capper 2011, 158). While methods for combating both conditions has been, Temple Grandin points out that the high frequency of mastitis and lameness in the dairy industry are examples of ‘bad becoming normal’. This term describes the concept where something happens that is bad for all parties (due to productivity and welfare damages), but the frequency it occurs makes it seen as part of doing business, rather than something that can be changed (Capper 2011, 158). Anthony Weston’s idea of a ‘self-validating reduction’ could also apply here (and with other examples of normalized decreases of animal welfare included in this chapter.) The term, as Weston introduces it, identifies a type of self-validating prophesy regarding nature, in which the tendency to ‘cognitively disvalue’ nature leads to it being mistreated or exploited. The resulting poorer

quality of the part of nature being treated in this way is then used as justification for disvaluing it in the first place (Weston 1996, 115). The conditions that dairy cows are kept in cause higher levels of mastitis, but this high frequency problem is taken by the industry as justification to continue practices like calf-separation, chemical spray systems and preventing cows from laying down (Pepperell 2018) rather than a reflection of the initial disvaluation.

### Better Welfare for Chickens

Chickens raised for their meat or egg production have different welfare issues, like cows, due to the different method of raising and their genetic breeding. Chickens raised for egg production are called layers, and chickens raised for slaughter are called broilers. Both breeds of animals share a set of desired conditions and behaviors. Straw is important for both; it plays a role in multiple types of natural behavior and chickens will learn to peck a key in order to gain access to straw (Dawkins 2021, 28). Shared desired behaviors include; preening, stretching wings, walking, jumping, perching, dust bathing, foraging (Newberry 2006, 108). Layers are primarily (80%) raised in group or individual battery cages, which are barren cages with nothing added inside of them, a further 10% live in cages with some level of enrichment to the environment (such as litter to forage in, perches to roost on, or access to nesting boxes), and 9% live in cage-free range environments (Anderson 2009, 163). The amount of space each layer is provided is less than the amount they need to perform comfort movements and preening (Anderson 2009, 166.) Broilers are raised in large pens outside of cages, but still without environmental enrichments and densely packed. High densities increase daily mortality, leg disorders, and skin disorders such as breast blisters and hock burns, and poor management of



large flocks can lead to inadequate water supply, deteriorating litter quality and dust accumulation, all of which cause harm to the broilers. (Gregory 2007, 118).

However, if well managed, density itself isn't the biggest issue for welfare. Genetic breeding has led to chickens that are more tolerant to sharing space and don't react aggressively to sharing food and water access (Newberry 2006, 108). While it is reasonable to assume that decreasing broiler and layer housing density will improve their welfare, studies have shown that instead it is the housing environment that has the bigger welfare effect (Dawkins et al. 2004). Plastic floors, a lack of bedding and absence of perches for roosting caused "consistent differences in the birds' attitude, behaviour and performance attributable" demonstrating their welfare was worse (Whay et al. 2007). An aviary system is a suggestion for better housing conditions, due to the inclusion of sawdust and perches and the vertical build lowering total floor space requirements per bird (Norwood and Lusk, 120). Rearing chicks in a manner to best suit them to their intended growth facility conditions is also essential to their welfare and productive success (Campbell et al. 2019).

Layer-specific welfare issues include starvation, hypothermia and broken bones, all of which stem from their genetic breeding. "laying strains of chicken have been genetically selected for increased egg production and improved feed conversion efficiency. This means that hens are now achieving high egg yields with a smaller metabolic mass (smaller sized birds) compared with earlier strains" (Gregory and Devine 1999). When the feeding of these birds with high metabolic conversion is not sufficiently increased, they suffer through constant hunger states as well as being underweight or even emaciated. A survey of layers at end of service (when they are retired from egg-laying), showed that up to 9% from certain facilities were severely emaciated, a status defined by having less than 16 g of body fat, the caloric equivalent of a single egg

(Gregory and Devine 1999). Outside of this study we do not have access to how prevalent underfeeding layers is, as there is no oversight or reporting body for the condition of layers at end of service. Without an avenue for statistical feedback, nutritional requirement recommendations are not being updated to keep up with the introduction of new, higher metabolically active birds. A lack of absorbed nutrition also leads to brittle, easily broken, bones and a lack of ability to regulate temperature (same as is seen in emaciated humans.) When layers are transported to slaughter facilities, the trucks are not insulated, temperature controlled and often aren't even covered. Due to their lack of fat and also poor feathering, another effect of nutritional deficiency, the same study on emaciation discovered that layers had an 11% mortality rate from hypothermia upon arrival at the processing facility (Gregory and Devine 1999). This mortality percentage, while high on its own, did not even include the many birds who were hypothermic, cold, and stiff, while remaining alive; showing the serious welfare issue pertains to more than the chickens who die from it. Genetic selection for egg-laying productivity needs to be balanced by monitoring emaciation and bone breakage in order to allow egg layers to have welfare, regardless of their housing conditions, which shows that better cages is not the only solution needed for the egg industry.

For broilers, their genetic breeding for large appetites and rapid growth causes skeletal and joint disorders, higher likelihood of cardiovascular disease, and leg pain (Newberry 2009, 110). Their muscle mass has been increased to such an extent that there is no longer sufficient space inside of the abdomen, leading to prolapses in broiler breeder hens (Gregory 1998, 13). Broiler breeder hens have several significant welfare issues, due to the qualities of rapid meat growth working against what is healthy for laying. Their feed must be severely restricted in order to maintain reproductive fitness and to have the internal abdomen space to lay eggs. Food

restriction for the breeder hens leads to constant hunger and frustration, which is shown in a trough-pecking stereotypy that further leads to beak injury and pain, and increased social cannibalism (Gregory 2007, 121). Attempted solutions to limit this behavior include offering a high fiber, poorly digestible, bulky food that fills the hen's stomach but does not lead to as much weight gain, however this does not completely alleviate the hen's hunger or frustration. Two strategies that have been showed to decrease stereotypy frequency are providing a brooder lamp and using lower stocking densities (Gregory 2007, 121), but these welfare management techniques are not currently widely employed.

A shared welfare issue common to broilers and layers is debeaking. There are positive welfare reasons to perform this procedure at present, bird mortality in both cage and non-cage systems increases without trimming beaks; "A meta-analysis of mortality data from 801 beak-trimmed and 228 intact-beak flocks housed between 2006 and 2012 showed significantly (but not dramatically) lower mortality in beak-trimmed versus intact flocks at 70 weeks (7.2% vs 8.3%) (Weeks et al., 2016)." (Nicol 2018.) The pain from this procedure can be reduced by performing it before the beak has hardened (before 10 days of age), using a hot-blade that can cauterize the tissue, and only removing at most a third of the beak (Nicol 2018), all of which matches European regulation for the practice. There are still negative functional differences, even when abiding by these recommendations; removing the tip of the beak prevents birds ability to remove parasites from their plumage and even "significant changes in navigational ability and functional activity are detected due to damage to mechanoreceptors and magnetoreceptors in the beak" (Nicol, 2018). More research is needed to determine what makes for better overall welfare, considering the reduction in bird mortality with debeaking, as it continues to be an issue even in free-range facilities with higher levels of enrichment to the environment (Newberry, 2017).

## Better Welfare for Pigs

Earlier in this chapter I discussed two welfare issues for the pork industry related to breeding, which were piglet mortality through crushing and the extensive confinement of pregnant and nursing sows. Housing design related solutions to both issues exist. Temperature control affects pig welfare, and its effects can also be addressed through housing design. The comfortable temperature range for a pig is particularly narrow and changes as their weight increases. Pigs kept in temperatures cooler or warmer than their desired range will experience discomfort (and with wider variations it can lead to death), but also their productivity suffers, with decreased weight gains when outside of their desired temperature. Temperature's negative effect on weight gain means that producers are motivated to maintain higher standard with regards to this aspect of welfare (Blackwell 2004, 256). However, due in part to the need to maintain appropriate temperatures with growth, pigs are moved in and out of new pens frequently. This causes stress and fighting each time there is an introduction of new pigs due to their need to establish a social hierarchy. The fighting can be reduced by introducing a mental distraction as new pigs are introduced, such as a toy, like a bowling ball or old tire (Blackwell, 258). The lack of stimulation in pig confinement spaces is a problem throughout their lives, and leads to other physical welfare issues. When pigs find their environment undesirable, they respond by engaging in exploratory behaviors, perhaps as a way to self-distract from the perceived problem (Blackwell, 258). When the exploratory behavior is stifled, through crowding and a lack of stimulus to direct it towards, it appears in the form of negative behavior like tail, ear and bar biting. The industry solution to tail biting is to dock the tails and clip the teeth, both painful procedures that also increase risk of infection (Zhao et al. 2013). While the use of anesthesia would be a good immediate supplement for better welfare, these procedures can be

avoided altogether by designing enriched confinement spaces. Bare and concrete floors prevent natural rooting avenues of mental stimulation and also leads to increased leg damage (Gregory 2007, 109).

The importance of mental stimulation for pigs is especially important when you take into account their displayed levels of mental aptitude; pigs can learn their name, be taught to fetch, and “pigs can manipulate a joystick to play simple video games, and are unique in that they understand the rules of games after only playing once” (Norwood and Lusk, 82). But an objection from farmers and other pork producers is that “my pigs aren’t that smart.” From their point of view, it seems like researchers are wrong about what they say their animals want. They see evidence that their animals are perfectly content to just stay in one confined place and don’t want to go outside and wouldn’t know what to do with a toy if they had it (Norwood and Lusk, 84). The apparent difference in what welfare researchers say pigs can do and want, from the farmers’ everyday reality and years of experience, can lead them to distrust animal scientist recommendations. From their point of view the academic doesn’t seem to know about real pigs. The difference in abilities between what pigs can do and what pigs in the pork industry tend to do comes from the circumstances of intensive confinement. Pigs raised in intensive confinement condition are mentally stunted compared to those who got longer to nurse, more stimulation and more welfare friendly conditions (Norwood 84). The lack of stimulation in their environment leads to a suppression of brain function, which changes how pigs can take on tasks; in a study on pigs learning, pigs from a higher welfare facility “were more open to learning particular tasks than those kept in intensive, bare confinement conditions” (Sneddon et al., 2000). Confined, mentally stunted pigs, are more likely to be fearful of new situations like open spaces, react with strong panic when someone enters the building, and do not utilize environmental enrichment

toys, all things that the average pork producer would be seeing. This is exacerbated if they are depressed, as animals with symptoms of clinical depression will show lethargy and apathy, which can be assumed from the outside as them being content with their situation (Gregory 2004, 33). Pigs have the least behavioral diversity when kept in a barren pen and display the most when provided with straw and an enriched outdoor area (Sneddon et al. 2000) Therefore it is not surprising that those who interact with pigs raised in intensive and barren environments have a different view of their capabilities and what their behavior indicates they want compared to the desires of mentally healthy pigs. Even if the pigs currently raised in poor conditions would not want these things, that doesn't mean it counts as good welfare for the pig industry to continue raising them in this way and denying enrichment, as it goes against what the healthiest state is for pigs. While this objection is about pigs, the larger point here is that it does not count as good welfare to intentionally raise animals with malformed preferences shaped by barren environments. Political theorists have made precisely this claim regarding the status of maladaptive preferences in humans. Martha Nussbaum, for example, argues that "embraced as a normative position, subjective welfarism makes it impossible to conduct a radical critique of unjust institutions ... This limitation is especially grave when we are in the process of selecting basic political principles that can be embodied in constitutional guarantees" (Nussbaum 2000, 116). Not only would the desires of pigs raised in intensive conditions not count towards Dawkins' definition of welfare, but it would not count as relevant information in the original position. The preferences of those in unjust circumstances (like the subjugated housewife) do not represent the desires they would have if conditions were better, or if societal institutions were just.

## Slaughter and Handling

Since my project is about the standards of welfare for livestock animals, including animals raised for meat, the expectation is that they will be slaughtered. If we determined that reasonable welfare standards include not killing livestock animals, the industry wouldn't exist. If we accept that animals must be slaughtered to reasonably discuss welfare *for the livestock industry*, then we can critically assess the degree to which the slaughtering process produces unnecessary pain and prevents animals from having what they want, up until the point of death. In this light, two of the major welfare issues with the slaughter process are transportation and the method of rendering animals unconscious.

Transportation has always been a focus of animal suffering, all the way from the origins of the ASPCA working to improve conditions of animals transported on rail cars. The trucks that animals are transported in now generate many sources of welfare discomfort; water and food deprivation during long travel times, the noise of the truck and traffic exceeding comfortable decibels, getting motion sick, suffering wind chill or overheating from a lack of insulation or cover, and injuries from being bullied on and off the crowded truck (Gregory 2007, 181). Stocking densities of the transport make these problems worse; overcrowding prevents having room to stabilize when jostled and makes it so that the animals cannot lay down, which causes physical fatigue and sleep deprivation. One study found that nearly 50% of trucks are packed above maximum density recommendations (Gregory 2007, 182.) and the larger extent of the issue is unknown due to the unloading process being out of view of any HMSA auditors at slaughter facilities, as discussed in the section on that act's enforcement.

The HMSA requires that animals are rendered insensible before slaughter. If chickens (and all other major livestock such as rabbits) were added to the HMSA, simply enforcing what

is already legislated would be a significant improvement to the welfare of animals at slaughter. Approved methods of stunning need to be maintained for effectiveness and production halted when these tools stop working. Bolt guns should be tested regularly for velocity, dropping below the species-specific velocity makes effective stunning less likely, and the same is true of with electric stun voltage (Gregory 2007, 194.) The simple modification of regular cleaning and maintenance of these stunners could significantly improve welfare, and it would still just be following what the law requires. CO<sub>2</sub> gas chambers are the other common method of stunning, used in chickens and some pigs. Which combination of gasses is used makes a big difference for the experienced welfare of the animals who inhale it; for example a CO<sub>2</sub> and O<sub>2</sub> mix causes minutes of prolonged asphyxiation. The shorter the duration to unconsciousness can be made the better it is for the animals' welfare. There are many studies that demonstrate that an Ar/CO<sub>2</sub> combination is most effective and maintains production-oriented goals of keeping the carcass intact (Gregory 2007, 202). However, there are no regulations regarding which mixture facilities need to use; any gas that does not transfer to human consumption is acceptable.

The method of slaughter itself, after the animal is rendered insensible, has related welfare issues primarily with ineffective cutting leading to regaining of consciousness. Chickens cut with a traditional conveyer belt past a spinning blade are most at risk for this, as their main arteries are on both sides of neck muscle and failure to cut both would result in a non-immediate death and potential for regained consciousness (Gregory 2007, 204). A higher welfare method is to require complete decapitation to avoid this issue and not cause production related loss of quality to the carcass (McNeal et al. 2003). The last welfare issue I'll include is that consideration needs to be extended to non-financially successful animals. The culling of male layers, chicks with birth defects or injuries, unhatched embryos, spent milk cows and spent egg layers is often done



outside of slaughter facilities and therefore is not regulated (Anderson 2011, 164). Care should be taken to make sure that death is immediate for these groups as is expected of commercially slaughtered animals.

The welfare of the animals at these facilities does not just depend on technological equipment; it is also heavily affected by what knowledge the human workers have who manage the animals through these processes. Basic training for workers on animal behavior would reduce animal stress and fear and decrease the likelihood of being physically abused in order to navigate through the facility (Grandin 2004, 119). Production is increased through handler training by increasing animal compliance, minimizing disruption, having calmer animals, and having product with less bruising/other physical results from being mishandled (Grandin 2004, 120). Learning an animal's flight zone and point of balance allow handlers to cause cattle and pigs to move and stop, simply through adjusting where they stand in comparison to the animal (Grandin 2004, 126). Knowing what causes animals to balk would enable a worker to recognize what circumstances is causing the resistance, such as a dangling chain, and could remove that barrier rather than bully the animal through the process with pain and fear.

## **Achievability**

Having just described what some of the welfare concerns are for livestock, I can now discuss if it is possible to have better welfare standards in the meat and animal product industries. For welfare standards to change, it needs to be possible to implement with reasonable cost-effectiveness. I will talk about consumer preferences with regards to paying more to ensure better welfare for animals in the following section, but dramatic price increases would work against realistic implementation as well as the justification I employ in later chapters, which

works through a democratic appeal rather than an ethical one. Welfare research on an industrial level needs to be funded to move lab tested welfare and production concepts into market ready systems and advice for producers and farmers. With better data available, farmers can more confidently buy into a new way of doing things. Effective auditing will also play an important role for monitoring welfare and/or ensuring compliance, which would be essential in moving from having regulations in place or widespread consumer demand of better practices, to the daily welfare of farmed animals being consistently improved.

Someone for whom better animal welfare is essential no matter the cost might object that it is not important if the price increases for meat and other animal products are significantly higher. But price increases are representative of the production levels the industry is capable of, compared to the investment costs. And the less productive our meat industry is (not in terms of total produced, but in terms of total produced per input quantity), then the more land, water, food and energy is used per pound of meat. (Norwood and Lusk 2011, 200). The meat industry already casts a long shadow on the globe, as detailed by the landmark 2006 report *Livestock's Long Shadow* (Steinfeld 2006), and it would be best if increasing animal welfare could be accomplished without making the industry more of a global burden. A further concern is that it seems to many to be unjust to raise the price of meat into the threshold of luxury goods, which removes the choice to eat meat from those who are below some certain economic threshold. However, there is evidence that shows that we can improve animal welfare substantially, without sacrificing production, by substituting and altering certain practices. The fear that a tradeoff between welfare and production is inevitable, I believe, motivates the industry to not be involved in animal welfare research. This same fear existed in scientists who used animals for laboratory research lab animal in the mid-1900s, who were against any regulation of the use of these

animals. They believed that if they had to manage animal suffering, it would be at the expense of scientific advances (Rollin 2004, 17). This fear was unfounded however; after federal regulations required pain control, research into lab animal welfare showed many ways to minimize suffering while also using them for scientific research.

In *Compassion by the Pound*, agricultural economists Norwood and Lusk estimate the cost of what a high-welfare confinement system would cost in terms of the price increase for the consumer good. To produce retail pork in a shelter/pasture system would raise prices by 8 cents per pound with a 2% production reduction (Norwood and Lusk 2011, 325). Switching all caged eggs to cage-free systems would cause an expected increase of 35 cents per dozen (Norwood and Lusk, 350). Both of these increases would not represent a significant, or potentially even noticeable difference on the consumer end. Norwood and Lusk's book was restricted by the research done at the time, in 2011, and needs to be built upon for more accurate estimates of market costs for improved welfare systems. A recent study from 2020 showed that an enriched environment for pigs doesn't just maintain current production growth, but improves it. The researchers placed half of the pigs in barren housing (the market standard) and the other half in an environmental enrichment. At 4 months old, half of the pigs in each confinement system were swapped to the other, and all four groups have their food intake and weight tracked. "Enriched housed pigs had higher body weight gains than barren housed pigs, both before and after the switch, as well as a higher feed intake" and displayed less tail biting. The researchers concluded that "Enrichment with rooting substrates and extra space profoundly affected behavior and growth of pig" (Luo et al. 2020). There would need to be more research done on how to transition this conclusion to a larger scale, but the evidence points towards improved welfare for pigs positively correlating with production. While maintaining low prices is important for the

reasons I have already mentioned, there is some room to increase the average American's spending on meat without creating an unprecedented situation. In 1970 the average American spent 4.2% of their income to buy 194 lbs. of meat/poultry annually, while in 2005 meat only takes up 2.1% of an annual income to buy even more meat, 221 lbs. (PCIFAP 2008, 15). It would not be historically out of the norm for households to pay even up to twice as much for meat, which is far beyond the expected levels for making significant welfare improvements. Furthermore, in many respects the demand seen in the current market preferences for cheap meat has been artificially constructed.

The research studies on the scale that have primarily been done set the foundation for deciding what processes and facilities ought to be trialed on a larger, industrial scale. The work Temple Grandin has done in the industry has shown that small changes (like non-slip mats on exit ramps) can both increase animal welfare and be inexpensive to implement, but it takes work and research and development to get there (Dawkins, 2012, 178). The larger, second stage in this process is an essential part of the necessary research to bring techniques to the market. Farmers would not risk anything that hasn't been proven on a scale closer to market conditions, as they often already operate on such thin profits as it is. The second stage trials will require significant planning, funding, effort, and time to achieve, but this stage unfortunately lacks a funding source right now. The industry does not have an incentive to pay for this second level research, as the current methods that involve bad welfare work out fine for them. The demand or legislation requiring it needs to be in place, but if there was sustained commitment to doing the research needed, there is every indication that financially successful better welfare conditions are possible. One contemporary working example of how this second level research moving prototypes to commercial reality can be done is the Food Animal Initiative (FAI), based in

England, near Oxford. The FAI is a stand-alone, profitable, commercial farm that works with welfare organizations, has corporate sponsorship from McDonalds and Tesco (two of the country's largest food providers), and has research links to three nearby universities (Dawkins 2008, 79). For example, FAI took ideas for high welfare pig systems "and developed them into a simple to run, highly competitive commercial system that large food companies are now pushing their suppliers to adopt" (Dawkins 2008, 80.) While the research has support from scientists, it is being done at the level of ensuring it works for their commercial farm within normal market constraints. This means that if a high welfare process works on their farm, it provides evidence that it can be successful for other farms to take on.

Auditing is the final, essential step in ensuring welfare. Proof that a failure in the auditing system counters the effects of welfare legislation is found through the inefficiencies in the HMSA's enforcement audits discussed earlier, compared to the success that Temple Grandin's auditing system has had in improving the welfare of animals in the facilities she works with. Grandin is very generous with sharing her auditing program to anyone who wants it, and the advice from particular facilities is broadly transferable to welfare audits for other farmed animals. She recommends that the essential elements to effective auditing guidelines are: eliminating vague wording in guidelines (such as sufficient, properly or minimal), switching everything to a yes or no answer and linking the facility's passing or failing to the answers that effectively relate to welfare (Grandin 07, 227). She says that the typical effective program has an outside auditor twice annually and internal audits at least weekly, with the data from these audits recorded digitally for easy tracking of trends and discrepancies (Grandin 07, 228). Not every data point that could be measured from the animals in the facilities will be useful to determining their welfare levels, so part of the welfare science is investigating what few data points can be easily

measured or counted and represent critical control points for maintaining good welfare. In large plants, a statistically significant subset of animals, such as 100, could be randomly selected to represent the total in order to make control tracking more efficient and feasible. This is the same principle as is used to track contaminants in food production. Grandin's audits require passing levels of all five critical points in order to pass the audit, regardless of how well they score at other measures; these are the at least 95% of animals stunned with one application of stunner, 100% rendered insensible before hoisting, no more than 3% of animals vocalizing on way to stun box, at least 75% of animals must be moved without use of an electric prod (95% is considered good), less than 1% of animals should fall or slip throughout the whole process (Grandin 2008, 106; Grandin 2007, 229). Alongside the critical points, there are a list of abuses and measurements which result in automatic failure, such as dragging a downed animal or poking animals in any sensitive area, such as their eyes, nose or rectum (Grandin 2007, 228). Following Grandin's guidelines for audits and performing them on all facilities would provide a reliable account of which facilities fall below the welfare standard agreed upon by society.

## **Public Opinion**

If we are convinced that better welfare is possible, the next step is to show that the public desires it to a relevant extent. Most surveys show that 98% of Americans (and 95% of Europeans) eat meat, and this percentage has stayed consistent in the last 50 years (Norwood and Lusk 2015, 3). Continuing to have meat and animal products available for dietary choice is the clear preference of the public, which requires the continuation of rearing livestock in some extensive form (due to the size of our population.) But the majority who consume animals and animal products also desire for animals to be treated well. Rollins references a 2003 Gallup poll

where 75% of respondents said they “want legislative guarantees of farm animal welfare” (Rollins 2011, 83). More recently, the 2016 Eurobarometer survey, a large study of nearly 30 thousand people across 28 countries in Europe showed that 94% agreed with the statement “protecting the welfare of farm animals is important” and 82% said they “think farm animals should be better protected than they are now”(Akaichi and Revoredo-Giha 2020, 105). These statistics reflect that the majority of our citizens have simultaneous values of desiring that farm animals are killed for their meat and that those animals are treated well before they are slaughtered. Ronald Bonney describes what people want is as being “able to buy products from farming systems that do not make them feel ashamed” (Bonney 2008, 63.) I think that think this is right; the most common response I encounter when talking about the conditions of livestock with other people is that they don’t want to hear about it, because they think what is happening is terrible, but are unwilling to give up eating meat. The uncomfortable feeling people get when thinking about the meat industry’s practices is even shared by some farmers keeping animals in those conditions. Kevin Fulton, a Nebraska cattle rancher, says that “a lot of farmers I know don’t support battery cages and gestation crates, but they fear being ostracized by the Farm Bureau and other trade groups if they speak out. I can’t imagine anyone being proud to have to keep their animals locked up in tiny cages for their whole lives” (Shapiro 2011, 118).

Part of the industry’s justification for maintaining poor welfare practices, is due to their incorrect perceptions of what consumers’ value. A Belgian study that surveyed what producers believed was true of their customers, they said that 1) consumers are not willing to pay more for higher welfare products, 2) that consumers thought that broilers suffer little, 3) that broiler welfare in current Belgian production units is generally non-problematic, but consumers believed the opposite of each of these points (Vanhonacker et al. 2016). A summary survey of people’s

willingness to pay more to ensure better welfare for animals concluded that “private values elicited from our informed consumers suggest most were willing to pay the cost of providing improved living conditions.” (Norwood and Lusk 2011, 301).

However, it is possible that the stated willingness for paying more would not reflect genuine market choices once such products are available. This is certainly true in the sense that organic, cage-free and grass-fed versions of animal products do not sell as well as the cheaper versions. However, this example does not necessarily establish that the public is unwilling to pay more to secure animal welfare. The first is an issue of a lack of knowledge of industry practices and animal conditions. Evidence that the public is uninformed is clear from the discrepancy in what people believe is offered in a grocery store compared to what the actually is; 44% of consumers reported that they bought eggs from a cage system and that they thought the egg industry produced 37% of their total eggs from a cage system (on average), but the true percentage is 90. Similar misconceptions existed for pork; 30% of consumers believed they bought pork from pasture, but the actual percentage is less than 5% (Norwood and Lusk 2011, 330). Grocery stores do not have what people believe they do. Norwood and Lusk performed consumer valuation experiments to see what would change if consumers had accurate and thorough knowledge of how chickens and pigs are raised. “We provided people with extensive information on modern egg and hog production systems, including unbiased information about why certain practices were used along with pictures of different systems” (Norwood and Lusk 2011, 330). After receiving accurate information about what livestock welfare realities are, over 70% indicated they were more concerned, with 1% saying less concerned (29% unchanged in concern) (Norwood and Lusk 2011, 330). This study shows that the welfare debate would receive more support and attention if knowledge of the system was widely available, something



that is also demonstrated each time videos of production facilities are released to the public. Norwood and Lusk also performed experiments where they provided people with real money and had them participate in controlled auctions to see what informed willingness to pay was regarding animal welfare. They conclude that once informed, people are willing to pay more voluntarily for better welfare even if they don't consume the food themselves, and also they are willing to pay substantially more than the raise in costs would actually be (Norwood and Lusk 2011, 357).

There are very few avenues for the public to become informed about how farm animals are raised in intensive systems. Producers do not have to report their practices to an agency, nor are they required to allow visitation from the public. "Ag-Gag laws" are the colloquial term to refer to legal measures taken to criminalize activist attempts to share information about what real animal farming and processing looks like, or any exceptional abuses that take place on these facilities outside of normal procedures. Iowa, Kansas, North Dakota, Montana, Wyoming and North Carolina have specific laws prohibiting taking, distributing or having any photos, videos or recordings of animal facilities without permission (Lyons, 2017) Obtaining information directly from producers, such as through their website, is unspecific as to the processes that take place or the variations between facilities. "Thus, where public access to knowledge about food production is concerned, there is no viable alternative to an undercover investigation of the commercial agricultural industry." (Lazare 2020, quoting Chen and Marceau 2015). The existence of Ag-Gag laws, and the industries' persistent lobbying to enact and maintain them, seems to contradict their claims mentioned earlier as to the public's lack of willingness to pay for better welfare. It would not be worth the expenditure lobbying for political measures if they did

not expect the public to react negatively to increased knowledge of livestock animal conditions.<sup>3</sup> Rollin recommends that agricultural industry consider this ignorance as giving them a grace period to come up with solutions to welfare problems, rather than a status quo to maintain, or the public will force change without industry input; “agriculture must accord with the emerging social ethic for animals or risk losing its autonomy and being legislated as research was” (Rollin 2004, 11).

The ‘market for lemons’ economic problem is relevant in this situation. The problem originally refers to the used-car industry; if consumers cannot tell lemons (a used car that is poor quality and will soon stop working) from non-lemons, then the used-car market in its entirety bottoms out, as no one is willing to buy a car when they cannot trust it is not a lemon. The consequence of informational asymmetry, when sellers have all of the knowledge and buyers have none, is a market that will not function, as the consumer assumes that every seller is untrustworthy (Norwood and Lusk 2011, 328). If the realities of intensive confinement operations became common knowledge, considering the evidence we have that consumers strongly oppose these conditions, then consumers would no longer trust that any meat they purchase was raised at a standard they approved of, regardless of what the producers claimed. And on the opposite side of the same problem, if farmers know that consumers assume their animals are raised with poor welfare standards and do not trust labeling saying otherwise in a store, they are not motivated to provide good welfare conditions for their animals as it will not cause consumers to choose their product. Economists use the market for lemons problem as a motivation for public policy, specifically in encouraging policies that would lessen the cost of

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<sup>3</sup> Thank you to my advisor, Piers Stephens, for raising this point in his comments to an earlier draft of this dissertation.

ignorance, which is how much consumers would be willing to pay to have obtained that missing information earlier in life (Hubbard et al. 2020, 65).

Public opinion can change industry standards, this was shown in the case of lab animal treatment. Other examples of public opinion (what citizens want) changing animal industries include the journalistic expose on the confinement of calves virtually destroying the veal industry (Rollin 2004, 7) and how the media coverage of dolphins being trapped and killed by tuna nets caused a reduction in American consumption of tuna that has yet to recover 20 years later (Broom 2011, 11). While consumer choices at the store might differ from their attitudes regarding what they prefer, big advocacy groups, such as the Humane Society of the United States (HSUS), can use media pressure to shame large retailers into purchasing or selling only high-welfare products. “If one did not understand the economics...it would appear as if HSUS forced Jack and Jill to purchase food they did not desire, but in reality, it took the bullying of HSUS to provide Jack and Jill with their desired pork” (Norwood and Lusk 2011, 317). This is the strategy that has worked with McDonalds, who now is working towards purchasing all their eggs from cage-free facilities, pork from facilities that do not use gestation crates, and beef from facilities that use Grandin’s welfare auditing methods. This could mean that what is really needed to affect welfare improvements for farm animals are more transparent consumer information, such as food suppliers like groceries performing audits, ensuring good welfare products are sold in their store and clearly labeled, to provide the circumstances necessary for the customer to express their preferences through their purchases (Hubbard et al. 2020, 69). Public pressure on large purchasers could be enough to change the industry, especially if it was combined with government funding for welfare research (which has been a part of the HMSA committee recommendations in every iteration passed into law since its inception). While I do

believe that regulations play an important role in welfare assurances, the argument that follows in the next two chapters does not exclusively apply to enacting regulations through government. If the considerations and deliberation outlined by the theory of justice result in other means than regulations through which to effectively, and in a long-lasting manner, provide higher welfare for livestock, then that would be the method supported by my argument.

## **Welfare Conclusions**

People, by and large, believe that animals can suffer. Especially globally and historically, cultures and legends have a pervasive intertwining of kinship and respect for animal life. The global participation in farming is immense; agriculture employs 1.3 billion humans and provides the direct livelihood for a further 1 billion humans, and livestock rearing by itself takes up 30% of the Earth's ice-free land (Rollin 2008, 3). I will go through the details of Rawls' theory of justice in the following two chapters, but generally his project is in determining what a fair structure of society looks like based on a democratic society that has a plurality of opinions and deeply held beliefs. Broadly speaking, the point I will make is that livestock, as animals which we have an extensive, manufactured, and intensive codependent relationship with, are a subset of animals that are owed a level of minimal welfare due to their location in and contribution to our society. We have generated this responsibility because of our chosen role as this massive population's caretakers. Looking at human history, there is substantial evidence that even if we wanted to have an ultra-minimally exploitative human society, husbandry would still be involved. A human society without animal use is hard to picture, and it would seem to be a historical anomaly, as all cultures had some intentional interdependency with certain species of animals. Determining what a just society looks like will involve considerations into how to

structure our animal use industries. So how does the ultimately agnostic understanding of animal consciousness relate to how this would be utilized in a Rawlsian framework? The type of information I have provided in this chapter is what the parties in the original position would have access to when using the thought experiment of the veil of ignorance to determine the basic structure, including the agricultural sector. These are the facts of animal welfare, and Rawls says that while many realities are obscured from these idealized persons, common scientific knowledge is available to guide deliberation. Rawls' method matches with what Dawkins, Rollins and many other theorists in this chapter have argued; it shouldn't be uneducated citizens making decisions about animal welfare, because they lack the expertise to do so, but they should be the ones guiding our ideals. Animal welfare scientists, farmers, and supply producers need to work together to generate educated conclusions on how to have an industry that provides good welfare and ensures that this is happening.

## **Chapter 2: Subjects of Justice**

In this chapter I will conclude that livestock animals are subjects of justice, and as such are owed a determination of how the principles of justice apply to them. My argument is made through the language and arguments contained within the political philosophy of John Rawls. I have picked his work due to his focus on providing a way for our real, unjust, and divisive democratic society to move towards a society effectively regulated by a theory of justice as fairness. I argue that my conclusion regarding livestock as a category of subjects of justice is internally consistent with Rawls' theory. I don't intend this to be seen as a revision to Rawls' theory, but a drawing out of implicit conclusions. I start with giving a robust description of the relevant elements of Rawls' theory of justice as fairness towards the purpose of understanding the justification behind the creation of the principles of justice and their application in structuring society. I show how the terminology Rawls uses throughout his work has an anthropocentric bias that obscures the fully ideal nature of his theory. This obfuscation, I believe, is what leads Rawls to a narrower application of his theory than is warranted once he moves to considering how it would be applied in our non-ideal society. I conclude with an argument that continuing our current practice (rejection of livestock animals as beneficiaries of just distribution in accordance with chosen principles) in the well-ordered society could only be justified as part of a positive argument; unlike how we currently think of it as the standard one must argue against.

### **The Project of Political Liberalism**

Rawls starts his second major work, *Political Liberalism*, by laying out the fundamental question his work will aim to answer; how to have a fair system of cooperation for a society of

diverse individuals thought of as free and equal to each other, or as Rawls puts it “which principles are most appropriate for a democratic society that not only professes but wants to take seriously the idea that citizens are free and equal, and tries to realize that idea in its main institutions” (JF, 39). There are multiple claims included in this question to consider before moving into its answer; why limit the discussion to democratic societies, why focus on the two attributes of free and equal for its citizens and why are institutions the correct subject of justice? The theory of justice that Rawls argues for relies on these aspects of the question to justify his conclusions regarding its answer. Focusing on democratic societies gives him the ability to make assumptions about the shared values held by its citizens, which lead to regarding individuals as free and equal. This then allows for determinations on a certain class of resources citizens would need and what type of system can ensure these. I will explain further why these determinations can be made, but it is important to note that justice cannot exist in a vacuum; fair terms of cooperation will change depending on the attributes of those engaging in that cooperation and the circumstances surrounding societal interactions. Rawls is endeavoring to come to a justified conclusion regarding principles of justice to regulate society. When someone questions if a law, action or institution is unfair, his theory should be able to answer this (for at least some substantial subset) with conclusions that are the result of a sound argument, which is how justified conclusions are generated. These are clearly the kind of conclusion needed when making determinations about justice, as determinations of what justice requires forces public compliance in a way that other realms do not (for example ethical or ontological determinations.) The question that Rawls starts with, and in virtue of limiting it to applying to democratic societies, enables him to generate true starting premises from which he can justify his full theory. Being able to do this is an important part of the liberal principle of legitimacy. Rawls defines this

principle, saying “our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason” (PL, 137). I will focus on this principle more in the next chapter, when I argue how the avenues of public justification reinforce principles of justice related to livestock welfare, but here the relevant point is to see how determinations of justice must be explained through sequences of logical, step-by-step reasoning to result in political conclusions that can be legitimately instituted through society’s laws.

The question that Rawls begins *Political Liberalism* with, is motivated from perennial questions within the history of liberalism. In his final book *Justice as Fairness: A Restatement*, which Rawls wrote near the end of his life in order to clarify and unite the theory developed through his two major books (*Political Liberalism* and *Theory of Justice*), he describes the War of Religions beginning in the sixteenth century as a historical origin of liberalism (JF, 1). With these wars each side strongly believed that their religion had the right answer to what counted as good and how to live a good life, and it wasn’t possible to come to a compromise as it would involve giving up what one believes is truly good. These wars led to philosophical debate on the right to have liberty of conscience, which is the right for free adults to have the ability to lead the life they think is best. Accepting or advocating for this right in turn requires principles of tolerance. Reading the political philosophies of Hobbes, Locke, Montesquieu and Rousseau and seeing their writing inspired by conflict between sides within the same society who each think their conception of the good is correct, Rawls concludes that a practical role of political philosophy is to narrow the kind of political differences citizens can have “so that social cooperation on a footing of mutual respect among citizens can still be maintained.” (JF, 2).



Social cooperation will require more than just toleration of others' beliefs to have a structure of justice in place where individuals with a plurality of beliefs can thrive. With history showing that it is likely humans will always have competing ideas of the good, it is essential to come up with a solution for beneficial societal cooperation that accounts for diverse and potentially conflicting comprehensive doctrines. This political conception of just cooperation will be separate from individual's moral and other doctrines. Comprehensive doctrines are systems of beliefs held by individuals that structure their ideals across most areas of their life. "It is comprehensive when it includes conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct" (PL, 13.) A person's determination of what counts as good actions, a good way to live and a good person to be, will all be informed by their comprehensive doctrine.

One way to deal with these conflicting ideas of what is right is to generate a system or argument through which all citizens are persuaded to share the same system of beliefs (presumably the best/correct one.) But Rawls doesn't think this is a reasonable pursuit as "a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason" (PL, xvi), especially when allowed the freedom of knowledge and pursuits guaranteed by a democratic society. The nature of democracy leads to pluralism; if a democratic society produced citizens who all held the same moral, religious, and metaphysical beliefs about the good it would seem like there was something akin to brainwashing or pervasive subjugation in the system. The opposing strategy to conformity is to admit that plurality is not likely to change and to instead work towards accommodating this fact. By starting with the assumption that citizens will hold a large variety of comprehensive doctrines, Rawls intends his theory in *Political Liberalism* to set out principles of justice that go beyond toleration or

pluralism, that each citizen will be able to affirm regardless of their personal held beliefs. The realms of comprehensive doctrines and the political conception of justice put forth by Rawls are not entirely distinct, but a political conception cannot fulfil the role of a comprehensive doctrine, as there will be many values essential to life missing from the strictly political sphere. Paul Voice in his book *Rawls Explained* describes the relationship between the two as overlapping circles. A freestanding political conception “needs to overlap with citizens’ comprehensive doctrines to the extent that, from within their own comprehensive doctrines, citizens can see the point of the reasons offered by the freestanding view and to the extent that they will be motivated to act on them” (Voice, 114). The legitimacy of the political conception will be strengthened due to individual citizens affirming its principles due to reasoning that matches with claims they support from their own individually held doctrines of belief, allowing Rawls’ political liberalism to accommodate pluralism and involves toleration without being reduced to either of these values.

The freedom to act on one’s deeply held convictions is an important part of having a comprehensive doctrine, as we value liberty of conscience on due reflection. If a citizen believes something is essential to their living a good life, protecting their freedom will include enabling them to act on their beliefs. Valuing equality between individual citizens can be at odds with the value of freedom. Being free to pursue what one wants can involve actions or beliefs that limit other’s ability to do the same. However, preventing inequality is also essential to maximizing the freedom of a populace. Economic and social inequality can lead to domination, when one group controls power generated through economic wealth or elevated social position, that group can enact political laws that ensure their elevated position is maintained and the subjugated group members are unable to gain power (PL, 131). Living in a subjugated position gives those

individuals significantly less freedom to pursue their conceptions of the good. Persons in both the low and the high-status group also tend to develop vices which are in themselves negative and further limit pursuit of the good. Attitudes of deference and servility in the dominated class would prevent autonomous creation of desires and restrict potential, while arrogance and attitudes of dominance could cause inauthentic views of self and others and damage positive social relationships. Due to the importance of equality, balancing this value alongside freedom is an important aspect of structuring society. Rawls begins his project, as previously mentioned, by taking seriously this commitment to citizens as both free and equal.

Since Rawls has concluded that citizens will continue to hold competing comprehensive doctrines, his project is to set up a society with mutually beneficial social cooperation and a structure through which all citizens can maintain their freedom as well as accept and affirm this political structure. Therefore, he establishes as a starting premise the fact that all citizens are both free and equal, which takes us back to his starting point. The commitment to all citizens being free and equal is important to guarantee that a diverse plurality of citizens will be able to affirm the society they live in, as is Rawls' conclusion that his theory will be justified only when applied to democratic societies. Democratic societies are characterized by allowing each citizen to have a say in how their political laws are structured. In order to ensure that each citizen can participate in a democracy, they must have freedom and equality. Inequality leads to domination as described before which would prevent democratic participation, and freedom is a prerequisite for this as well. Further, citizens would value the conception of themselves as free and equal in any comprehensive doctrine they might hold. Rawls makes this assumption from considerations of the importance of self-respect to individuals; living in a society that affirms one's position as free and equal is something everyone would consider part of the good. It is important to

understand where the commitment to all citizens being free and equal comes from in Rawls' starting question, as these qualities will end up leading to the justification of major points of his argument as I will show throughout this chapter. At this point, if we remember what Rawls states is the fundamental question of justice that he will answer; "what is the most appropriate conception of justice for specifying the fair terms of social cooperation between citizens regarded as free and equal?" (PL, 1), each aspect of the question is understood as to why it is a necessary and relevant starting point. Considering my ultimate aim here is to consider the role for beings who are neither free nor equal, it is important to realize in what way these terms are important and what role they play in justifying his theory, which is what I will move to next.

### **Role of Cooperation**

The desire to accommodate human nature, with its tendency to have great diversity in comprehensive doctrines, motivates Rawls' main question of what counts as fair cooperation. But it is the ideal of cooperation that locates Rawls' conception of a person. The ideal form of cooperation is to "be normal and fully cooperating members of society over a complete life" (JF, 18). A person, for the purposes moving forward about what fair terms will be generated, is an idealized conception that stems from a particular conception of cooperation. The phrase 'free and equal,' the foundational description of the members of society, reflects the powers necessary to achieve the type of cooperation he has picked out as the motivator for developing a theory of justice for. The conception of a person being free and equal also stems from a Kantian influence, which I will cover in more detail following this section on the role of cooperation. The answers to what is just, generated from a system based on premises involving an idealized notion of the person and cooperation, will be justified *through* this category of people (those who have the capacities for full cooperation), regardless of the kind of people we apply it to when we move

from ideal theory to non-ideal theory. It also ties to Rawls' goal of setting his theory up for a democratic society; Rawls says that this type of cooperation (from which he derives the definition of a person) is essential to being a citizen. The capacities he deems essential to being a citizen come from the kinds of abilities someone who would need to cooperate in society to "exercise and respect its various rights and duties" (PL, 18).

Going back to the history of political liberalism, attributes of freedom and equality for citizens have been consistent (at least, when we limit our consideration to just those considered a 'full citizen' at the time.)<sup>4</sup> The idea of having a particular conception of a person has been a part of political justice throughout the tradition<sup>5</sup> and as such it is important to realize that this is not meant to be a metaphysical or accurate description of a person in any context, it is a "political conception of the person" (Freeman, 333). The moral ideal of a person, or the friend ideal or the business ideal, could look very different, but a person *as a citizen* has these qualities picked out because of the kind of cooperation picked out as ideal, which in turn stems from the goal of political liberalism tracked historically and leading to Rawls' version. This conception of a person goes along with the ability to have a fair system of social cooperation, which is the goal of *Political Liberalism* and also political theory tradition more widely, all the way back to ancient Greece. Rawls points to "the ancient world," where having a role in social life with obligations and abiding by laws and being granted rights is first tied to the definition of a person (PL, 18).

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<sup>4</sup> My point here is that certain groups of people within society have traditionally not been considered equal or free, like women for much of history and certain racial groups, but that doesn't negate my point that freedom and equality for certain 'full' citizens (white, landowning men for example) has been consistent in much of the political philosophy tradition.

<sup>5</sup> PL, 300.

Why does Rawls have this particular type of cooperation identified? Understanding this is important because cooperation leads us to the powers identified of its citizens, which is fundamental for determining what justice requires. There are many kinds of cooperation, such as students cooperating with the professor, with students completing assignments based on the deadlines set by the professor, or a child cooperating with a parent to complete a puzzle; in both cases the participants can be said to be cooperating in order to achieve certain goals or benefits, despite neither example having participants who are necessarily free or equal in the cooperative relationship. The cooperation identified by democratic political social coordination is performed by those who are voluntarily engaging in cooperation and abiding by rules because they understand that these terms of cooperation enable a just society. Rawls is using the distinction in kind from the previous examples of cooperation to define social cooperation, or ‘full cooperation.’ He believes that there is something important missing when someone merely follows along and does not willingly choose to do so or does not have the ability to understand why they are doing it. When he says voluntary and understanding, it is purposely limiting to the type of cooperation between people who have diverse ideas on what the good is in life and have the ability to pursue it as we discussed earlier. Voluntary and understanding come from the idea of why we have cooperation, why we’re aiming (as a democracy) at having terms for fair cooperation. Fair cooperation aims at having each individual identify conditions where they can fairly pursue their conception of the good in a society that enables them to have more opportunities than they would without fair social cooperation.

The role that cooperation plays for generating the content of Rawls’ theory out of the “first foundational question” (PL, 3) of justice, which attempts to determine the fair terms of cooperation, does not fully justify the idealized idea of the participants of such cooperation being

conceived of as free and equal. These attributes are indebted to the Kantian influence in Rawls' theory. Rawls is clear that he intends his theory to be seen as coming out of Kant's moral theory; even publishing a paper in between *A Theory of Justice* and *Political Liberalism* in which he emphasized and further explained the Kantian roots of his theory.<sup>6</sup> Rawls describes his theory as a form of Kantian constructivism, or more precisely a Kantian variant of a constructivist moral conception (Rawls 1980, 515). Although Rawls' theory of political constructivism (even more so in *Political Liberalism*, but also in *Theory of Justice*) is built out of the same Kantian beliefs of the primacy of moral personhood I will soon explain, Kantian constructivism as an independent notion can be applied to a wider range of issues than the basic structure than Rawls' political theory focuses on.<sup>7</sup> Rawls describes his theory as Kantian by analogy, not identity, in that it shares certain fundamental aspects, such as Kant's conception of personhood (Rawls 1980, 517).

In Kant's theory, moral personhood identifies the ability to be held accountable while acting from the rational pursuit of one's desired ends, as the distinguishing aspects of humanity from which a broader moral law is determined (Weber, 71). Rawls' use of the term person, someone with full moral powers (needed for democratic cooperation), meaning they act out of a sense of justice and have a conception of the good, matches up with Kant's definition of moral personhood. I will explain both powers and how they work to ground the description of a person as free and equal, in more detail in the following section. When Rawls uses the term 'person' in this way, it is an intentionally idealized conception focused on separating out morally relevant characteristics of the person, and is one of the three "model-conceptions" for Rawls, which are the ideas of moral person, well-ordered society, and the original position (Rawls 1980, 520).

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<sup>6</sup> John Rawls (1980) "Kantian Constructivism in Moral Theory."

<sup>7</sup> The credit for the identification of this nuanced distinction goes to Dr. Kaufman, in his 2010 conference paper "Rawls and Kantian Constructivism."

Model-conceptions give the boundaries of the framework within which Rawls can generate an ideal theory of justice that respects commitments to freedom and equality, the foundational characteristics of democratic society. “We then reason within the framework of these conceptions, which need be defined only sharply enough to yield an acceptable public understanding of freedom and equality” (Rawls 1980, 520). A moral person is not meant to describe a real person or even what most people are like, and the term does not prevent people from having other important characteristics apart from their moral powers. The model-conception of person just states what aspects can be considered when constructing a theory of justice grounded in the shared political values of all in a democratic society; these are the characteristics that are morally relevant.

“Apart from the procedure of constructing the principles of justice, there are no moral facts. Whether certain facts are to be recognized as reasons of right and justice, or how much they are to count, can be ascertained only from within the constructive procedure, that is, from the undertakings of rational agents of construction when suitably represented as free and equal moral persons (Rawls 1980, 519)”

What Rawls is *not* claiming is that it is true that these are the only moral characteristics, or that by using this conception of the person to structure the process of identifying principles that truth about morality and justice will be discovered. Just principles will be discovered, but it is the process of generation that grounds their status as right. Rawls theory is constructed out of these initial premises (model-conceptions), they can’t be changed after the fact without losing the grounding for how his theory is constructed. “The leading idea is to establish a suitable connection between a particular conception of the person and first principles of justice, by means of a procedure of construct” (Rawls 1980, 516).



## **Two Moral Powers**

Now that we understand the justification behind Rawls' use of full cooperation to define his conception of a citizen, we can go through what capabilities are necessary for full cooperation. Two powers/capacities are needed to be the type of being that has a capacity for full cooperation: "a capacity for a sense of justice and for a conception of the good" (PL, 19). What is a sense of justice and why is it necessary for full cooperation? Rawls defines it as follows: "the capacity for a sense of justice: it is the capacity to understand, to apply, and to act from (not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation" (JF, 18-19). When an individual has this capacity, they are said to be reasonable. The term reasonable comes from how they can be reasonably expected to accept these terms and expect others to follow them as well. Remember that it is fair terms of the ideal of social cooperation, the specific one identified, so this type of cooperation comes from citizenship requirements, which involves abiding by laws for the good of members of society, which means you must be able to be trusted to abide by things you expect from others (reciprocity and mutuality.) Regardless of what is best for an individual, they understand that there are some (fair) terms that everyone needs to follow so that we all benefit, which is going to involve a distribution of burdens. Because the citizen is reasonable, and the terms they must abide by are fair, they would be motivated to honor these terms even if it meant sacrificing their interests. The reasonable citizen wants to live in a society effectively governed by rules of justice, so in this sense they are motivated by justice itself, not just a capacity to follow the rules. Further they would not be begrudging of this requirement due desiring to be just and their expectation that others will do the same. The motivation for creating fair terms for cooperation is that everyone will want to be socially cooperative due to the benefits they can reap, but were individuals

expecting that others would ‘game the system’ then they would be less likely to cooperate in the future. Being motivated to pursue justice for justice’s sake, and expecting others to do the same, allows whatever rules are set in place to persist throughout time. Principles of justice aren’t arbitrarily set, they are generated out of consideration for what is needed to make full cooperation possible, so following the principles of justice is essential.

Where does the requirement to understand, and not merely follow, fair terms come from? It is because understanding the content of justice is what will lead a person to be able to apply the appropriate principles of justice in the appropriate situations. Obedience without understanding would require constant direction, or inflexible circumstances. If we’re talking about the powers that come from wanting to identify just principles, then these principles aren’t going to be circumstance-specific, they’ll need applying, which requires understanding. Remember that this capacity is something required of people in the ideal society; it is a necessary part of the hypothetical beings for whom Rawls’ theory is created. When the ideal theory is applied to real people, the expectation is that it will be relevant to the extent that they share in sufficient or relevant degree to these ideal beings.

The second moral power is the “capacity for a conception of the good: it is the capacity to have, to revise, and rationally pursue a conception of the good” (JF, 19). An individual who has this capacity is described as being rational. Rationality is valuable, because it allows one to hold a meaningful conception of the good, which means that the person is able to have a meaningful idea of what to pursue, what is valuable to them. This isn’t a shared consensus on what is valuable, it is what someone personally (and sufficiently autonomously) decides is good. Something is good if I think is to my advantage to have, if I judge it as advancing my well-being. However, simply liking something isn’t sufficient for having a conception of the good. To think

of this more clearly it is helpful to think of what lacking this capacity would look like; if I did not have a sense of the good then I would not know if the things I did were good or bad for me to do. I might still know if I liked doing it or if it was enjoyable, but there wouldn't be an understanding of if it made my life better. A person needs an overarching system of beliefs in order to understand which things advance them closer to what they value and what brings them further from this goal. It is possible for this to be as simple as the things I like or do not like, but it would still require a conception of the good. If I have a hedonistic worldview, then I would know that things I find enjoyable advance my good, so that wouldn't count as lacking one. Understanding what counts as good will come from my comprehensive doctrine, which informs what I find valuable within life.

Further, it is essential to actually have a conception of the good, not just have the capacity to develop one in the future. "In addition to having these two moral powers, persons also have at any given time a determinate conception of the good that they try to achieve" (PL, 19). To fairly cooperate a person needs to know the content of their comprehensive doctrine, as it enables them to utilize their resources to pursue their conception of a good life. A comprehensive doctrine will give the person holding it an idea of their final end, the thing they pursue through their life, and being able to modify ones' actions according to what will advance their final end is part of being rational. This second moral power comes out of the definition of cooperation, because in order to identify what is to ones advantage (part of the goal of cooperation) they need to know what they find valuable and what is antithetical to that. Being socially cooperative in order to reap benefits entails understanding and identifying what are the benefits according to your particular comprehensive doctrine. This will vary person to person and so identifying fair ways of cooperating with each other will necessitate each party understanding what benefits them. The

generation of this second moral power did not come from a survey of powers held by real humans, but out of what fair cooperation between members thought of as free and equal entails for those members.

With both powers combined, it means that the moral person<sup>8</sup> is motivated to follow terms of fairness for their own sake. When society is filled with moral persons, the society gains an aspect of stability in having a shared goal outside of anyone's individual sense of the good. When citizens are considered "as free and equal members of the political community within which they would conduct those activities, they would aim at the shared final end of establishing and maintaining just institutions and would prize those institutions as good in themselves" (Mulhall & Swift, 469). While other kinds of associations might share many ends, the fundamental commitment to a democratic society of individuals with a plurality of conceptions of the good means that citizens aren't guaranteed to share any ends, except (importantly) the ends that fall under the conception of political justice. As Rawls says, "they share the end of giving one another justice" (JF, 20).

So far I have gone through the main points of Rawls' argument that the two moral powers are implied by full cooperation, that these are necessary for fair democratic participation, and thus each citizen would have both powers. With this in place, Rawls is now able to defend his statement that all such citizens are free and equal. In a society of citizens who all have these two moral powers, their status as such earns them the label of equal, as long as equal is understood to be defined in a particular way. The second power, being able to revise one's conception of the good, ties together cooperation with being (free and) equal. Remember that being free and equal

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<sup>8</sup> Remember that the term "moral person" as I use it throughout this dissertation is not a judgement on an individual's ethical status; it refers to the definition that comes out of the political philosophy tradition, meaning a person with both moral powers.

is not just about an individual, those terms would be meaningless without a social context of comparison. Cooperation is a part of what makes being free and equal valuable and gives it meaning (having an equal power balance and the freedom to enter into it or not would be components of fair cooperation). Being equal also means being equally capable of understanding and complying with justice, meaning one can be an equal participant in social cooperation (CP, 333).

When Rawls says that all citizens should be considered free and equal, he isn't adding an additional requirement for citizens.<sup>9</sup> Citizens are equal in light of having the two capacities, it would be impossible to have both moral powers and be considered unequal (if one is in the well-ordered society, where the institutions and social fabric of society wouldn't influence circumstances unjustly.) "The basis of equality is having the requisite minimum degree the moral and other capacities that enable us to take part fully in cooperative life of society" (JF, 20.) Everyone with both moral powers are equally able to be a citizen. Of course there are many ways in which citizens are unequal, due to their desires or natural abilities or simply the location they inhabit. However, these other ways of being unequal aren't relevant to disproving the claim that all citizens are equal, because they do not change how the persons can participate in civil life. So while the citizenship itself might be extremely unequal in the distribution of talents or assets, even in the abstracted conception of persons, that they are equal citizens comes out of having the two minimally requisite powers.

Remember that this conception of a person comes out of the political domain, as opposed to any other type of associations we have with others, therefore the claim of equality is restricted

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<sup>9</sup> JF, 20.

to being equal for matters of political justice. Earlier I discussed how the social collective isn't guaranteed to share most ends, and this quality of disagreement is what contributes to the differences in powers each person might have not being relevant to contradict this definition of equality. Whereas particular associations who share a communal definition of the good or desired ends could rank their members through contribution towards that goal or their 'amount' of good they have, "a democratic society has no such shared value and ends (falling under the good) by which its citizens can be distinguished" (JF, 21). Therefore, people are "equal in that they regard one another as having an equal right to determine principles of justice" (Freeman, 294).

Further, we are equal in how we view each other, in the limited domain of are they political equals. "Citizens are equal in that they regard one another as having an equal right to determine, and to assess upon due reflection, the first principles of justice by which the basic structure of their society is to be governed." (CP, 309) Equal in this sense comes from the capacities allowing people to recognize the capacity in others. I have the capacity to understand and abide by principles of justice, part of which is determining what these just principles are that will govern our cooperation, and so I understand that this is a collective assessment which will require others to do the same (determine and abide by principles of justice.) We (the ideal citizens) are equal in each other's eyes, by the definition of equal I pointed out in the preceding paragraph, of being equally minimally competent citizens due to all possessing the two powers.

Being free also comes out of what it means to have both moral powers. Samuel Freeman, in his impressive book simply titled *Rawls*, lists three reasons why citizens are free; which is that they have a conception of the good, they are a self-authenticating source of claims on social institutions, and they are responsible for my ends and adjusting them (Freeman. 2007, 336). The

first is that we all are free to have a conception of the good that we can either form for ourselves or at least revise if we want to. I can think having money is what counts as good, or having a large family I get to spend time with, or any number of things that are likely partially determined by my religious or moral doctrines. If I think that what counts as good is set forth by a religious text, then even though I haven't formed that conception of the good myself, I have affirmed that I believe it and could choose otherwise if I wanted to. Socially constructed goods still count as being independent to determine my good (Freeman, 2007, 294) and thus I am free in determining my desired ends. Also, I see myself as separate from that end (free from being intertwined with that end.) The power that leads to this aspect of freedom in a person is their capacity for rationality. Rationality gives the capacity to understand and thus form, revise and rationally pursue conceptions of the good. Regardless of if I achieve my good or not, pursuing it requires the capacity for understanding and reasoning through it. Further, having an interest in acquiring adequate primary goods comes out of my capacity for rationality. The independence in setting one's own good, and choosing for themselves the avenue through which they choose to pursue that good is an aspect of being free (JF, 21). They can also change their mind about what they consider to be good as many times as they wish, which is another way in which they are free (CP, 309).

The independence in setting out one's desired ends leads to the second way in which citizens can be considered free. As a free and equal citizen I can make demands on social institutions as "a self-originating source of claims" (CP, 333). Each person is free to make a request for the institutions of society to serve them. These claims will subsequently be put up against claims from others, all of which have equal weight, but it is an aspect of freedom to be able to mold one's surroundings (as much as I can) to pursue one's good. When setting up the

principles of justice, the parties in the original position (I will describe that process later) will be determining principles that shape the fundamental institutions that make up our society and have a big influence on the kinds of goods a person can pursue. The choices made are valid in that they are made for citizens who have equal weight in their desire to each pursue their good, and the validity of molding an institution to allow the pursuit of goods comes from the citizen themselves and their desire for things.

Finally, I consider myself responsible for that good; “I assume responsibility for my ends” (Freeman, 294). Each citizen is responsible for adjusting their desires to what can be legitimately expected through social cooperation. This comes from the capacity to reason too, knowing if one’s ends are the kind of things that can be achieved or not. Understanding that certain things I could identify as a good are unreasonable to expect a society to work towards. While I’m not going to go through a full account of the rights that are granted to citizens as the result of Rawls’ theory, it is relevant to the discussion here to point out that certain freedoms are guaranteed due to the moral powers of those determining principles of justice. In order to foster or guarantee the two moral powers, which in this theory are required to have a populace thought of as free and equal, certain rights will need to be protected. For example, the liberty of personal property “is to allow for a sufficient material basis for a sense of personal independence and self-respect, both of which are essential for the development and exercise of the moral powers” (PL 298). Therefore, there will be further, more concrete ways in which citizens are free that come out of the moral powers and their propagation or protection.

I’ve hopefully gone through enough of Rawls’ theory at this point that you understand why those who cooperate in society in this ‘full’ way have certain powers and are therefore free and equal as a result. But why would someone, even theoretically, want to cooperate in a society



and garner their free and equal status? In what way does it benefit them to be a part of a democratic society, and how would it motivate a desire to cooperate? As this section is completely based around a theoretical person, the benefit would need to apply regardless of the particulars of their desires. That social cooperation leads to benefits to those involved is not a novel idea of Rawls; political philosophers from the previous centuries, such as Hobbes and Locke, provide reasons people would want to abandon the ‘state of nature’ and enter into political society. Largely, these arguments gesture to the undesirability of having to do things alone, or without guarantees of social cooperation. To name a few; larger scale projects require labor from many people to achieve, gaps in individual’s natural or developed talents can be compensated by others, and a judicial and penal system ensures certain protections against harm. People benefit from working together; while there isn’t a guarantee that each individual will receive some sort of optimal benefit (what would be *best* for them), they would benefit minimally, as in better than if there was no cooperation at all. It is to one’s benefit to socially cooperate, as the type of benefits of living in a society where people cooperate will be more than anyone could accrue if they did not, as long as everyone is doing their fair share and the benefits are distributed fairly. “All who are engaged in cooperation and who do their part as the rules and procedures require, are to benefit in an appropriate way as assessed by a suitable benchmark of comparison” (PL, 300). This is true regardless of an individual’s conception of the good, because the society is predicated on the idea that everyone has different ideas of the good, and therefore societal cooperation will generate and distribute primary goods that can be used to work towards any conception of the good. Each citizen is part of the body that determines how society is structured so that it can advance a plurality of conceptions, and so the theoretical person, regardless of their particular conception of the good, would be able to use their portion of

distributed benefits as they wish to advance their desires. for example, I brought up previously how a right to property would be guaranteed; this right could help someone in a wide variety of personal conceptions of the good they might have.

This explains why a person would want to take part in social life, wanting that cooperation for their own benefit, but understanding that this is so requires the two moral powers (not just to be able to participate as we've previously explained.) Combined these two moral powers give this idealized person the ability to engage in the type of beneficial social cooperation Rawls has picked out to identify fair terms for, and further to be motivated to follow what justice requires 'for its own sake. It is the reasonable moral power that has within it a desire for "a social world in which they, as free and equal, can cooperate with others on terms all [reasonable citizens] can accept. They insist that reciprocity should hold within that world so that each benefits along with others" (PL, 50).

## **Term Equivalence**

Now that I've set out the justification process of Rawls' definition of citizens as free and equal, and how it is tied to cooperation and having the two capacities, I want to tie this to its relevance for my project before moving onto the concepts of the basic structure and original position. Rawls uses throughout his books a set of terms that he takes to be equivalent. He also tends to move back and forth between a theoretical society and its citizens, and referring to actual people and society without recognizing the limitations in his justification regarding the two, due to his speciesist bias (relevant to my work, but also likely other bias such as ableist.) Rawls uses many terms interchangeably, and their technical definition, in how they are used, needs to be identical for them to be justified in the claims he is making. He isn't necessarily

hiding that they all mean the same as he explains the terms throughout his works, especially political liberalism, but because they *seem* to mean something different or refer to the words as we colloquially (or sometimes even denotationally) define them it muddles the point.

To get a sense of the sheer scale of different terms used that actually refer to the same thing, here is a non-complete list of the terms Rawls uses in PL to refer to the theoretical free and equal beings with the two moral powers I've been describing thus far: citizens, persons, full persons, persons with two moral powers, all members of society, humans over a complete life, free and equal citizens, free and equal persons, reasonable and rational citizens, democratic citizens, everyone, and all. While these terms appear in many instances across PL, JF and TJ; I will provide text locations from which it is particularly clear that Rawls intends these to be synonymous in order to provide evidence to my claim that these terms are meant to all describe the type of theoretical ideal person I have described so far. This section is not intended to be an exhaustive account of the instances where Rawls uses these terms or even that these are the only terms one could find; I aim to provide only enough support to show that the terms I have picked out are being used as synonyms.

In *Justice as Fairness*, Rawls defines 'citizens' as one of only two fundamental ideas that companion the idea of justice as a system of social cooperation, saying "the idea of citizens (those engaged in cooperation) as free and equal persons" (JaF, 5). This shows that the term citizen is describing only those who have the capacities for full cooperation and for the types of powers that enable being free and equal. Rawls specifies these powers belonging to citizens in *Political Liberalism*; "Being free in these respects enables citizens to be both rationally and fully autonomous" (PL, 72) before moving on to describe in more detail the varied capacities necessary to be autonomous in both ways. That citizens have these powers is even more clear

later in a section called the ‘Idea of the Good’ where Rawls says “we view citizens, for the purposes of political justice, as normal and fully cooperating members of society over a complete life, and thus as having the moral powers that enable them to assume this role” and even that these two powers are part of the “essential nature of citizens” (PL, 203). These passages show that citizens for Rawls are not any human being, of any age, in society, but specifically the type of being who can cooperate fully and has the two moral powers. If citizen as a term without any modifiers refers to this particular concept of a citizen, then it is less surprising that “free and equal citizen” refers to the specific, ideal conception of a person too. The term “reasonable and rational citizen” is used at certain points, meaning the same thing as citizens with two moral powers but given its own term. It is clear in the section he uses this in that it is not written as a further specification of a type of citizen but used to refer to the same group as when he writes citizens later sentence as well as the rest of that paragraph: “if a political conception of justice is mutually recognized by reasonable and rational citizens who affirm the reasonable comprehensive doctrines...” and the end of this sentence “...worthy of citizens’ devoted allegiance” (PL, 210).

Democratic citizen isn’t a term used in this exact ordering, but it’s relevant to the term of citizen that it means citizens of a democratic state when Rawls uses it. I’ve already talked about why being democratic is relevant for justifying holding all citizens as free and equal, but Rawls makes it particularly clear that ‘citizen’ equals democratic citizen when he restates that political liberalism unites people due to shared social cooperation rather than a shared conception of the good. He says social unity is founded on “a shared public conception of justice appropriate to the conception of citizens in a democratic state as free and equal persons” (PL, 304). So citizens is a term referring to the subset of those in a democratic state, rather than the broader term of citizens

as member of any country. Rawls' use of the term does not distinguish between legal variations of citizenship. Green-card holders, non-voting citizens, legal residents, nonresidential dual-citizens; these are all variations of the category of citizens that exist in our real, democratic society. Such distinctions would come at the earliest at the legislative stage for Rawls, which comes after the principles governing the basic structure are determined. Since Rawls does not attempt to go through determinations at this, less ideal, stage, his usage of citizenship does not prohibit or force the inclusion of citizenship categories that might affect the distribution of goods and protections amongst each.

In *Justice as Fairness* Rawls talks about how a political conception of justice sets out 'constitutional essentials' and there will be times it is necessary to go beyond this when deciding on important issues, but that once these essentials are agreed upon (by these participants) then "political and social cooperation between free and equal citizens can be maintained." (JF, 28). And then in the following two paragraphs, refers to the same participants just as 'citizens' heightening the clarity that they mean the same thing. It makes sense they mean the same thing, as I've gone through before why beings with two moral powers are free and equal, but my point here is that this shows that by 'citizens' he also means 'citizens who are free and equal' not just any member of the society. In PL, Rawls clarifies that the laws of justice are established by "those persons themselves" (PL, 22) involved in social cooperation, "by free and equal citizens who are born into the society in which they lead their lives" (PL, 23). So not only beings with two moral powers required to be involved in full cooperation, but there's also an assumption that these could only be persons (humans) and he stipulates that these theoretical persons are also theorized to spend their whole lives in the society. It will be helpful as we go through this section

on terminology to keep in mind the accumulated details of these theorized beings being used to generate what counts as just and fair terms.

In addition to the label of free and equal citizens, citizens are also described as free and equal persons. This goes along with the substitutional swapping of person and citizen and is used often when Rawls wants to highlight the conception citizens have of themselves as free and equal. For example, when listing primary goods Rawls writes “these goods, we say, are things citizens need as free and equal persons” (PL, 180). He repeats this phrase, but adding the extra terms ‘moral’ and ‘rational’ in the introduction to the basic structure as subject section of PL. “we think of the parties to a social contract as free and equal (and rational) moral persons” (PL, 259.)

Because Rawls has limited the scope of consideration of justice to those who can fully cooperate, meaning those who have the minimal amount of capacities necessary to fulfil the two powers, he can speak of all persons having this characteristic without each time specifying that it’s an assumption. Differences will of course still exist between members of this theoretical group of citizens, but they’ll be differences in things like preferences, character, and beliefs of the good; all variations that wouldn’t affect the ability to fully cooperate as Rawls defines it. “Given these [having the requisite moral powers] assumptions, variations and differences in natural gifts and abilities are subordinate: they do not affect persons’ status as equal citizens” (PL, 302.) Persons as a term does not mean what we would think of it meaning in everyday life, as referring to any person/human we know, because he is stipulating that they must have these capacities. ‘Person’ is yet another term with the same definition as citizen and all the others mentioned thus far. A particularly clear example that Rawls’ writing presupposes that a citizen is a person comes when he explains why citizens can change their conception of the good; “As free

persons, citizens claim the right to view their persons as independent...” (PL, 30), which also shows the use of person as referring to the embodiment of the mental capacities for cooperation. And finally, Rawls sets out the definition of person early in *Political Liberalism* in the section on Fundamental Ideas, saying “Thus, we say that a person is someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.” (PL, 18). Since person already is defined in this way, it is unnecessary that Rawls continues to add qualifiers to the terms throughout the same work, such as ‘full person’ or ‘persons with two moral powers,’ however this is common in his writing. Prior to *Political Liberalism*, Rawls also uses the term ‘moral persons’ in *A Theory of Justice* to refer to persons regarded as having the two moral powers (JF, 19). While it isn’t contradictory for persons and full persons to refer to exactly the same group of beings, it is more commonly understood that added terms work to identify a smaller subset within a category, which isn’t the case here.

We can see in the quotes just referenced that when referring to a collection of individuals that Rawls uses persons, the plural of person. Another word for a collection of persons is people or peoples, and Rawls uses this term as well, most famously in the title of his 1999 work *The Law of Peoples*. However, I am not comfortable with claiming that Rawls uses peoples in a synonymous manner as persons or the other terms I have included in this section, as peoples has an additional meaning of referring to a collection of persons in a region that are grouped together, akin to members of a nation or state. Further, in the preface to *The Law of Peoples*, Rawls says of this work that it shows how he thinks “reasonable citizens and peoples might live together peacefully in a just world” which clearly shows that each term is intended to represent a separate group, even if each isn’t clearly defined.

People and persons are not the only collective terms used by Rawls to refer to the same group of beings in society with the two moral powers. ‘All’ and ‘everyone’ are indefinite pronouns used regularly by Rawls both of which have the same content as ‘citizen.’ In a passage of Political Liberalism where Rawls gives an account of primary goods, he says that justice will require a political understanding of “citizens’ needs and hence as advantageous for all” (PL, 179.) The term advantageous for all is used rather than advantageous for citizens, but the content of that section shows that Rawls does not mean that the things that citizens need would be advantageous to citizens and also everyone else that makes up ‘all’, rather that he is assuming that ‘all’ of society is simply free and equal citizens. This is because he starts his argument with the premise that he will be considering what justice is for persons thought of as free and equal. This assumption continues throughout, and it is this group that he’s referring to when he says all or everyone. We can see this clearly in his section on the basic structure; he restates that throughout his argument he is assuming that “everyone has the capacity to be a normal cooperating member of society” (PL, 184). And when explaining why the basic structure is the primary subject of justice, he states that the “social contract is a hypothetical agreement...between *all* rather than some members of society” (PL, 258) and that these members are thought of as free and equal. Continuing his explanation regarding the principles of justice that are generated, Rawls states “the principles require that the basic structure establish certain equal basic liberties for all” (PL, 261.) We know, from my earlier explanation, that the justification for labeling all citizens as free and equal comes out of their equal capacity for cooperation. When Rawls says “all” have equal basic liberties, this can only mean those who are equal in that manner are assured equal liberties, and therefore the term ‘all’ in these quotes means all members of a society where everyone is assumed to have the minimal capacities for



full cooperation. We know that here in our real world there are parts of society that will not have those prerequisites, certain humans at certain ages or with certain disabilities, and non-humans that are interwoven into society, but when Rawls uses the term ‘all members’ he only refers to those citizens who can fully cooperate, or rather, he can only mean that and still fit his justification. ‘Everyone’ follows this same reasoning as to why it is limited to the group of hypothetically assumed fully cooperating citizens. One place where we can see this language in Rawls’ work is in his description of the well-ordered society as a society that has “everyone” accepting the same principles of justice (PL, 35). The clearest passage though is in the section on Priority of Right, where Rawls reminds readers of exactly that assumption. “Given our assumption throughout that everyone has the capacity to be a normal cooperating member of society...” (PL, 184.) Later in this paper I will be discussing the lack of clarity regarding how a well-ordered society is different from ‘society’ as Rawls uses the term, but leaving that complication aside we can see that when he uses broad, indefinite pronouns ‘all’ and ‘everyone’, he is referring to the theoretical group of fully cooperating, free and equal citizens. Rawls makes one final assumption regarding the group of free and equal citizens and demonstrating this assumption will be the last part of this section on terminology.

Rawls assumes that his theory of justice only encompasses humans; the society is populated solely by humans, the principles are generated by humans and the principles apply only to humans. It might seem obvious that the terms citizen, person and everyone refer to humans; it clearly was to Rawls as he uses aspects of human biology in his conclusions related to the principles of justice. I will first demonstrate that Rawls assumes all beings in society for the purposes of his theory are human, and then I will show that this assumption is only partially justified. Rawls makes it clear from the beginning of *Political Liberalism* that he is designing a

theory of justice for humans. At the beginning of this chapter, I went through the motivation for Rawls' political project; accounting for the plurality of comprehensive doctrines common throughout history and designing a system that adjudicates rights and privileges in light of that. Within the first few pages of PL, Rawls says that "a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason" (PL, xvi). This shows that humans are the population that Rawls was motivated by when forming his theory of justice, but it does yet not prove that Rawls is speaking of only humans throughout his argument. Rawls also brings up humans when he discusses what a society is, saying that society "has a place for all the purposes of human life" (PL, 40). This does not preclude society *also* being a place for the purposes of non-human life.

In order to demonstrate that Rawls considers solely humans throughout his work, I will show that he assumes all citizens are humans. This is clear in the following quote regarding the source of legitimacy for Rawls' proposed societal structure; "our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason" (PL, 137). As you can see, Rawls assumes that all citizens would be able to use their "human reason" to assess principles of justice, meaning that he assumes all citizens would be human. Apart from the likely scenario that Rawls never considered otherwise, we see his reasoning for citizens being human explained further in *Justice as Fairness: A Restatement*. As I've covered here, citizens are beings with two moral powers, a sense of justice and a capacity for a conception of the good. It is in the second, being able to pursue and revise one's goals in accordance with a conception of the good, that Rawls explicitly assumes is the domain only of humans. "Such a conception is an ordered family of final ends and

aims which specifies a person's conception of what is of value in human life" (JaF, 19). Rawls then continues this section by referring to 'persons', which strengthens the equivalence of citizen, person and human. He states this in PL as well, that the capacity for a conception of the good means "a conception of what we regard as a worthwhile human life" (PL, 302). Assuming all beings with the ability for full cooperation are human ends up generating some significant conclusion, based on the realities of human physiology and development, primarily the list of primary goods.

I will go through a more comprehensive discussion of the role of primary goods in Rawls' theory later, but for now it will hopefully suffice to give a brief description. The capacity for a conception of the good assumed in all citizens means that each person has a concrete idea of the kinds of things they need to advance their own good. However, due to the restrictions of the original position and the veil of ignorance (both of which I will explain later on), when making decisions on what kinds of things society should use their collected resources to advance it is unknown what specific conceptions of the good citizens have. Instead, Rawls identifies primary goods as the kind of things that would advance the majority of the variety of comprehensive doctrines citizens might hold. Primary goods will also be the kinds of things that help citizens develop into having the two moral powers necessary for full cooperation. What exactly are the primary goods? "Here we must look to the social requirements and the normal circumstances of human life in a democratic society" (PL, 307). In order to determine what kinds of things would realize the moral powers in persons and advance their general goods, we need to know "various general facts about human wants and abilities, their characteristic phases and requirements of nature, relations of social interdependence, and much else" (PL, 307). Rawls concludes from these facts about human nature that some primary goods would be securing basic

liberties and access to wealth; these things would be necessary to advance a wide variety of the kinds of good that humans want and would help to develop moral powers in many humans.

The list of primary goods comes from an assumption that the kind of being who can have a capacity of the good is restricted to humans. The fact that the kind of being that can do that is human is very relevant to the generation of a list of primary goods and the content of the principles determined to advance these primary goods, but being human itself is not part of the requirements when you look at the justification structure. Rawls seems to be correct that the kind of beings on earth that can be his citizens (that have the two moral powers and can fully cooperate) are humans, but this isn't essential to his work. If aliens happened to come to our society and had the two moral capacities, the list of primary goods that Rawls brings into the theory based on human nature would have to change. This does not count as a flaw in his theory, but it will end up being important for my larger argument that citizens being solely human is an assumption based on the realities of our non-ideal world. However, as written, this assumption is not made obvious, and it is not clear that any aspect of the argument that is dependent on human physiology is based off an assumption related to the two moral powers and is not in itself justified. When working out what primary goods should be ensured for citizens to have what they need, Rawls reiterates that it's the political conception of the person he's working with (PL, 178), not a complete or realistic conception, and that this along with basic facts of how humans are nurtured that leads us to say what citizens' needs are. Keeping in mind what I've just gone through, this means that we are using a theoretical conception of a person (not necessarily a human) and then adding facts about humans (due to those beings who currently seems to have the capacities for full cooperation) to come up with our principles of justice. Who we apply to these principles to has yet to be explained, but just because they were generated out of

knowledge of human development does not mean that they only apply to humans, or at least not without some further argument.

It might seem like I have taken up a lot of space considering this section was dedicated purely to definitions of terminology, but the equivocation of separate terms is the foundation of my larger argument in this chapter. I believe I have thoroughly proven that all of these terms of synonyms when used by Rawls in his ideal theory. This in itself is not an issue, the danger comes when remembering that Rawls is writing this for a public audience, who uses each of these terms regularly to mean something different, both from what Rawls is using them to mean, and in the sense that each term would mean something different from each other. There is a concern that the equivocation leads readers (and Rawls himself) to mistaken conclusions regarding the application of ideal theory into our real, non-ideal society. These terms are justified in their restricted definition due to their place in ideal theory; human means just those who have these certain capacities in the ideal theory, but in non-ideal theory human could no longer be justified to have that restricted definition. A reader who associates the casual usage of terms like ‘everyone’, ‘citizen’ and all the others I go through in this section might read Rawls’ theory and think it is justified to say that all, real-life humans have both moral powers. Rawls stipulating that all of these terms mean the same thing, without that fact being obvious, makes his claims seem broader than they really are. When ‘all persons’ (for example) written in Rawls’ books does not actually mean all (real-life) persons, his theory becomes muddled. I believe these term equivalences potentially also reflect Rawls’ lack of appreciation for the diverse capabilities of those who contribute to our real society. As is seen in the political philosophy tradition before him, Rawls assumes that almost all actual people have the potential to fit the Kantian conception of people having complete, rational and autonomous control over their actions. However, we

have a rich (mostly contemporary) history of criticism for the idea of a person as only those who can be independent and rational.

### **Development and Safeguarding of Moral Powers**

We've so far gone through how out of cooperation we generate the concept of people in society as having the two moral powers, which also makes them free and equal. I'm now going to move on to explain how this conception of who inhabits society makes the primary subject of justice the basic structure. The reason I need to give an account of the following concepts in Rawls work is that my argument for the inclusion of livestock in Rawls' theory of justice relies on their location in the basic structure. It is only once we understand the basic structure and the method through which the principles of justice are ascertained that my argument will be coherent.

“The basic structure is understood as the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation” (PL, 258).

The importance of the basic structure comes out of the knowledge that individual transactions between people can only be fair once there are certain background conditions. If two people agree to a trade, but one person doesn't have the freedom to say no or doesn't have the education needed to understand how to advance their desires, then that trade was not a fair trade even if both parties agreed. Outside conditions can affect the kind of adult a child grows into, the desires and talents they will have, and the array of choices they are presented with throughout their life. The “institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are. The social structure also limits people's ambitions and hopes in different ways” (PL, 269). Rawls' goal with *Political*

*Liberalism* is to offer an account of a fair system of cooperation between citizens; what fair terms would be for their continued cooperation with each other so each can be better off than they would be apart. This goal of cooperation is what generates the conception of who counts as a citizen, what qualities are essential to be able to cooperate with each other. Clearly then, cooperation is a fundamental aspect of fairness, and the basic structure ensures the background conditions necessary for fair cooperation.

How can the basic structure affect fair cooperation? Due to the all-encompassing nature of the basic structure in how it affects the development and conduct of individuals, an unjust basic structure will prevent fairness from persisting. Even if each individual act of cooperation between citizens is fair, justice can be undermined through things like bias against certain classes of people built into the marketplace. Background institutional conditions could distort relationships and cooperative acts to a point where they are no longer fair, thus society needs to prevent this from happening by securing just background conditions. Rawls uses an example of wage agreements to illustrate this (PL, 266); I am offered a certain wage by my employer and accept it. There is no way to determine if this exchange was fair by solely focusing on me and my employer's actions; looking at the offer compared to the industry standard, judging the historical influences that affect the evaluation of that industry's labor, ensuring that I as the employee had fair bargaining power, and even if growing up I had a fair opportunity to develop the relevant skills are all aspects of determining the fairness of the wage agreement. Focusing on adding restrictions to the individual acts of cooperation to ensure fairness is not feasible, as the types of rules that would be needed are infeasible. They would be too complex, require too much information, and most transactions between two people still involve a multitude of third parties;

this strategy for ensuring fairness would be beyond the comprehension capacities of real humans (PL, 267-268).

As I explained earlier in this chapter, to have the ability to cooperate in the way Rawls identifies as the function of society, citizens need to have a sense of justice and a robust conception of the good. These two moral powers do not exist in infants, they are something humans can, or often do, develop over time. A human needs certain resources and support to develop into their healthy adult form. Two theoretically identical babies would grow into very different adults if one received more encouragement, opportunities, nutrition and education than the other. Even one's idea of the good and one's ambitions are determined in large part by their social environment:

“So not only our final ends and hopes for ourselves but also our realized abilities and talents reflect, to a large degree, our personal history, opportunities and social position. There is no way of knowing what we might have been had these things been different” (PL, 270).

If we want to have a society of beings that have the two moral powers necessary to have fair cooperation, then we need to develop these powers in that society. The rights that citizens have, the resources and opportunities they have access to have strong causation on the development or stifling of their capacities. Citizens will have a wide variety of abilities, talents, aspirations, and desires; but we can only trust these differences are authentic and a justified part of fair cooperation if they were developed amongst a background of just institutions. “The basic structure shapes the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good” (PL, 269). Even for persons with both moral powers developed, the basic structure of society will affect the types of goods that they have access to and the avenues through which they can realize their (already developed) *bonum vitae*. A more obvious, but equally important, aspect to the adequate development of the



two powers is to consider what rights/liberties a person has. Or to put another way, an important aspect of ensuring fairness will be to identify which rights and liberties are required in order to develop the two powers. This is how the basic liberties are connected to the conception of the person as free and equal, and certain institutions of the basic structure will be tasked with the generation and enforcement of these liberties (PL, 293).

What I have just presented is a summary of much of the reasoning for why the basic structure is the primary subject for a theory of justice, however in order to finish the full justification I need to give an account of how the principles of justice are generated. These principles will affect how the basic structure is regulated, which will give us the last piece for explaining its priority in securing fairness and give us a clearer idea of what a just basic structure would look like.

### **Original Position and the Motivation of Primary Goods**

I should start by saying that I can't possibly fully explain each part of Rawls' theory related to the original position, even a brief summary of its aspects could fill a book in itself. I am going to focus on the way the OP works to generate the principles of justice and how it ties to the conception of the person Rawls sets out. Understanding how the principles are generated will be essential to my argument regarding the justification of their application. In the section preceding this one I gave Rawls' argument for the primacy of the basic structure for a theory of justice; this argument relies on the necessity of authentic cooperation, free of coercion, between citizens. That same concern is what motivates Rawls to come up with the original position, which removes coercive conditions from the generation of the principles of justice. An agreement, reached by parties who are free and equal, free of coercion and each chosen for their

own reciprocal advantage, would be fair. But how do we know that the parties involved are free of coercion and have an equal power balance and access to the same bargaining tools? By removing the participants from all sources of potential influence and bias they will be in a position where any agreements they come to will be fair.

The original position describes a theoretical location outside of society where representatives of citizens, who embody the characteristic features of citizens as free and equal, generate principles for societal cooperation that are to the advantage of the citizen they represent. However, these representatives are restricted from any knowledge of the skills and desires of the person they represent due to an informational restriction called ‘the veil of ignorance.’

“In the original position, parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons’ race and ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range” (JaF, 15).

This information restriction is expressed as the parties being behind a veil of ignorance. How could someone with such limited knowledge choose principles that will advance the good for the person they represent? They would have to do so by estimating what choices and rules for cooperation would generate the best outcome for them, regardless of what kind of person they are or what kinds of things they desire. The parties in the original position aren’t without all information, they do have access to general facts about different natural and social sciences; for example, they wouldn’t make choices like ‘we will only propagate four crops’ since they know that citizens tend to have a wide variety of food preferences and that ecosystems need natural variety to thrive, therefore it wouldn’t be in the best interest of the citizen they represent to make that decision.

With that abbreviated description of the original position in place, we can see how this hypothetical situation matches Rawls' conception of the person as rational and reasonable. Rational is straightforward, the parties are set up as "rational, autonomous representatives of persons in society" (PL, 305) and thus use their power of reason to pursue what they think would be good for the person they represent. The restrictions places on the parties means that they cannot help but to be guided solely by what they think is good for the person they represent, and thus are rational. The parties are reasonable (they have the capacity for a sense of justice) because they agree to follow fair terms and expect others to do the same. This is modeled through the restrictions placed on the parties in the OP and the conditions of their acceptance to have these principles apply to all in society. "Beginning with a state of no information, we allow in just enough information to make the agreement rational, though still suitably independent from historical, natural and social happenstance" (PL, 273). Further, the idea of citizens as free and equal are modeled in the OP. All parties are symmetrically situated with regards to each other, and therefore they model the equal aspect to persons. The kinds of differences that exist amongst persons, like their sex, social status, race, or what tasks they're talented at performing, are not relevant differences for whose good matters more (to use Rawls' language, these are morally arbitrary.) And among the options presented to the parties behind the veil, they are free to use their reason to choose the best one for advancing their conception of the good, whatever it may be, and thus also model the freedom of persons. When these representatives of free and equal persons, through a process that prevents their judgement from being affected by coercive elements, come to an agreement on principles that will regulate their societal cooperation throughout time, they will be just principles.

The original position is purely a thought experiment, meant to generate just principles. The parties in the OP are not real persons, nor are the hypothetical persons doing their task of agreeing on principles at a real, historical time. The original position is designed to help us, as real people, discover just principles through modeling the circumstances of fair cooperation between free and equal persons. “The content of justice must be discovered by reason: that is, by solving the agreement problem posed by the original position” (PL, 274.) The original position is an “artifice of reason” (PL, 75) and is inhabited by artificial beings we create for the purposes of discovering the principles that lead to fair cooperation and a just society.

Now that we understand the device through which we generate the principles of justice, we can look at what principles Rawls reasons would be agreed upon by parties behind the veil of ignorance. To understand why these principles are chosen, we need to briefly go back to the idea of primary goods. Primary goods are resources that broadly work to advance human well-being and enable individuals to reach their conception of the good. Remember that the list of primary goods is generated from Rawls’ (likely true) assumption that only humans can commit to honoring their agreements and rationally pursue their conception of the good utilizing the resources available to them. If another type of being was determined to have the requisite capabilities to count as free and equal beings, then the list of primary goods would change. The parties in the original position have access to this list of primary goods, it is part of their limited knowledge to know what kinds of things would work to advance the good of the person they represent. Therefore, the parties will want to choose principles that they estimate will bring them the most primary goods, so they have the best chances of advancing whatever metric they find valuable.

One category of primary goods are basic rights and liberties; having freedom of movement and free choice of occupation, for example, enable a person to have the autonomy to pursue their aspirations. Material goods like money and food are another category of primary good, but the goal of the parties in the OP to maximize these does not mean that Rawls' theory is akin to hedonism. Instead, "the basis of the parties' reliance on primary goods is their recognition that these goods are essential all-purpose means to realize the higher-order interests connected with citizens' moral powers and their determinate conception of the good" (PL, 76). As the goal is to provide the terms for fair cooperation between citizens conceived of as free and equal, part of those terms will be assuring that there are citizens who are free and equal, as much as that can be achieved. Therefore, securing the means for humans to develop the moral powers, and to maintain these powers throughout their life and for future generations will be essential to modeling a just society. Even though the representative of the citizen in the original position does not know their talents, they (as someone who is reasonable, rational, free and equal) would want to maintain this status, and thus out of self-interest would promote this development for everyone in society to improve their chances of having both powers. This is why the parties in the original position are described as self-interested, or being motivated solely by what is best for themselves. The persons the parties represent have a level of altruism unknown beyond the veil of ignorance, and without that knowledge all the party in the OP can do is secure primary goods so that the person can use them according to the level of social attachments and general philanthropy they have. "it is these already formed interests, as well as the conditions necessary to preserve moral personality, that they [the parties in the OP] seek to protect by ranking conceptions on the basis of their preference (in the original position) for primary goods" (PL, 278). The ranking part of this quote refers to the list of competing principles of justice that the

parties in the original position have access to and decide between in order to come to an agreement on the best principles to govern the basic structure of society.

Rawls determines that there are two principles that would be agreed upon by all in the original position, based on their likelihood to ensure access to sufficient primary goods for each person in society. The two principles of justice are:

“First Principle: 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;

Second Principle: Social and economic inequalities are to satisfy two conditions:

-They are to be attached to offices and positions open to all under conditions of fair equality of opportunity;

-They are to be to the greatest benefit of the least-advantaged members of society (the difference principle)” (JF, 42–43).

Paul Voice, in his 2011 book *Rawls Explained*, explains why these two principles best advance each persons’ ability to manifest their conception of the good (Voice, 40). The first principle grants equal liberties to everyone in society; the parties in the OP would choose to grant these liberties to everyone so that they will be ensured to have them, and they would want to have the liberties so that they can be free to pursue their conception of the good. Being free to pursue their conception of the good is not enough however to ensure they will be able to achieve it, as most conceptions of the good require at least some and often many resources to fulfil. The second principle speaks to the accumulation of resources and the second half of it, the difference principle, allows (as fair) an unequal distribution of goods as long as they benefit the least-advantaged. The parties in the OP would pick this principle to guarantee that no matter where in society they fall, they will have the best chance of having enough resources to promote their good. They can’t know what status they have in actuality, but with the difference principle controlling material distribution they know that they will either be in a comparatively good position, or if they aren’t and are among the least advantaged in society, that societies’

distribution of goods will never worsen their position. Rawls explains the utility of the difference principle as maximizing the usefulness of the liberties guaranteed to all citizens by the first principle. As I said before, being free to achieve your good is not the same as having the resources to achieve it. “The basic structure of society is arranged so that it maximizes the primary goods available to the least-advantaged to make use of the equal basic liberties enjoyed by everyone” (PL, 326). The two principles, taken together, model the free and equal status of the citizens for whom the fair terms of cooperation. Rawls described the two principles as “a first step in combining liberty and equality into one coherent notion” (PL, 327).

There is much more to say about these principles and the device of the original position, but for the purposes of making my argument for livestock’s inclusion in the sphere of justice this brief description will hopefully suffice. The next step is to understand the difference between Rawls’ ideal and non-ideal theory, specifically in how it ties to his description of a well-ordered society versus a regular society.

### **Well-ordered Society & Ideal theory**

I’ve used the term society in this chapter often; of note is its inclusion in the definition of citizen (a fully cooperating member of society.) While this definition shows that society is this concept in which full members live, it doesn’t necessarily mean that society is only a place where full members live. It is this distinction that I will draw out and argue for in this section and it will end up being a significant aspect to my overall argument regarding livestock’s place in Rawls’ account of justice.

How does Rawls define society when he is focusing on that concept itself rather than as a part of a separate concept? In *Justice as Fairness*, Rawls begins the text by laying out core concepts, including society (§1:2, pg 5). He defines society as the fair system of social

cooperation (over time from one generation to the next), and this is consistent between all three major texts (found in ToJ §1:4 and PL §1:3). He continues by adding on two companion ideas, the idea of free and equal persons that I've already gone through, and the "idea of a well-ordered society." How exactly does a well-ordered society differ from the society originally mentioned, and who/what is included in each? Parsing that out exactly is more difficult than it might seem. The problem is that Rawls tends to conflate the group of beings that generate the theory of justice with the group of beings that are the subjects of that justice, which is a critique given by several theorists before me, such as Dombrowski, Nussbaum, and others who suggest a modified original position to expand the subjects of justice wider than rational humans (Dombrowski 2011, 61). I will start with the well-ordered society; as it is a concept that Rawls introduces and it is more robustly defined than a regular society, which has more of the conflation between technical terms and colloquial use that we have seen with several other terms.

A well-ordered society is an ideal conception of society that is useful when comparing how societies set up through different principles would fare, judged by any metric. If we think of the example of judging the stability of a utilitarian society versus the society governed by Rawls' principles of justice, it would be useful to judge them based on if everyone followed the ideals and rules, rather than take two flawed and realistic versions of these societies and compare them against each other, as the failures or successes of the citizens might mask the positives or negatives of each society when compared against each other. Rawls has used this concept of a well-ordered society throughout all of his major works, and while most would assume the term



came from his first book *A Theory of Justice* (1971), he actually introduced the term even earlier, in his 1967 essay “Distributive Justice” (CP, 150).<sup>10</sup>

A well-ordered society is a society that is “effectively regulated by a public conception of justice” (JF, 8) meaning it is the idealized realization of a just society. If a society is well-ordered it further implies three conditions; first is that all citizens accept the principles of justice and know that all other citizens do as well. Second, the basic structure of society is set up such that the citizens believe it abides by the principles of justice. Third, all citizens are both capable of and always act out of a “normally effective sense of justice” (JF, 9), which means that all citizens can understand the principles of justice and apply them when performing their duties and desires in society. Stipulating these constraints on society makes the well-ordered society an aspect of Rawls’ ideal theory. Ideal Theory “assumes strict compliance and then works out the principles of justice that would characterize a well-ordered society existing [under such conditions]...Strict compliance obtains when everyone acts justly and does his or her part in upholding just institutions. Ideal theory thus gives us an account of what a perfectly just society would be like, that is, it presents a social ideal.” (Hayden 2002, 27.) Rawls largely focuses on ideal theory, believing it is of highest importance as it is the only method through which he can provide a basis for a systematic account of non-ideal issues (TJ, 8).

Is it ok that Rawls gives us an account of justice via ideal theory? As I’m going through some confusions that result from idealizing society, I think it is important to briefly defend that Rawls uses ideal theory at all. There are potential problems that idealization can cause for a theory that makes it useless or unapplicable. A theorist could idealize major problems away, such

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<sup>10</sup> This article also debuts Rawls’ term ‘the veil of ignorance.’

as assuming endless resources which would make distributive justice unnecessary. A theory that did that would not be helpful for guiding our distributive decisions in this non-ideal world. But Rawls argues that his ideal theory is essential exactly because it can guide our decisions, so how is his ideal theory justified? Matthew Adams defends Rawls' claim that nonideal theory depends on ideal theory in his paper "The Value of Ideal Theory." Adams splits it into two 'ideal-content theory' (criteria for evaluating something as perfectly just or not) and 'ideal-method theory' (theory relying on assumptions that do not correspond with the actual world) and points out that Rawls' former is constructed out of the latter, an explanation for which I have already given in this chapter (Adams, 75).

Adams' defends both types of Rawls' ideal theory. For ideal-method, Adams points out the value of a method constructed based on certain idealized assumptions, namely ignoring non-compliance; selecting principles of justice and ignoring non-compliance is helpful because it gives non-ideal people a normative standard to judge non-ideal actions against. It also distinguishes retributive justice from distributive justice, which is a helpful distinction (Adams, 79). This does not justify every idealization Rawls makes, but it does justify that ideal-method theory as a method compared to strictly focusing on non-ideal theory isn't inherently flawed. Ideal-content is constructed from the ideal-method for Rawls, and its utility is as a 'guidance relation of dependence.' "Ideal-content theory plays an essential role in hiding the actions of political actors in nonideal conditions; consequently, without such theory the actors would not be able to determine what should be done" (Adams, 80). This doesn't mean that referring to ideal-content theory is essential to figure out the right thing to do in our non-ideal world with every case (Amartya Sen famously argued that many things can be determined to be wrong without reference to ideal theory) but it does mean that ideal-content theory is useful, and since it's

constructed from ideal-method theory then both halves of Rawls' ideal theory is defended from the objection that only non-ideal theory can be useful for guiding decisions in our non-ideal world. With regards to society, being well-ordered is essential to envisioning a society made up of fully cooperating, free and equal citizens, and determining what principles they would decide upon to govern their cooperation. Once these principles are determined, then we have a set of standards against which to judge how our society operates.

Conceptualizing a well-ordered society is helpful for judging the success of successfully implemented structure of justice. "In such a society the publicly recognized conception of justice establishes a shared point of view from which citizens' claims on society can be adjudicated" (PL, 35). Rawls states that if implemented, the principles of justice could effectively regulate the basic structure of society and establish rules for fair cooperation. However, it is important to keep in mind that this proof is still highly idealized; in what kind of beings are in society, the attributes they have, and the structure of society itself. I've said before that while Rawls does focus on ideal theory, his intention is for this theory to be applicable in our real society. In order to avoid the main criticism levied against ideal theories, that they aren't useful because of their abstraction, Rawls will need for his theory to do some work towards explaining how to make our society more just. The introduction to *Law of the Peoples* gives us particularly clear wording that Rawls intends for his theory to do just that.

"I begin and end with the idea of a realistic utopia. Political philosophy is realistically utopian when it extends what are ordinarily thought of as the limits of practical political possibility... The idea of this society is realistically utopian in that it depicts an achievable social world that combines political right and justice for all" (LP, 6).

The wording of 'an achievable social world' shows that Rawls thinks if we could take enough steps that our society could look like a well-ordered society. Even if that goal is far away, it can

be useful as a metric of determining if steps take our society closer or further away from a society well-ordered by principles of justice.

It is possible for a regulative ideal to be impossible to reach and still be worthwhile as a useful tool for determining success. Platonic solids are an unreachable ideal of perfect measure through which we can determine how ‘good’ a cube or a tetrahedron is, despite it being impossible to create a perfect platonic solid in real life. Rawls well-ordered society could be of that category of ideal theory, but he explicitly says it is not. “The social world we envision is feasible and might actually exist, if not now then at some future time under happier circumstances” (LP, 12). This quote shows that Rawls does think his theory, including the well-ordered society, is possible to reach if we change enough of our laws and practices. Ideal theory, for Rawls, is essential *because* it is an essential part of non-ideal theory (TJ, 343). It is also essential for a surprisingly uplifting reason. Rawls is worried that people have an attitude of hopelessness regarding humanity’s ability to work together without subjugating, dominating and being cruel. He says that sort of behavior is not inherent in human nature; human nature also lends itself to justice and empathy. “Our social world might have been different and there is hope for those at another time and place” (JF, 38). “Our social world” from the beginning of that last quote would seem to refer to ‘society,’ not a well-ordered society, but the society that Rawls uses as a term throughout his works. However, the distinction between the well-ordered society and society is not as straightforward as it seems.

### **Society & Non-ideal Theory**

When Rawls presents his ideal theory, which represents the majority of his writing, Rawls describes ‘society’ as a system of fair cooperation. In doing so, he limits society to those who can fully cooperate. As a part of ideal theory this makes sense, idealized restrictions are

commonplace and necessary; however, this also means that most of the times Rawls refers to ‘society’ he is referring to the well-ordered society and not our society/what we think of when we use that term. We know that Rawls intends to have a concept of society included in his theory that is not well-ordered; he says so explicitly: “It is important to distinguish three points of view: that of the parties in the original position, that of citizens in a well-ordered society, and finally, that of ourselves” (PL, 28). People in the original position are purely hypothetical, they do not exist at any point of time, people in the well-ordered society are real people located at an indeterminate potential in time where their society has become well-ordered, and finally ‘ourselves’ are people in our unjust, non-well-ordered society, right now. I have already gone through the first two positions, what is left is to understand the society that we find ourselves in and if Rawls is consistent in how he references society that is not well-ordered.

Once the parties in the original position choose the principles that would guide a well-ordered society, they will secondarily be asked (hypothetically) “which principles to adopt under less happy conditions” (TJ, 216). Once the parties determined that answer, the generated principles could be adopted in our real society as an attempt to move closer to the conditions of the well-ordered society; non-ideal theory serves as guide to remedy injustices in our real society. Our society differs from the well-ordered society in that there is only partial compliance, existing structural and historical inequalities, a lack of common reason and members of society exist along a wide spectrum of capabilities (it is populated by more than those who can be considered free and equal.) The principles the parties in the OP generate for our real society would be made with adjustments for these non-ideal circumstances.

There are two versions of society in Rawls’ theory, the well-ordered society (from his ideal theory) and our society (non-ideal theory); each time Rawls uses the term ‘society’ it means

one of these two concepts, with the idealized version being much more common in use.

However, Rawls does not include the term ‘well-ordered’ each time he uses the term ‘society’ to mean the version that is a part of his ideal theory. I believe this leads to potential confusion over which society he is referring to. In the WOS, it is consistent to say that solely moral persons (meaning persons with the two moral powers) make up the society, but the population of our society is more heterogeneous. Humans exist along the continuum of our lifecycle; babies that have neither moral power, children who can’t be counted as free or equal despite having certain requisite reasoning capabilities and possess a conception of the good, adults with both moral powers, adults without one or both moral powers, adults who fail to utilize their capacity for reason, and adults who have lost their moral capabilities due to deterioration or accident. Certain non-humans exist in our society too, even when the scope of society is limited to the basic structure and those who accumulate the benefits and burdens that the basic structure will allocate as part of distributive justice.

However, when Rawls refers to society (as opposed to the well-ordered society), he does not widen his scope to acknowledge the diversity of beings in our real society. He continues to refer only to adult humans with the capacity to fully cooperate as the relevant beings in our society. It isn’t just the well-ordered society that is defined as the system of fair cooperation from one generation to the next, but society in general. In §2 of *Justice as Fairness* (titled Society as a Fair System of Cooperation), Rawls presents the aforementioned definition of society and then introduces the concept of the well-ordered society and the idea that citizens will be considered free and equal as the “two companion fundamental ideas” (JaF, 5). I take that to mean that being well-ordered is tied to his concept of society from the beginning, and it stems from the goal of his entire project of political philosophy. Rawls wants to account for the seemingly unchangeable

fact of moral pluralism and still be able to present a way in which we could have justice and fairness in a society of people with different ideas of the good. Imagining what this looks like requires that the system is built from the ground up focusing on people with competing comprehensive doctrines. But when we transition from the well-ordered society to applying those principles to our society, we no longer have justification for restricting who counts as a part of society. I will argue this in more detail in the following section, where I discuss the justificatory process in *Political Liberalism* as it applies to our society as opposed to the well-ordered society. The goal of this section is merely to set out that these two societies are present in Rawls' theory, and to give some account of how they differ.

I want to be clear that I am not critiquing the scope of Rawls' inquiry, nor it being limited to the basic structure nor that idealizations are a necessary first step to generate conclusions on what is just for a non-ideal society. Restricting political justice to the principles that are generated out of consideration for free and equal persons is important for the justification of implementing his theory. The issue I raise is that when Rawls talks about the applications to a real society (our society) that he maintains these restrictions despite lacking an accompanying argument for doing so. I will argue this point, about the lack of an accompanying argument, more fully in the following section. Since the principles were generated by only considering fully cooperating members of society, if we want to use those principles in our society, we need to thoroughly consider how those principles apply in a society that has more diverse occupants.

To illustrate my point, I offer the example of the publicity condition. The publicity condition is one of the restrictions for the parties in the original position; it states that the principles generated must be understandable, meaning that the rules must not be too complicated for citizens to understand or be purposefully deceitful in order to trick citizens into accepting it.

“Publicity ensures, so far as practical measures allow, that citizens are in a position to know and to accept the pervasive influences of the basic structure that shape their conceptions of themselves, their character and ends” (PL, 68). The publicity condition clearly is justified through the conception of all citizens as free and equal; respecting that status motivates the publicity condition. There is a reason why being a citizen with both moral powers means that they need certain conditions to be fairly coerced into giving up their status as autonomous (being forced to follow just laws.) Moving to our real society (or rather, a real society where the publicity condition is adopted), if someone happens to have the moral powers, then the theory is set up to make conditions fair to them. The publicity condition respects those powers, and as someone who can be reasonable and rational, they would (be expected to) freely endorse this condition. But, if you were someone without the moral powers, you would still live in a society where the publicity condition holds and would be affected by it. Non-moral persons (persons without both moral powers) are part of a society that was set up to be fair to people who are not like them (who are free and equal), but as a part of society they will still be distributed to and subject to the laws and regulations of the society they inhabit. This is the conclusion I will argue for more thoroughly now that I have in place the relevant aspects of Rawls’ theory required to understand my argument.

With the structure of Rawls’ arguments for the justification of the principles of justice now in place, I can move onto the first step of my own argument in this chapter; that the principles generated in the original position do not require individuals to have both moral powers in order to have the principles apply to them. Having both moral powers is an appropriate assumption for Rawls’ ideal theory. We’ve already gone through the connection between the ideal of cooperation and the conception of the citizen; which matches how many people think of



themselves. “The ideal conception of citizens as free and equal moral persons is the most suitable way to represent, theoretically, how we actually conceive of ourselves in our capacity as democratic citizens.” (Freeman, 334-335). The “we” in this quote being those of us who do have these capacities. It will be easier to enforce something that backs up how many people conceive of themselves, as being autonomous. The point here is that the free and equal doesn’t stem from an aggregate count of real characteristics of average people; it is a top-down definition. Rawls was motivated by the real history of political theory and democracy, but in terms of generating the principles, they are justified through appeals to stated assumptions, not through descriptive capacities of beings in our world.

Even the designation of ‘full cooperation’ as the relevant type of cooperation was just one type of the many kinds of cooperation that exist in our society. Rawls gives us reasons why this type of cooperation is the relevant ideal to forming the rules governing a just society, but that doesn’t mean that other versions don’t also exist. Nor does it mean that full cooperation is an ability someone must have to have the principles of justice apply to them. When Rawls says that “cooperation is always for mutual benefit” (PL, 300) and that cooperation implies two characteristics (the reasonable and the rational), he is conflating two different ideas. One is that these idealized citizens who are theoretical and positioned in the OP and for whom fair terms are decided, commit to cooperation due to the mutual benefit it provides (not least in guaranteeing their ability to become free and equal, the essential elements of themselves.) But the second is that *only* those who cooperate in this idealized manner (not any form of cooperation, but the cooperation Rawls has picking out as essential to the notion of citizenship) share in the burdens and benefits of this cooperation. It’s true that people who fully cooperate share in the benefits and burdens, but it isn’t justified (hasn’t been justified explicitly) that they are all who do. Henry

Richardson, in his 2006 article “Rawlsian Social-Contract Theory and the Severely Disabled,” agrees and argues that reciprocity is not essential for Rawls’ theory. He, much like his contemporary Martha Nussbaum, is concerned that Rawls’ intention to leave out issues related to non-fully cooperating beings from his theory of justice will be a defeating aspect of his theory. “There are too many general reasons to suspect that confronting the issue of care for those with serious disabilities will require us radically to rethink some of our basic ideas about justice” (Richardson, 420.) Richardson is speaking to the idea that if we generate an ideal theory that would have to be either thrown out or radically modified to work in our real society, then it isn’t a good use of time to focus on that ideal theory. And Rawls seems to agree, with his focus on providing an account of an achievable society. I will go through the “general reasons” Richardson is referring to in the quote I referenced in the next part of this section, where I justify the claim that our real society includes many non-moral persons.

This section however is about how the ideal theory is applied once we transition to utilizing the principles generated from it in our real society. Earlier, in the section on cooperation, I referred to the following quote: “Fair terms of cooperation articulate an idea of reciprocity and mutuality: all who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison” (PL, 300). Richardson points out that in this quote Rawls is not limiting the benefits to *only* those who can fully cooperate, opening the door for others to benefit as well. Also, Richardson writes “because Rawls’s is a theory directed at the basic structure of society rather than at each individual or at each transaction, this loosened structural interpretation of social cooperation, which forbears from demanding universal participation, marks no great departure from his view” (Richardson, 427). Richardson here is making the same sort of point as me, that certain benefits and rules generating

from full cooperation do not exclude benefits and rules to those who cannot fully cooperate. Further, that because of Rawls' claims regarding the intention of his theory applying to our society in its entirety, widening the scope of consideration to those who can't cooperate fully is consistent with Rawls' theory, despite his claims otherwise. Richardson also makes the argument that the reason the principles are applicable to "all levels of disability" (he follows Nussbaum in focusing on disability in humans rather than any being without the ability to reciprocate) does not come from the "nature of their grounds, but from their being – like all of the principles discusses here- constitutional principles that direct and limit the collective use of force" (Richardson, 429). This matches my point that the origin of the principles in free and equal beings is relevant to their creation, but their use is in setting guidelines of conduct within the society that applies to all collectively who inhabit that society.

Those who don't have the capabilities for full cooperation would likely not count as equals within our real society. Rawls says all who count as citizens can be treated differently only as public political conception allows (JaF, 21), meaning if you have the two moral powers then you get equal rights to all others who share that quality. However, if someone does not have sufficient capabilities, there's nothing in Rawls' theory that says 'but, if you are not a moral person then you get nothing.' The principles that govern the basic structure are decided upon by moral persons, completely out of self-interest. In this sense, nonmoral persons (beings) are left out of considerations of justice. But the decisions made for what justice require are intended for application in our real society, which means they are principles that are chosen to govern the entire structure. And often times our real society has inhabitants operating within the basic structure who are not moral persons. The agreed upon laws still pertain to them, even though they do not count as equal. The model-conceptions, including the definition of moral persons,

determine what counts as justice and the process through which these determinations are generated. But once they are generated, they move out of the part of Rawls' theory where the restriction to include only moral persons is justified, because what justice requires is already set. Applying it to our real society, which Rawls clearly intends to be done (through a graduated process I will discuss more in the following chapter), will include distribution to non-equals. As I will get to, plenty of non-ideally-cooperating-beings exist throughout even the most generalized and basic structure of our society. These beings contribute to the accumulation of burdens and benefits generated by societal coexistence and working together (what I would call cooperation if I didn't want to confuse the term with Rawls' reciprocal version.) Not having the capability for a robustly guiding sense of justice or conception of the good can affect what Rawls calls the "suitable benchmark of comparison" for these beings (for example, principles governing fair equality of opportunity would not endlessly give resources to these beings because we recognize that no amount of resources will bring them in equal footing for career opportunities), and this is related to how they would not be free and equal. However, as we apply the principles generated from Rawls' ideal theory to our non-ideal society, they apply across the board to structuring the basic structure, and a relevant part of determining how to implement these principles will be determining in what way they apply to those that live their lives in our basic structure of society but are unable to be free and equal. Assuming everyone can be a "normal and fully cooperating member of society over a complete life" (PL, 203) and thus has both moral powers is clearly the realm of ideal theory; when the theory moves to our society, those who have the capabilities to reason must determine what extent it is reasonable and possible for various members of society to be subjected to the principles, based on their attributes.

To summarize my point, there is nothing in the ideal theory of Rawls' social contract that forces the theory to be applied only to moral persons. To have this requirement would mean that Rawls needs to include additional justification for a claim of the sort "and also these rules the hypothetical parties come up with in the original position will only apply to humans that have the same powers as those who generate the principles." Even "the same powers" part of that sentence would need to be justified, as these capabilities exist on a spectrum and would need a further argument for where the line is drawn to count as similarly abled. Apart from missing this justification, a society that contains only those with both moral powers would be hard to conceptualize and would be unlike any society in history, due to the variety of beings in our real society that fall outside of 'beings with both moral powers.'

### **Non-ideal Persons**

The next step of my argument is to demonstrate that our society includes non-moral persons. I will start with a discussion of human beings in our society who do not possess, nor can they develop, the two moral powers due to a significant mental disability. Rawls brings up the reality that people exist who do not have the capacities required for "normal cooperation," but says that because he assumes throughout his work that everyone has the essential minimum degree of capabilities, that his theory does not need to deal with any wider variations that exist. This assumption speaks to his confidence that providing an ideal theory (where we can make restrictions on who is considered) will be sufficient for guiding our real society. This assumption has been criticized by one of Rawls' contemporaries, philosopher Martha Nussbaum, who holds the status of being the premier Rawlsian critic on the subject of disabilities; I will go through three of her points related to this subject from her 2006 landmark book *Frontiers of Justice*. The

first is a moral point that has to do with the division Rawls' draws between those who have the minimal powers for full cooperation and those who do not, or to use Rawls' terminology, those above or below "the line" (PL, 184). Nussbaum says that it is wrong for a theory of justice to form a stark dichotomy between the disabled and the non-disabled, considering the horrendous treatment of those who have serious disabilities by the majority of society throughout history (Nussbaum 2006, 194). I am surprised that Rawls was not more attentive to this point, considering his language when arguing for significance of harms resulting from inequality in *Justice as Fairness*. He writes there that any status system that ranks two groups as one above or below the other will result in attitudes of arrogance and domination from those with the higher status and feelings of deference and servility in those with the lower. "These effects of social and economic inequalities can be serious evils and the attitudes they engender great vices" (JF, 131). He continues to say that if these status allocations arise from one's birth, then the issues are "particularly odious" (JF, 131). Linking back to Nussbaum's point, having a disability to the extent that one falls 'below the line' and is therefore kicked out of society, or is no longer owed justice or any allocation of primary goods, is exactly the type of inequality that Rawls argues is harmful.

Another point from Nussbaum, related to the status of falling below or above the line, is that disability is a continuum and does not lend itself to such a line being drawn non-arbitrarily (Nussbaum 2006, 126). Every person (and every being) has a collection of capabilities, which are informed by their genetics and their social upbringing. Think of all the possible ways in which one can have a capacity; being able to breathe, count, smile, play the piano; every small way of interacting with the world comes with a spectrum of ability where you can be better or worse at it than others around you. When we try to separate this limitless breadth of skills into

‘abled’ or ‘disabled’, or above or below a line; it picks out only certain skills as counting towards ability and discounts others. Consider the example of the outdated language used to describe autistic individuals as “high functioning” or not. The term is misleading because it is determined by a single attribute (IQ), which is not a good indicator of how much assistance that person might need to perform different functions in society. Consider how many social functioning skills there are; object naming, planning, sustained attention, recognition of emotions, perceptual-motor coordination, empathy, and humor are just a few of the social skills that contribute to someone’s ability to develop social relationships and perform social tasks (Sachdev et al., 636). Autistic individuals could have high skill levels or low skill levels compared to their non-autistic peers in each of these skills, so separating into only two groups, high and low functioning, ignores how nuanced social interaction is, and how everyone can be better or worse at some of these skills. Therefore, it does not match with how capabilities work to say someone is either good or bad at social functioning. When Rawls says that we can put everyone either below or above the line (depending on if they have the minimal powers for full cooperation), he isn’t giving enough thought to how social cooperation is built out of a plurality of capabilities.

Talking about individuals with serious mental deficiencies might seem like a small enough percentage of the population to not count as the pervasive issue I talked about earlier. However, being ‘below the line’ is such a regular occurrence in our society that every single person ‘above the line’ has spent time below it too. Nussbaum uses this fact to argue for a non-Humean account of the circumstances of justice with her capabilities approach (Nussbaum, 87). She does not rely on this notion of being free and equal and having no dependence on others as an essential aspect of political society. She believes this is an advantage because of the pervasiveness of dependence through normal human life. Humans begin as infants who require

immense support, and this stage lasts for a long time as toddlers and children continue to be dependent on adults to provide them with the requisites for growth. I am not sure when Rawls' would count a human as moving from below the line to above the line, but I can't imagine that it happens within the first several years of a human's life. Related to that point, trying to identify at what age a child has the requisite capabilities to count as a fully cooperating member of society highlights the indeterminate nature of full cooperation when tied to a survey of an individual's capabilities.

The beginning of life isn't the only time a human lacks moral personhood, even in someone who has the capacity to fully cooperate in their prime. As we age it becomes more likely that we will lose our status as a free and equal person due to diminishing physical and mental capacities. Brain diseases like Alzheimer's and other forms of dementia are common among the elderly population. 11% of Americans aged 65 or older have Alzheimer's dementia, and that is just one of the seven common types of brain degeneration that removes an adult's capacity for reciprocal social functioning. (Alzheimer's Association, 19). The progression of generative mental diseases (for all ages) highlights the difficulties of identifying when someone moves from above the line to below it due to the complexity of social functioning and how each capability can decay at different rates.

There are other, regularly occurring, segments of an average human's life wherein they do not have the capabilities to reciprocate or participate in full cooperation. Albeit a temporary state, every time an adult is sleeping they do not have the ability to be rational or reasonable. Similarly vulnerable but temporary periods could happen due to accident, disease, or certain temporary medical states. Even pregnancy, a necessary and natural state of being for humans, can cause sickness and immobility that would prevent that person from having the necessary



capabilities to be a free and equal citizen. These regular times where humans lose their capacity for full cooperation; when they are young, very old, sleeping or temporary illness are all states that are built into society as Rawls describes it. Society “is complete in that it is self-sufficient and has a place for all the main purposes of human life. It is also closed, as I have said, in that entry into it is only by birth and exit from it is only by death” (PL, 40). Rawls also describes it as the place where fair cooperation happens “from one generation to the next” (PL, 15). So if society (and remember, this is the well-ordered society that Rawls is talking about, because his claims are all regarding his ideal theory) persists from one generation to the next, then being born and dying must happen within the society, which places infants and the elderly as part of society. Even if in the WOS accidents don’t exist (which Rawls does not claim) and there is no one who has a severe function-restricting disability (which Rawls *does* claim by assuming all citizens have both moral powers), there would necessarily still be segments of the society without those moral powers due to being very young, very old or unconscious (sleeping). Even restricting our concerns to Rawls’ ideal theory there would either be people who gain and lose their citizen status throughout their life based on their mental status at that time or citizen status is given to someone who does not have the two moral powers at that time. It is nonsensical to say that all citizens are assumed to have the capacity to fully cooperate and also that society is a closed system in which citizens live their whole lives.

Of course, it does not make sense to speak of someone losing their moral personhood during sleep, but the reasoning why this does not make sense reinforces the distinction that arises when moving from ideal to non-ideal theory. Rawls’ theory is focused on generating the principles that would guide determinations of justice, and these are made through a series of restrictions in reasoning that force the position of someone who is purely rational, reasonable,

and unbiased due to a lack of knowledge of the nature of their lived circumstances. As such reasoning is not actually undertaken at a specific time or place, it wouldn't make sense to say that a person is a certain age or needs to sleep during the process. But real people do lose and gain their moral powers throughout their life, which demonstrates the assumption that the distributive principles will apply to you to the extent that they can, irrespective of your moral status at that moment (or ever). What is relevant is the moral personhood of who creates the principles, and how institutions and rules can be put into place to ensure that they are applied. Even if such application is for the benefit of people who have moral powers at that time.

Rawls seems to believe that his theory of justice applies only to citizens and those who might become citizens. We see this language used when he talks about the rights of children who cannot be denied essential medical care. He says that his theory demands justice be allocated to children, not because they have the status of a free and equal citizen, but "as prospective citizens" they have rights (JF, 11). This sentence tells us two things; that children are not citizens themselves and that Rawls believes the reason they deserve consideration is because they might have the potential to become a citizen. Despite it being what Rawls believes is true, I don't think the second conclusion fits with how his theory works. As I've shown, even in the well-ordered society, there would be a population of humans that don't currently have their moral powers. For Rawls' sentence regarding children to be true, that would mean that babies are not citizens, but they are subjects of justice. So imagine a particular baby that has some developmental delays, there would have to be some point in their adolescence when it is decided that they are no longer 'a prospective citizen' due to it being unlikely rather than likely that they will develop the moral powers. They would lose their rights as soon as that is decided (by whom and through what method is, to be generous, unclear) or at a minimum they would transition from being a subject

of justice to being someone for whom the allocation of justice is determined by some supplemental theory. To put it into clear language, Rawls believes that having the capabilities to be free and equal at some point in your life is what justifies having rights and other considerations of justice; either as a prospective citizen or presumably as a former citizen, although the latter phrase is never used. However, remember that the idea of moral powers comes from an idealized conception; if Rawls were to write “if at one point in a real person’s life they have the sort of capabilities that my idealized version of people have, then they get to be a subject of justice, but no one else is allowed” then I think the unjustified nature of this claim would be more obvious. This ties back to my section on the ambiguity of equivalent terminology between the ideal society and our real society affecting a reader’s understanding of the theory. What makes more sense is that the examples of normal functioning involving periods without moral personhood (babies, the very aged, and temporary unconsciousness) show that Rawls’ theory applies across the board to the structure of society. Even if one of the aims chosen is to structure society so as to develop many real humans’ moral capacities, this is compatible with benefiting those who cannot.

Rawls believes that most people in our real society would meet the minimum requirements for full cooperation, and thus would be ‘above the line.’ However, when I look at the descriptions for being reasonable and rational as Rawls describes it, I am not so sure this is true. As has been mentioned many times, Rawls assumed that everyone in his WOS “have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life” (PL, 184). Rawls’ well-ordered society is intended to be recognizable enough to a real person that it would provide guidance for our non-ideal society; so can we make the same assumption about the majority of

our real citizens? A person is reasonable if they have both an understanding of and are motivated to act out of a sense of justice. Part of this capacity means that an individual will restrain their desires due to being in a community of persons who have different desires and equal claims to them. Citizens with this capacity will “press claims only for certain kinds of things and as allowed for by the principles of justice. Strong feelings and zealous aspirations for certain goals do not, as such, give people a claim upon social resources or the design of public institutions” (CP, 241). Being reasonable means that you are motivated by justice when you pursue your desires, and won’t want to force others to follow your conception of the good through anything other than public reason. And further that you understand what counts as appropriate methods of public reason, and how your actions could mitigate others freedom. In our real society, not all adults are motivated by the principles of justice. There are a lot of adults who believe that it is their right to pursue their desires, regardless of who it harms. There are adults who do not care about others rights, only their own or the rights of people they have affection for. I understand Rawls has hope that this tendency for real humans to be unreasonable would be fixed if they were raised in a society that is effectively regulated by the principles of justice, but since he intends his ideal theory to be applicable to our non-ideal world, persons who do not regulate their desires with respect to a conception of justice would not count as citizens. Citizens are also expected to willingly do their share in maintaining the burdens of social cooperation; “they are ready and willing to do their part in those arrangements provided they have reasonable assurance that others will do their part” (PL, 86), but we have many examples in our society of individuals unwilling to give up something they desire, even if everyone else is doing so. The COVID-19 pandemic is a recent example that shows how many adults in our society are not reasonable (as Rawls defines the term.) Anyone who finds it too difficult to let go of an unjust conception or

desire (such as the person who has racist assumptions entrenched in their mentality) doesn't exist in Rawls' ideal theory, but they certainly exist in our society, and in no small numbers too.

I understand that Rawls is talking about these capacities within the context of ideal theory and would likely respond here that while citizens in our unjust society do not regularly display these capabilities, they still have the capacity to do so if they wished. But remember why we are talking about our real society in the first place; Rawls wants a theory that can move us from our situation today gradually towards a society effectively governed by fairness. If these real citizens were placed into his well-ordered society, they would not count as citizens. The reason they count as citizens in our society isn't due to an imagined future where they might have developed their innate capabilities differently, but because they're a part of the society we do have (an imperfect and unjust one). We can take the knowledge we've gained by imagining the well-ordered society and reasoning through what principles would be generated through the process of hypothesizing the original position, but if we're going to be consistent in how these principles are applied then they must be applied to everyone in society.

In our society, humans and some nonhumans cooperate in multiple ways, not just with 'full cooperation.' Since our real society isn't limited to only those with the capabilities of full cooperation, we have many beings that lack the capacities to count as free and equal. Some theorists have taken that to mean that Rawls' entire theory is flawed, due to being too utopian or unrealistic for human nature (Stemplowska & Swift, 123), but I am not making that same critique. My point, instead, is that without an additional argument for why we can pick and choose which non-ideal beings to count as subjects of justice and which do not, we must apply Rawls' ideal theory to the basic structure of our society and *all* who inhabit it. This does not mean each being is awarded the same rights, but that the principles include them as a part of

distributive justice, to an extent limited by their physiological realities; I will explain this point further following my discussion of animal inclusion. Further, I argue that it is not a modification of nor an extension to Rawls' theory to apply the principles of justice to all who live in our society (meaning those who are born into it, live out their entire lives within it, and whose prospects and quality of life are determined by the organization of institutions in the basic structure.) Rawls' mistake originates, I believe, from his inattention to the distinction of the terminology defined in his ideal theory compared to how we use those terms in regular usage (citizen, everyone, person, etc.)

### **Application to Livestock**

If I have successfully argued that the principles of justice apply to all members of our non-ideal society, even to those who do not have the capacities to fully cooperate, then this argument has no reason to be limited solely to humans. We have a plurality of beings who (fully and non-fully) cooperate in order to generate benefits. While it is true that humans are the kind of being we know about that can have the two moral powers, and thus the principles will be generated out of consideration of humans only, it isn't the case that these principles would only apply to humans once utilized in our non-ideal society.

As I covered earlier, the basic structure is the primary subject of justice; this means that if any non-humans are to be directly affected by the principles of justice it must come out of their relationship to or location within the basic structure. While not all animals would have an intrinsic connection to the basic structure, I believe livestock animals are a part of the basic structure for three reasons; they are a unique type of property, they make up a category of socially important primary goods, and they contribute towards the accumulation of goods through social cooperation. I believe that each of these three reasons provides reason to defend

the claim that livestock are subjects of Rawls' theory of justice (when combined with my argument thus far), however the benefit of having three avenues for their connection to the basic structure means that an objector to this conclusion would need to reject all three points to counter my claim.

Of the animals that humans own, there are primarily three categories: research animals, pets, and livestock. By livestock I mean animals being intentionally bred and raised so that humans can reap their byproducts. Of the three categories, livestock are by far the most numerous. There are roughly 25 million research animals used annually in the United States, a bit under 400 million pets owned (about 250 million non-fish pets) and over 9.5 billion land-animals slaughtered for consumption (not including fish, which are measured by tons, rather than individually.)<sup>11</sup> When considered as a whole, the meat industry is a massive institution in society, but is it part of the basic structure? One concrete example Rawls gives of an aspect of our basic structure is the structuring of legally recognizable forms of property (PL, 258). Considering the prominence of the meat industry, determining the nature of livestock's property status will be a step in setting out legally recognized forms of property. Currently, the meat industry (each individual animal facility owner, be that farm or factory) is granted full and largely unrestricted rights grounded in the definition of livestock animals as their property. Property as a category has historically not been given legal rights of its own, regardless of the properties' capacities. There are a variety of ways we could structure this system of raising animals to process and how this system will work in tandem with other social institutions. Figuring out how to structure our system with regard to all types of property is part of the task of justice. Since livestock make up a

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<sup>11</sup> USDA "Livestock Slaughter 2019 Summary", USDA "Livestock, Dairy, and Poultry Outlook", and "Facts + Statistics: Pet Ownership and Insurance" Insurance Information Institute 2021.

substantial category of property, their rights or lack thereof is essential for determining what a just basic structure looks like. In order to ensure that the basic structure of society is constructed in a just manner, regardless of the requirements of the public conception of justice that we ultimately construct in relation to livestock animals, we must include reflections regarding the interests of these animals in the deliberations that define the basic terms of deliberations regarding justice.

Further, livestock's life matches Rawls' comments about society being considered closed and complete. They are born into their social position, they spend their entire lives within our society and contributing towards its benefits and burdens in the form of the value they generate with their byproducts and the burdens generated out of their required nutrition and medical care. Their quality of life and the type of choices available to them are controlled by the principles of justice that regulate the basic structure of society, just like with humans of all variations of capabilities. Livestock are clearly a different kind of property than inanimate objects. They can experience pain and pleasure and they are the kind of being that can have a better or worse quality of life. These facts are part of the general physiology and other sciences that are allowed in the considerations of the hypothetical parties in the original positions, as is the tendency of humans to eat meat. The parties would therefore know that livestock are a type of property and would know that they are a significantly different category of property (kind of like children have different needs compared to adults) in terms of their physiology. They would need to determine whether there is a just way of having this industry and what that part of the basic structure looks like, if they want meat and animal byproducts accessible to humans in our society.



Would the well-ordered society have a meat industry? I think this is an interesting question; we don't have many details about what Rawls' ideal society looks like. We know that he thinks only free and equal citizens are located there, but as I discussed in the previous section, there are at least those who are not yet citizens or who are no longer citizens due to not having both moral powers. I believe that Rawls intended for animal products to be a part of the well-ordered society, because that is what a standard society looks like. While I am not certain one has never existed, I do not know of a single instance of a human society that does not utilize animal labor in some form. Meat-eating has such a long history that it predates the evolution of homo sapiens, and the intentional keeping of animals for slaughter is among our oldest records of agricultural society. There is no reason that the well-ordered society must have livestock included in it, but I do believe that the parties in the original position would choose to incorporate it. This is due to its place of importance in many cultural associations within society and its connection to primary goods, and I will return to this point in the following chapter when I engage more with Rawls' arguments related to the justification of the principles generated.

The importance of the meat industry in the lives of individuals is two-fold; meat is an important part of nearly every culture's traditional meals and individual families' passed-down recipes, and our society has a moral interest in agricultural and agrarian values. The percentage of individuals in our society that eat animal products is large; Americans consume an average of 200 pounds of meat (consisting of 62.4 lbs. Beef, 46.5 lbs. Pork and 73.6 lbs. poultry (60.4 chicken)), 32.7 pounds of cheese, 600.5 lbs. non-cheese dairy (including 161 lbs. drinking milk), and 16 pounds of fish. When you compare these amounts to American's non-animal-byproduct consumption of 415 pounds of veggies and 273 pounds fruit on an annual basis, you can see how

large a percentage of our daily diet that animals contribute to.<sup>12</sup> Furthermore, the vast majority of Americans have a diet that benefits from animal byproducts, as only about 0.5% of the U.S. population, or around 1.2 million people, say they never eat meat, eggs or dairy.<sup>13</sup> (A somewhat larger percentage [3%] says they never eat meat, but do eat eggs and dairy.) While a society could exist without an institution of animal use, it is not irrelevant that 99% of current citizens choose to have animal byproducts in their life. The parties in the original position need to determine principles to organize the basic structure, and part of the basic structure is deciding what the institutions of property-ownership look like; therefore, the parties have the task of deciding if future generations have the choice of consuming animal byproducts or not.

While there might be an argument for why the principles of justice entail that the processing of livestock is impermissible, I do not see that as an obvious conclusion. It seems that the importance of agriculture, and the deep intertwining of having farm animals as part of a desired lifestyle, means that the parties would choose to keep the raising and slaughtering of livestock as an option for future generations pursuit of their conception of the good. The just savings principle comes out of the idea that our society owes a great deal to past societies due to inheriting the benefits of their social cooperation (in terms of knowledge gained, institutions being already set up, and resources generated that we make use of.) “They are to save and invest for the future that percentage of wealth or social product that it would be rational for them to want their own forebears to have saved for them” (Freeman, 139). Animal husbandry is a skill and resource generating tradition that free and equal citizens benefit greatly from the work of

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<sup>12</sup> Visuale Economics, 2010, <http://www.onegreenplanet.org/news/american-food-consumption-statistics-infographic/>

<sup>13</sup> Vegetarian Resource Group, 2015, [How Many Adult Vegetarians in the US?](http://www.vrg.org/press/201511press.htm)  
<<http://www.vrg.org/press/201511press.htm>>

generations past, making it likely that it is the kind of thing we ought to preserve for future generations as well.

The way that meat, dairy, eggs and animal products in general play a role in what many consider to be a good life is what connects livestock animals to humans through intergenerational cooperation in generating and processing those desired animal products. The institutionalized aspect of this cooperation is what includes livestock animals as part of the community of society that is not free and equal. Therefore, while I am not arguing that participants in the original position would be forced to choose to permit animal use, I do think that the historical significance of animal husbandry to a plurality of comprehensive doctrines makes it likely that this is the choice that would be made. would be included in the well-ordered society. Meat is not only a desired food option, but it has played a role in the formation of human values, including characteristics described as virtuous. Rawls describes the basic structure as shaping “the way the social system produces and reproduces over time a certain form of culture shared by persons with certain conceptions of their good” (PL, 269). The cultural values behind food and cuisine choices, and the ethos of small farm life and raising animals, means that the decisions we make with regard to how and if we can raise animals for food shapes the choices individuals have and even the kind of person they can be. This last point has to do with research that shows that having higher standards for animal welfare creates people who intrinsically value animals more, and cultures that treat animals poorly tend to generate people who think poorly of animals. Paul Thompson makes this point in his book *Spirit of the Soil*; America had a large culture and ethos behind agriculture and small farm life that today is no longer represented in young person’s ambitions, because of the switch to animals raised and processed behind walls out of sight and with animal husbandry now being performed by workers who are poorly compensated. This

example shows how the rules and regulations, set out by principles of justice that regulate the basic structure, will affect the formation of desires and capacities of the free and equal citizens of that society. Our society has decided to set these up in a particular way that removes any rights for the animals that we raise, but in the well-ordered society, those decisions need to be made without being affected by historical influences.

Therefore, if it is decided that the meat industry in some form will exist in the well-ordered society (as I think is likely, due to its pervasive and widespread importance in historical societies), it means that livestock fall into the same category as some humans, as non-free and non-equal members of society. These beings can cooperate (non-fully) in order to generate significant benefits for society. Not just in terms of their byproducts, but also with the capital generated through the industry as a whole. If considered as part of the larger system of food production “the meat and poultry industry’s economic ripple effect generates \$864.2 billion annually to the U.S. economy, or roughly 6% of the entire GDP.” (The Meat Institute, 2013, The United States Meat Industry at a Glance.) The rearing and processing of livestock also employs many citizens. There are over 2 million farms in operation<sup>14</sup>, and companies involved in meat production and ancillary industries employ 6.2 million people in the U.S. with jobs that total \$200 billion in wages<sup>15</sup>. It is obvious that livestock are an essential part of generating these resources, but does it count as cooperation?

It doesn’t count as full cooperation, because they do not have the capabilities required of being rational and reasonable. However, as I demonstrated in the previous section, there are many humans in our real society who lack these capacities as well. Full cooperation is not the

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<sup>14</sup> USDA, 2016, Farming and Farm Income

<sup>15</sup> The Meat Institute, 2013, The United States Meat Industry at a Glance.

only type of cooperation that generates resources and benefits for free and equal citizens, it is just the type of cooperation that justifies the principles generated in the original position. Once generated though, and when utilizing the conception of a well-ordered society in order to move our non-ideal society closer to being just, we will apply those principles to our non-ideal, messy and complicated society which includes many sorts of cooperation. Livestock have a type of cooperation with their owners that generates all of the benefits I've covered in the past few paragraphs. This is not true for all animals though, not all animals socially cooperate in the way livestock animals do in our society. Wild animals, squirrels in the park, bugs in our house; none of these groups of animals have the dual dependency relation that arises out of the meat industry. The ontological capacity of wild animals might be the same as with livestock, but their relationship with humans isn't in this essential, co-dependent and active role, which is what puts livestock into the realm of justice along with children and racist adults; not as equals, but still deserving of the allocation of the principles of justice that would still apply to members of society without the capacities of equal members, I will return to this point soon.

Humans in our nonideal world are not all free and equal. It is not just the marginal cases of severe mental disability, but because of how real humans often do not fit the requirements for being reasonable. Therefore, our real society is filled with examples of non-ideal cooperation between humans (child to parent, teacher to student, etc.) and this is true of non-humans involved in non-ideal cooperation too. By allowing livestock animals to be a type of property and by using them in a cohesive industry to generate a category of goods for full citizens, livestock and the rules regarding their treatment are a part of the basic structure. It is thus a duty of justice to figure out how the principles of justice apply to each type of non-equal being in our non-ideal society in order to serve as a guide for becoming more just. It is not novel to say that livestock are a part of

the society and deserving of certain considerations of justice, while not deserving of equal treatment. Citizenship levels and distinctions are common in most societies, including ours. Consider how we give different rights to different levels of membership, such as the differences for people with a permanent residency visa vs natural citizenship, or how incarcerated individuals have a limited set of rights.

The parties in the original position would know the biological facts of societies' different members and could determine how the principles will affect these categories of beings, if at all, without being affected by any individual bias they might have. This is true in both directions; they can't know that they would want to have cheap meat in exchange for no regulation for animal welfare or if they would want to abstain from meat eating entirely and treat all animals like treasured pets. Furthermore, the history of how humans have in the past and currently treat livestock cannot determine how we do so in the well-ordered society. "These contingent advantages and accidental influences from the past should not affect an agreement on the principles that are to regulate the institutions of the basic structure itself from the present into the future" (PL, 23). It is part of the job of setting up the basic structure, if it is determined that current and future generations should be allowed animal husbandry and meat eating as choices for the good life, to determine what a just way of doing these things looks like; this is simply a relevant part of working out how the principles will regulate the institutions of the basic structure. As I have argued throughout this chapter, it is not justified for Rawls to claim that this is not the role of his theory due to animals' lack of personhood. While it is true that only moral persons are considered with the generation of the principles, once we reach the stage of applying them to the institutions of society (even just the well-ordered society), nonmoral persons and livestock animals, would be a part of this application.

When applying ideal principles to nonideal circumstances, reasonable changes will need to be made based on the different categories of inhabitants' abilities. As Rawls states, the straightforward application consists of granting moral persons, full and equal rights. But even moral persons who are temporarily unable to make use of certain rights would not have these distributed during these times. To use a more colloquial sense of the distribution of rights for the sake of analogy, a sleeping person does not have the right to vote until they wake up and a child does not have full rights to freedom of movement until they are more autonomous. But both a sleeping person and a child share with a moral person the right to not be protected from intentional harm. The principles apply as they are relevant to the capacities of the included category of participants, and such capacities would be known within the original position, considering their access to basic scientific facts of biology. The participants, when they choose to have animal product industries in the well-ordered society, will know that this will cause severe dependency relations of many sentient beings to moral persons. They would need to decide what subcategory of the principles apply to these beings in this part of the basic structure.

Determining that animals count as a form of property no different to non-sentient objects is not sidestepping making a choice about the rights surrounding the institution of property, it counts as a determination of how to apply the principles to this part of the basic structure. I think a reasonable determination, from the impartial and rational standpoint of the participants in the original position, without knowledge of their particular feelings on livestock rights, would decide that rights related to access to primary goods are distributed to all who can use that category of good, as it fits in with the basic structure designed for justice of moral persons. The list of primary goods in itself is also determined only through consideration of full and equal persons, because that is how Rawls' theory generates the content of justice, the limitations in this sense

are built in from the beginning. But once generated, I have argued that they need to be applied to a broader category of members of society than just moral persons. The reasonable way to apply this, it seems to me, is to distinguish categories of property between those that can't experience bad welfare and those that can, and provide minimal welfare rights for those that can, out of respect of their shared participation in a subset of primary goods such as health and preference satisfaction. To put this another way, while the list of primary goods is not formed with their consideration in mind, considering them once it is formed is unavoidable. And at this point in Rawls' argument, the justification that only moral persons are relevant to determinations of application no longer holds. The ideal theory has generated the content of justice, now it must be applied to all in a<sup>16</sup> real societies' basic structure, which even in the well-ordered society will include nonmoral persons. It is outside of the scope of my dissertation to argue conclusively that this is the determination of justice that would be generated with regards to what livestock would be owed. Rawls includes this same caveat with his theory, he provides very few examples of how the principles would actually organize the basic structure of the well-ordered society reason when the full process of reflective equilibrium is carried out. But overall, my point is that some determination would have to be made regarding what rights animals as property are owed if the participants want to include animal use as an option for moral persons pursuit of their conception of the good. Further, Rawls' theory can consistently be applied in this case by recognizing that the principles are applied to many non-equal beings, after they are determined, through a general principle of the extent to which they can make use of it, in comparison with the standard (as it must be) of the moral person.

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<sup>16</sup> I will explain more in the following chapter about the transition from our real society to the well-ordered society, but the distinction is why I do not claim that the ideal is directly applied to *our* real society



In a section of *Political Liberalism* where Rawls defends his strategy of using ideal theory to determine the content of justice, he says that conflict is what motivates political philosophy at its core; “We turn to political philosophy when our shared political understandings, break down, and equally when we are torn within ourselves” (PL, 44). The refrain I hear over and over again when surveying people’s feelings on eating meat and how the industry is regulated is that they don’t want to think about it. Having animal products available to them is important to their idea of a good life, but they don’t want to have to think about how it came to be on their plates, because the idea of animal suffering causes them distress. By recognizing that livestock are members of our society and as such deserve some benefits of the principles of justice, we could determine what a just meat industry looks like. But doing this will challenge our beliefs and upset norms, which is why political philosophy gives us a valuable avenue for resolving this dispute. The fact that Rawls’ theory specifically accounts for the plurality of conceptions of the good and the disagreement between peoples as to the content of what justice would look like for livestock animals makes his theory particularly valuable for resolving this conflict related to livestock’s right to a certain level of welfare.

The principles of justice are meant to govern the assignment of rights and duties, specifically to determine the distribution of benefits and burdens amongst the society’s cooperating members. Right now we have put a lot of ‘burdens’ on our livestock, but there is no commitment to needing to limit these burdens and no commitment to distributing benefits to them either. We need principles of justice that govern these more fairly. Livestock animals have not done anything to deserve their place in life; they are born into the institution with no ability of their own to affect their life choices. “The intuitive notion here is that this structure contains various social positions and that men born into different positions have different expectations of

life determined, in part, by the political system as well as economic and social circumstances. In this way the institutions of society favor certain starting places over others.” (TJ, 7) If we replace the term ‘men’ in this quote (which is antiquated language anyways) with ‘beings’ we can see how this intuitive notion extends to livestock as well. If you’re born a human, you get all the expectations of life that entails; if you’re born a cat or horse or lab animal, you get all the favors that entails (which is lots less than humans, but still some, as guaranteed through regulation such as the animal welfare act and the horse protection act,); but if you’re born a livestock animal you lose these minimal protections. The institution which regulates the general ownership and using of animal bodies in the meat industry is a starting position which is severely disfavored as compared to others, even compared to other animals.

Despite the fact that I am engaging in proving that certain animals deserve consideration as a matter of justice, I believe the burden of proof here ought to be swapped. It seems to me the burden of proof has been distorted as a result of historical biases in the tradition of political philosophy. Historically, accounts of justice generally consider it essential to address the relationship of humans to other humans and to objects, but almost all such accounts claim that our duties to animals are secondary or supplemental to the norms that govern our relations with humans or goods. As a result, arguments within the western tradition have worked from the assumption that the relation of humans to animals is a matter of secondary concern from the standpoint of justice. The burden of proof for establishing that our relationship to animals is to be considered has therefore fallen automatically upon those asserting the importance of that relationship. Rather than allowing tradition to assign the burden of proof in this way (which would be an example of an *ad antiquitatem* fallacy), I suggest the burden of proof should fall on those persons who insist on the view that human relations with animals should be treated as a

matter of secondary importance. We raise billions of livestock animals annually,<sup>17</sup> controlling all aspects of their lives. We assign to ourselves arbitrary and absolute power of life and death over these animals and the majority of citizens are involved daily in this process at some level. For this aspect of our basic institutions to be just, we must use deliberative processes to evaluate what that would look like, which must include considerations of non-humans. To argue that animal treatment is not a concern of justice and that it is up to the individual to decide as a matter of ethics, is to avoid recognizing that we have already decided on the matter by setting up our basic institutions as we have.

If animals are properly viewed as subjects of justice, as I have argued, then establishing what we owe them and enacting it is of pressing importance to creating a less unjust society. Rawls is not sufficiently appreciating the relevance of animals for certain foundational parts of the basic structure, such as property rights, when he dismisses animals from discussions of justice. He suggests in *A Theory of Justice* that while animals are unable to be included in an account of justice, the proper method to come up with a correct conception of our relationship to them is through metaphysics. “A correct conception of our relations to animals and to nature would seem to depend on a theory of the natural order and our place in it. One of the tasks of metaphysics is to work out a view of the world which is suited for this purpose” (TJ, 448). This seems to me to be an unacceptable suggestion, considering livestock in particular. We have billions of sentient beings that are right now being raised in conditions causing them pain and distress before we slaughter them for human purposes; waiting until we work out a metaphysical ordering of all of animal-kind (and ‘nature’) to see if our theory of justice can accommodate

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<sup>17</sup> In 2013, the following numbers of meat industry animals were processed: 8.6 billion chickens, 33.2 million cattle, 239.4 million turkeys, 2.3 million sheep/lambs, 112 million hogs. (North American Meat Institute, *The United States Meat Industry at a Glance*, 2013.)

them, I believe is representative of the kind of bias that results from becoming numb to commonplace horrors. Animals we raise are, in very obvious ways, quite different from furniture we own; if you think they ought to be treated the same by our laws then the burden of proof ought to be on you to explain why. Saying animals cannot be accommodated by Rawls' theory of justice ought to lead you to a basic structure that literally does not include animals; yet nothing in Rawls' writings (or in the extensive Rawlsian literature) indicates that this theory shouldn't be applied to a society like ours (and like all societies I can think of in history) which makes use of cooperation with animals. By pushing animals out of the consideration of justice, I argue that it is *you* who must convince us that Rawls' theory could accommodate such a suggestion.

In this chapter I have concluded that Rawls' theory lacks an argument for why we can pick and choose which non-ideal beings to count as subjects of justice and which do not, but meanwhile he clearly intends for his theory to be able to transition a real society inhabited by non-ideal beings from their current state into a more just society. Therefore, when we apply Rawls' ideal theory it will apply to the basic structure of our society and *all* who inhabit it. This is not a modification of Rawls' theory itself, although it would (hopefully) have changed his own understanding of the limits of his theory, if I could have had the good fortune of his readership. Due to the contributions made by livestock in their collaborative existence with full citizens, their biological capacities as sentient members of society, and how animal husbandry is a part of the basic structure, I conclude that they are owed consideration of how the principles of justice apply to them as a category of members of society.

### **Chapter Three: Overlapping Consensus, Intergenerational Justice and the Justification of Principles Related to Livestock**

That the determination of principles chosen by parties in the original position would apply, to the extent that it is reasonable, to livestock, represents only the first stage in Rawls' account of justice as fairness. The next step of the project is to evaluate my claim from the preceding chapter in light of the realities of reasonable pluralism. While the foundations for the legitimacy of the principles and my argument for who they apply to come from the conception of justice as fair cooperation between citizens conceived of as free and equal, the necessity of just conditions persisting throughout generations makes stability an essential characteristic of justification. It is this element of stability and ideas related to public justification that I will discuss in this chapter. Specifically, would welfare assurances incorporated into the institutionalized rearing of livestock have the requisite characteristic of stability in a democratic society? Before moving on to answer this question through a discussion of overlapping consensus, there are certain conditions and qualities to this consensus that must be in place for its reasoning to have the justificatory force required, which are the conditions of publicity and autonomy.

#### **Autonomy and the Publicity Condition:**

In the last chapter, I explained the importance of the basic structure for an individuals' experience of justice, including how it works to secure the background conditions necessary for just actions and procedures to take place. A basic structure set up in accordance with principles of justice can facilitate the desired social circumstances for relationships to develop "in

accordance with free agreements fairly arrived at and fully honored” (PL, 265). Part of determining if agreement were freely agreed to is understanding autonomy. In this chapter I will be discussing the relevance of Rawls’ conception of overlapping consensus to the inclusion of livestock animals in the sphere of justice. The participants in an overlapping consensus and the debates held between individuals have a background condition of the participants’ autonomy. Without a relevant status of autonomy, any consensus reached by the participants would not be reflective of conditions of justice, such as those the basic structure works to maintain. Two obvious examples would be getting others to agree to something through force or by speaking for them while they are unconscious, these are not representative of autonomous agreement.

The role autonomy plays in Rawls’ theory changed substantially between *A Theory of Justice* and *Political Liberalism*. In the earlier work, autonomy is guaranteed through justice; a person who lives justly is autonomous by the definition of justice. “We can say that by acting from these principles [of justice] persons are acting autonomously; they are acting from principles that they would acknowledge under conditions that best express their nature as free and equal rational beings” (TJ, 452). Rawls assumed that citizens would have a rational desire to act from the conception of themselves as free and equal, and thus a desire for autonomy would be a part of every persons’ conception of the good (according to their individual comprehensive doctrine). This is modeled from and remains similar to the Kantian conception of autonomy, where moral personality is fundamental to one’s sense of self (TJ, 493). Autonomy comes from the expected realization by each individual in society that a “sense of justice is a highest-order desire in their ration plans,” which in turn makes autonomy an intrinsic good (Freeman 2003, 300). But is it possible for an individual to not value autonomy as part of their held comprehensive doctrine? Rawls acknowledges that there was a lack of examined separation

between a moral doctrine of justice and a political conception of justice in *Theory of Justice* (PL, xv). He assumed that there could be a consensus on moral doctrines that supported the principles of justice once these were understood. *Political Liberalism* as a project is motivated from the acknowledgement that a plurality of moral sensibilities is likely to persist in a democratic society, even one well-ordered through the principles of justice he identifies, which would be an issue for stability. Giving an account of how a society, even with a plurality of moral doctrines held by its citizens, could persevere through generations and have the stability essential for maintaining a just society, is the reason why Rawls separates moral and political reasoning and focuses only on the later, primarily through overlapping consensus (PL, xvi).

The role of autonomy changes in *Political Liberalism* due to the elimination of moral reasoning from the theory of justice; Rawls was able to disconnect the choice to live autonomously, in some ways, from acting justly (as well as acknowledge that autonomous actions can take place under other systems of justice than his own theory of justice) (Weithman 2017, 98). In *Political Liberalism*, Rawls connects two types of autonomy to each of the two moral powers, with a third type described for having both (Freeman 2003, 314). Rational autonomy is connected to the moral power of rationality, the capacity for a sense of the good. A person is autonomous in this sense when they develop a life plan to pursue their individual idea of what is good. Remember from the last chapter, this aspect of freedom leads to each individual being a self-authenticating source of valid claims, an aspect of rational autonomy (PL, 32). Moral autonomy is connected to the moral power of reasonableness, from applying and acting from the principles of justice. Full autonomy is reached when an individual displays both autonomies, specifically with their sense of justice regulating the pursuit of their desires. “When the principles of justice...are affirmed and acted upon by equal citizens in society, citizens then

act with full autonomy” (PL, 306). However, full autonomy is not all encompassing of all aspects of behavior as it was in *Theory of Justice*; “full autonomy is achieved by citizens: it is a political and not an ethical value” (PL, 77). This means that someone could choose a moral doctrine that caused them to give up their autonomy in certain ways to another person, such as those who determine portions of their actions and beliefs by what a religious leader decides. By exercising their capacities as a citizen, they are fully autonomous even if they aren’t autonomous within realms of associations in their non-public life.

As explained last chapter, the generation of the principles of justice is accomplished using the thought device of the original position (OP). The conditions of the original position model rational autonomy, as they are solely guided by considerations of what best allows the person whom they represent to pursue their conception of the good, what that might be.

According to Rawls, the participants of the OP are rationally autonomous, but they would not be fully autonomous, as they are not guided by a particular conception of justice (PL, 306).

However, Michael Sandel criticized the description of these OP participants as autonomous as “incoherent” because non-embodied persons lack a sense of self. Sandel argues a sense of self is inseparable from the social relationships and historical particularities that form it, and so without these there would be no self from which to make autonomous decisions (Sandel, 1984).

“Therefore, Rawls’ contractors in the original position cannot make genuine choices and cannot display genuine agency” (Voice 2011, 101). Even if we grant Sandel’s criticism, the fact that the representatives in the OP are not rationally autonomous does not mean the OP, when taken as a system, does not model rational autonomy, nor that autonomy of persons is absent from PL’s account. Rather than those in the OP, it is the citizens located in the WOS who are fully autonomous. Their full autonomy comes from their role as a citizen, through their conduct in



exercising their two moral capacities discussed earlier, regardless of what their comprehensive doctrine is and how they choose to act in their associations and private life (PL, 306).

The reason the condition of autonomy is important to discuss at the beginning of this chapter, aside from how it relates to the theory, is that I will be discussing later in this chapter the conditions for public reason as it relates to overlapping consensus. The importance of these further conditions will be in part justified by their role in securing autonomy. Therefore, it is important to understand in what way autonomy comes about from the moral powers and status of citizens as free and equal. Further, autonomous decisions are tied to the value of consensus. Consensus is attractive for a theory of justice because of how it works to increase the likelihood of stability, increases social trust and willingness to cooperate, and reduces costs of enforcement, but consensus is also valuable because it reconciles human autonomy with political authority. (Cohen 2009, 44). However, not all consensus is valuable. Consensus that is forced or manipulated would no longer imbue the aforementioned, positive qualities of consensus; free consensus is most desirable. Free consensus is consensus reached by autonomous members through autonomous deliberation, deliberation characterized by free consideration and public deliberation. Autonomous consensus is part of how citizens can be described as self-governing, despite submitting to government rules and interventions; “because each endorses the considerations that produce the decisions as genuinely moral reasons [from their comprehensive doctrine] and affirms their implementation” (Cohen 2009, 44).

Along with autonomy, the publicity condition is another prerequisite for public debate and overlapping consensus is the publicity condition. The publicity condition states that the principles of justice ought to be public knowledge in a well-ordered society, which has several implications for the content of the principles and for society. Since the principles are to be

known by all citizens, any consequences of requiring that all citizens know them, either psychological consequences for individuals or societal consequences, are to be examined when evaluating competing principles of justice. For example, the language of the principles should not be too complicated or technical as to prevent clear understanding among the general public, otherwise the publicity condition could not be satisfied. (JF, 86) While publicity plays a role in Rawls earlier writings, including in *Theory of Justice*, it is formalized in *Political Liberalism* with Rawls focusing on explaining how justice can be formalized in a society inhabited by individuals holding a plurality of moral and philosophical doctrines. As discussed in the previous chapter, a society is well-ordered when principles of justice are publicly known, which is the basic description of the publicity condition (PL, 35). However, this condition has three stages of fulfilment, which Rawls calls the ‘three levels of publicity’ (JF, 121).

The first level of the publicity condition regards society; it is fulfilled when society is effectively regulated by public principles, both citizens and institutions. This means that citizens accept and know all other citizens accept the principles of justice and know (or reasonably believe) that the institutions of the basic structure are just as well (JF, 121; PL, 66). The second level of publicity is the shared common knowledge of general facts, which would be necessary to generate the principles of justice in the first level, as they are what the parties in the original position are limited to when deciding the content of justice as fairness. The third and final level of publicity states that the entirety of the theory of justice and its reasoning be publicly available. “This justification includes everything that we would say -you and I- when we set up justice as fairness and reflect why we proceed in one way rather than another” (PL, 67). This condition is intentionally weaker than requiring that each citizen know the full theory of justice and its reasoning, as carrying out this type of reflection is an intellectual pursuit many might choose not

to pursue. These three levels are generated from the commitments found in Rawls' initial conception of justice as fairness, which is to identify fair terms of social cooperation over time that will result in a stable and just society, despite moral pluralism. This social cooperation between equal and rational citizens "brings with it a need for mutual understanding among persons about the terms on which they are cooperating" (Garthoff 2014, 673). Each of the three steps works together to guarantee that the social cooperation in a well-ordered society preserves justice and enables the autonomous characteristic of the participants that was previously discussed. Without this understanding of how justice permeates the structure of society, or at a minimum having the well-founded belief that it is true, then the expectation that everyone would continue to share the same conception of justice becomes much more unlikely, and in turn the likelihood of all following fair terms of social cooperation decreases.

Rawls is more direct about the psychological tendencies that led to his belief in the likelihood of instability (without common understanding and other societal aspects included in the publicity condition) in *Theory of Justice*. "While every citizen is a friend to some citizens, no citizen is a friend to all. But their common allegiance to justice provides a unified perspective from which to adjudicate their differences" (TJ, 415). He adds that a sense of justice gives rise to a natural desire to see systems uphold that sense of justice, or at least it reduces the feeling of opposing them. Therefore, if people didn't share the same understanding of justice (and for the same reasons), then they could oppose the institutions in the basic structure in favor of those that better support their alternative sense of justice. An additional aspect of publicity relevant to human psychological development is ensuring not only that people are treated justly, but that they themselves recognize that just treatment. This goes back to Rawls' theory of moral development he co-developed with Lawrence Kohlberg, a Harvard psychologist and colleague of

Rawls, in which they determined that people tend to develop their own sense of justice out of how they believe they have been treated in that regard (Garthoff 2014, 675). If a society wants their citizens to act according to principles of justice, then they need to be raised in a society where they are treated justly and located within just structures.

For this reason, the publicity condition applies to the well-ordered society, wherein the institutions of the basic structure accord with just principles. Full publicity is the term Rawls uses to describe the satisfaction of all three of the levels of the publicity condition. If a theory of justice is unable to accommodate both full publicity and human nature (developmentally or psychologically), then there is good reason to think it would not have the characteristics of stability necessary to persist through the generations. Satisfying the full publicity condition is difficult, it would only be possible with the kind of conditions found in the WOS. Rawls' justice as fairness is able to meet the full publicity condition, which gives it more support for being the theory of justice chosen by the participants of the OP than other systems, such as utilitarianism. Even the version of utilitarianism Rawls considers the strongest rival to his principles of justice, the principle of restricted utility, would fail the first level of the publicity condition, as he says that it would be too difficult for any individual citizen to see to what extent the principle of restricted utility is being satisfied through the institutions of society. Thus, in such a society, they would not have the certainty required to "develop a normally effective sense of justice in a society governed by that principle" (Garthoff 2014, 675). The formation of one's personal sense of justice requiring a stable, continuous perception of just institutions and fair treatment makes just principles fail the publicity requirement if they are too vague or imperceptible by citizens.

A society governed by principles that fulfil the publicity condition has robust defense against harmful ideology spreading through its citizens, which guards against future breakdowns

of its just structures. In the second level of publicity, Rawls says that the general facts that citizens know (the common knowledge available to participants in the OP), “must be believed by citizens for good reasons; their belief must not be illusions or delusions, two form of ideological consciousness” (JF, 121). This would not prevent false, or unproven beliefs for all forms of private knowledge, as this requirement from the second level applies only to public reason. I will be discussing public reasoning more later in this chapter, but as an overview it is the kind of reasoning used between members of society who hold different comprehensive doctrines, in order to discuss and agree about a public matter. The publicity condition leads to the necessity of an education role in the theory of justice, even when limited to a political conception (JF, 122). Recall that a requirement of publicity is that the language of the principles and theory of justice must be clear and not too technical so as to prevent understanding. This has a corresponding educational requirement, because it is not the case that the principles must be understood by someone who lacks any education at all. Education must be structured appropriately to develop the capacities in citizens to understand principles which are clearly stated and not too difficult, as well as its role in making sure that citizens have the general facts and common understanding of non-controversial fields of science. Publicity is also intertwined with maintaining individual autonomy with regards to the principles of justice, which will have unavoidably coercive results. Coercion is a special type of influence in that it is especially effective compared to other avenues of influence, which means that it needs to be grounded in consensus to maintain respect for citizens as free, equal and autonomous. “Publicity ensures, so far as practical measures allow, that citizens are in a position to know and to accept the pervasive influence of the basic structure that shape their conception of themselves, their character and their ends” (PL, 68) and having this knowledge guaranteed by publicity is part of “their realizing their freedom as full

autonomous, politically speaking” (PL, 68). Knowing about the bases of social cooperation, without ignorance or false beliefs, allows for each member to participate autonomously despite being required to follow the generated principles of justice. In summary, the importance of publicity is far reaching; it works to prevent ideological thinking, increases likelihood of stability, is tied to the formation of individuals’ sense of justice, brings in education as a related role of justice, and maintains autonomy in the setting up of the basic structure with its coercive results on citizens.

Publicity is an important part of justifying the coercive aspects to the basic structure’s influence, which means that if livestock welfare was not something that fits the publicity condition, it would make its condition as a potential subject of overlapping consensus irrelevant. Before I engage with the potential for livestock animals to be subjects of principles of justice through the justificatory avenues of public reason, overlapping consensus and intergenerational justice, I need to first provide evidence that such reasoning could meet publicity conditions. Rawls’ provides an example of an alternative theory that would fail based on the publicity conditions, which is the capabilities approach suggested by Amartya Sen and Martha Nussbaum. Capabilities, which describe the set of functioning each being has enabling them to transform primary goods into well-being, identified by their biologic needs and doctrinal beliefs. Rawls criticizes the capabilities theory on a series of points, but among them is how capabilities as a concept is not sufficiently public. “By Rawls’s lights, capabilities are not sufficiently public; well-being is somewhat inscrutable, and abilities to convert resources into well-being inherit that inscrutability” (Garthoff 2014, 676). Considering my suggestion, that livestock animals and their welfare related to their living conditions are subjects of political justice, includes a topic as

potentially vague as ‘animal welfare’, I must explain why it does not fail the publicity condition as Rawls believes the capabilities theory does.

Rawls does not believe his theory of justice would ignore diminished capacities altogether, an issue that the capabilities theory puts center stage. For example, he says that his principles of justice would require healthcare over a full life, and as a full lifetime of a fully cooperating citizen includes times of diminished capacity and functioning, such as in early childhood or advanced age, the resources needed to help navigate these times could be built into the basic structure (such as wheelchair ramps in public buildings) (JF, 174). The way in which a theory of justice can respond to diminished capacities is through “publicly accessible and publicly remediable” avenues of distributive justice (Garthoff 2014, 676). While capabilities could be a better, or more true, way of describing how human (and other animal) functioning works, it does not meet the publicity requirement for a conception of justice. If implemented, it would be difficult for the public to see how primary goods given to recipients with diminished capacities increase their well-being to a level in accordance with justice. The level of livestock consideration I am arguing exists in Rawls’ theory of justice does not suffer from the same inscrutability as the capabilities approach to distributive justice. Instead, I am suggesting a level of welfare at the publicly remediable form, and restricting the definition of welfare to that which is publicly assessable, Dawkins’ definition of welfare as health and what animals want.

It is outside of the scope of my dissertation to argue exactly what is owed to livestock animals, that would require the process described in Rawls’ theory to be undertaken: generating suggestions for the layout or general restrictions of the institutions of the meat industry, going through the process of reaching reflective equilibrium, engaging them through public reason and ensuring overlapping consensus of the suggestions from within popular reasonable

comprehensive doctrines. My thesis here is to argue that such an undertaking is appropriate and, at least for our societies' desires, demanded of a theory of justice such as Rawls' justice as fairness. The animal welfare research I summarized in the first chapter gives scientific knowledge of a sort that is publicly accessible and able to be utilized to have confidence in what bad welfare for our livestock animals constitutes. I believe that principles requiring a maximum level of welfare would fail this condition, as it would be impossible with current knowledge to ensure animals experience excellent welfare. What is not impossible is to design institutions related to animal care and production where avoiding poor animal welfare is a necessary condition. Where Sen and Nussbaum's capabilities approach sought to redefine primary goods, my approach does not rely on modifications to the set already suggested by Rawls. Using the same idea of primary goods, which includes a conception of good biologic functioning and a lower-bounds assurance of healthcare<sup>18</sup>, their role in pursuing what individuals want in life is central to the conception of what primary goods are for. Therefore, Dawkins' definition of welfare as what is healthy for the animal and what the animal wants, fits well with Rawls' use of primary goods in his distributive schema. Even though the primary goods are generated out of sole consideration of the likely interests of a moral person (and thus a human), once generated these at least partially apply to all beings that are included in the cooperative structure of society. I will discuss livestock animals' relation to primary goods more at the end of this chapter. I have not explained or justified why livestock animals ought to be included as subjects of justice as part of this point on publicity; here I am specifically aiming to avoid the critique that what I

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<sup>18</sup> While this is arguably ambiguous in PL, it is clarified in JF on page 173: "The only difference is that now the expectation of an assured provision of health care at a certain level (calculated by estimated cost) is included as part of that minimum."



suggest is too vague, or otherwise violates the publicity condition and thus would not meet the requirements to be a part of the principles of justice.

An additional point related to publicity comes from the requirement that citizens must believe/know that the institutions of the basic structure are just. As I have argued that the industries enabling the mass transformation of animal lives into animal byproducts are a part of the basic structure, the current opacity of animal treatment in these facilities would not satisfy this condition. The treatment of livestock would need to be public or somehow otherwise ensured, perhaps through a robust auditing system or increased public access, in order for citizens to maintain their belief in the justice of their institutions. This relates to the ‘lemons’ problem I discussed in chapter one, where people need to have an avenue for knowledge in the market to have trust that what they are being provided with matches what has been promised and ensure the stability of the institution.

### **Overlapping Consensus and Reasonable Pluralism:**

Overlapping consensus is Rawls’ answer for how his theory of justice as fairness can be stable despite the likelihood of persistent pluralism, and in Rawls’ words “how, as I have characterized it, political liberalism is possible” (PL, 139). Overlapping consensus fulfills two roles, it provides justification for the desirability of implementing the principles of justice determined through the OP, and it provides a basis of motivation for citizens to follow and maintain these principles (Voice 2011, 127). Rawls separates his theory into two parts, which he describes as the first and second stage to his account of the political conception of justice. The first stage includes what I wrote about in chapter 2, the generation of the principles of justice out

of a starting position of the fundamental concepts for a democratic society. The generation of these principles, and the schema for the distribution of primary goods, did not depend on any beliefs or values from comprehensive doctrines, moral, philosophical, or religious. Stage one presents a “freestanding view that expresses a political conception of justice” (PL, 144). The second stage moves the freestanding view into a society of individuals with competing and conflicting ideas of the good. If the principles of justice can be endorsed from the many respective viewpoints of citizens’ comprehensive moral doctrines, then they are supported by overlapping consensus. The reasoning for the proposed political conception of justice is evaluated from within the standpoint of those comprehensive doctrines to see if the same conclusions could be reached through the beliefs and commitments they personally hold; “justice as fairness is not reasonable in the first place unless in a suitable way it can win its support by addressing each citizen’s reason, as explained within its own framework” (PL, 143). If the conception of justice can reach this overlapping consensus, then there is social unity for political cooperation and this conception of justice would have stability, as it is not “too much in conflict with citizens’ essential interests as formed and encouraged by their social arrangements” (PL, 134). Justification is something that is addressed to others; Rawls didn’t want his theory to only be accepted by the theoretical persons in the original position, but to all citizens of the well-ordered society. The justification of justice as fairness, while beginning with shared fundamental ideas (basic democratic values) needs to also have freely given agreement from the citizens who are affected by it. Once it has the support of individuals’ reasonable comprehensive doctrines, this is what makes it a reasonable political conception of justice (PL 101). A fundamental part of Rawls’ theory is that citizens are considered free and equal, in order to respect this status when implementing something as pervasively affecting as a political conception of justice, citizens

must autonomously agree that they are justified through their own reasoning, appealing to values and facts generated from shared public knowledge and their own moral doctrine. The first stage of justification therefore and reasoning is not complete until shown to be stable through the second stage (PL, 141f.). This means that it is important that principles be reasonably believed to have overlapping consensus, and not only that they would be chosen in the original position.

While having the consensus of many reasonable comprehensive doctrines is important for the reasons just discussed, it would not be good for conception of justice to gain that stability due to being generated from surveying doctrines and choosing what is held in common. “To do that would make the political conception political in the wrong way” (JF, 37). For example, if a principle governing the system of distribution is picked by examining popularly held comprehensive doctrines in our society currently, and choosing whatever system distributes the greatest amount of goods valuable to each doctrine, this would not be justified. It would have overlapping consensus, but the second stage alone is not enough for full justification. While this principle might be stable in the short term, it would only maintain that status as long as the current popularity of comprehensive doctrines is maintained, and it would lack the freestanding justification earned by the principles generated through the first stage of Rawls’ deliberation. Rawls’ first stage does not make reference to a single comprehensive doctrine in the first stage; its principles of justice are generated from fundamental political commitments when considering society as a fair system of cooperation. By generating the theory in this way first, then checking its stability against comprehensive doctrines, this results in valuing stability for the right reasons; “stability for the right reasons will subordinate the rational to the reasonable and explain how citizens come to be motivated to abide by the principles that govern the basic structure of society” (Voice 2011, 139). A last point to consider is why this motivation wouldn’t lack the

stability that characterizes other *modus vivendi* agreements, but I will return to this point after first laying out the last two aspects to overlapping consensus that will tie into this reasoning.

The concept of reasonableness is used throughout Rawls' theory, being one of the two capacities attributed to all democratic citizens. It is perhaps unsurprising therefore that overlapping consensus is restricted to viewpoints of citizens who hold reasonable comprehensive doctrines. "Political liberalism supposes that there are many conflicting reasonable comprehensive doctrines with their conceptions of the good, each compatible with the full rationality of human persons" (PL, 135). Being 'compatible with full rationality' means that the person holding the doctrine can critically analyze it and bring new information they learn into resolution with their overall beliefs. The doctrine is subject to the same capacities of rationality used in public reason and the process of reflective equilibrium, as I will soon discuss. If overlapping consensus was not restricted to reasonable doctrines, and instead required that all held doctrines of any quality consider if the proposed political conception of justice could be reached through reasoning from the standpoint of their closely held beliefs, then unreasonable, irrational, or corrupt doctrines could prevent a good theory of justice from having the necessary aspect of stability. It would be as though an appropriate conception of justice for all reasonable persons was held hostage by the unreasonable few (or many, as the case may be.) The requirement that only reasonable doctrines are considered comes out of the reason why overlapping consensus was introduced as essential. When Rawls' transitioned to political liberalism, he uses the conception of overlapping consensus to account for the autonomous generation of ones' belief of the good, which is in turn a result of being reasonable and rational. Unreasonable or irrational doctrines are not generated from exercising these aforementioned capacities, and thus do not have the same reason for accommodation.

But why are there multiple reasonable comprehensive doctrines? Many philosophers, such as Plato and Aristotle, have argued that given enough time for reflection *the* correct comprehensive doctrine could be discovered. Rawls' does not say that this is an impossible task, but believes that diverse and competing personal values is a natural consequence of free institutions (PL, 135). Comprehensive doctrines include political valuations, but also a variety of ethical and personal values. Reasonable pluralism can come from individuals assigning different weight to each of these values, even if the values themselves were shared (PL, 145). If political society declared that a single comprehensive doctrine was correct, then it would need to spend a lot of resources in coercing and enforcing every citizen to share in the same weight distribution of each value, a task that even if possible, would not be stable in a free society due to the effect of free institutions in generating a plurality of beliefs. It would be difficult to see how a society could respect the autonomous status of citizens while expecting each to share the same comprehensive doctrine. By limiting the political conception of justice to that which can be supported by all reasonable moral doctrines, it garners the stability essential for considering that conception of justice as realistic to adopt (non-utopian). "Following the reasonable pluralism interpretation, then, when we restrict ourselves to common ground in the face of the fact of diversity, we are acknowledging that reason does not mandate a single moral view and then are refraining ourselves from imposing ourselves on others who are prepared to be reasonable" (Cohen 2009, 54). By restricting the avenue of reasoning in this way, and giving reasons that can be supported by what the person thinks are true, they are more likely to be convinced than if offered reasons from what someone else believes are true that do not match their held beliefs.

The test of overlapping consensus is only properly applied to a certain domain of topics related to the political conception of justice. It is not applied to general matter of determining

what is right or good, which would be the domain of individuals' or associations' comprehensive doctrines. For my project, this means that the overlapping support for livestock welfare from a wide variety of comprehensive doctrines, if shown to exist, is not necessarily relevant to justice. The subject of overlapping consensus is a restricted domain of topics, relevant to the fundamental ideas of political society. Rawls describes the scope of overlapping consensus in terms of its depth and breadth;

“It supposes agreement deep enough to reach such ideas as those of society as a fair system of cooperation and of citizens as reasonable and rational, and free and equal. As for its breadth, it covers the principles and values of a political conception (in this case those of justice as fairness) as it applies to the basic structure as a whole” (PL, 149). Core concepts are the concepts that result from the idea of political society as fair cooperation between people thought of as free and equal. This is the first stage reasoning that I covered in the previous chapter, the freestanding reasoning for principles regulating the just distribution of primary goods, generated out of the conception of citizens. As for the breadth, there is some disagreement as to if the ‘principles and values of a political conception’ refer only to Rawls’ two principles of his theory of justice as fairness or include these two among a ‘family’<sup>19</sup> of principles. Rex Martin, who wrote the entry on “Overlapping Consensus” in the *Rawls Lexicon*, argues that Rawls intended the later and states that most contemporary theorists agree (Martin 2014, 282). The section of PL where Rawls describes the steps to turn a constitutional consensus (which I will discuss shortly) into an overlapping consensus, is where I find him the most clear about the extension to a broader category of items than just the two principles; “Its breadth goes beyond political principles instituting democratic procedures to include principles covering the basic structure as a whole” (PL, 164). While other principles related to the democratic procedures are also mentioned by Rawls, the inclusion of the broad strokes organizing principles

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<sup>19</sup> The use of the term family in this sense is found in PL, xxxvii and xlv.

of the basic structure is essential for my argument later in this chapter regarding the inclusion of livestock welfare for distributive justice. The arrangement of institutional structures, necessary to put these principles into effect in society, will be subject to confirmation through overlapping consensus.

While overlapping consensus is the method of ‘completing’ the freestanding justification given in the first stage, by demonstrating the principles have the requisite consensus to be stable throughout generations, this process happens by citizens in a more ideal society, if not the well-ordered society, and could not happen in our current one. For overlapping consensus to provide stability as intended, citizens who hold reasonable comprehensive doctrines would need to make up all or a large majority of society compared to those who hold incomplete or unreasonable doctrines. Then, as already discussed, these citizens would need to identify reasons from within their own beliefs to support the political principles as aligning with their moral commitments. If they do not do this, the overlapping consensus is a mere *modus vivendi* agreement. *Modus vivendi* agreements are agreements made between parties who compromise for their own advantage. These are inherently unstable, because as soon as the agreement stops working for their strategic advantage, the cooperation would stop, and this could happen at any time. Rawls is able to say that overlapping consensus is not an agreement of this type, because the commitment to the principles of justice is not chosen due to individual’s advantage, but due to their moral commitments. Each participant has a principled commitment to a shared public political conception, which Rawls hopes will cause citizens to “judge (by their comprehensive view) that political values either outweigh or are normally (though not always) ordered prior to whatever nonpolitical values may conflict with them)” (PL, 392). This sort of agreement is unlikely to happen all at once, and so Rawls explains that there is a path of gradual moral reflection over

generations where more and more democratic principles and policies can find common agreement, starting with the most basic political rights and eventually ending with a constitutional consensus, which includes agreement as to the government structure, but not to more broad or deep principles such as the basic structure (PL, 159; Barnhart 2004, 261). “At the first stage of constitutional consensus the liberal principles of justice, initially accepted reluctantly as a *modus vivendi* and adopted into a constitution, tend to shift citizens’ comprehensive doctrines so that they at least accept the principles of a liberal constitution” (PL, 163), and as citizens’ views shift in this way they become more reasonable (as Rawls’ defines it), which is what moves simple pluralism into reasonable pluralism. As the scope of consensus grows, and the trust in fellow citizens advances (which would also be required for the well-ordered society’s publicity condition), eventually overlapping consensus is possible, with full overlapping consensus reserved for that which occurs in the well-ordered society.

A relevant objection to consider at this point, related to the constitutional consensus, is that if the basic structure is not included in this first stage, then that prevents my suggestion for livestock inclusion from being considered. Due to the importance of the basic structure in justifying livestock’s inclusion as subjects of justice, this objection is valid. At the initial stage of the constitutional consensus livestock would not be part of the discussion, however this process describes the stages of putting Rawls’ theory fully into practice to eventually manifest the well-ordered society. How the ideal aspects of Rawls’ theory are more commonly used, the structure of the well-ordered society and the principles of justice, are as ideals that give content and strength to our conceptions of justice that we work towards implementing in our real society. Any conclusions reached regarding livestock-human interactions would not lose their recommendation for implementation on the basis of the steps towards overlapping consensus,



nor would this prevent consideration through the use of the original position as to what livestock are owed.

While the true practice of overlapping consensus is reserved for a society that meets the conditions previously discussed, analyzing the content of popular or foundational reasonable comprehensive doctrines can offer some indication as to the likelihood of a principles gaining the support of overlapping consensus. It also, through the same reasoning of the value of overlapping consensus for stability in the WOS, give support for the adoption of regulation or practices in alignment with such a principle if it has the support of a majority of held moral, philosophical or religious doctrines in our society. Not only does the public support animals farmed through methods that represent good welfare, as discussed in the first chapter, but the moral duty to avoid causing undue suffering in animals, especially to those in one's care, is present in almost all major religious and philosophical traditions.

Core religious texts from the four most popular religions (tallied by estimated number of adherents), Christianity, Islam, Hinduism, and Buddhism, plus Judaism include passages that support considerations of animal wellbeing. The bible instructs humans to show care and concern for their domesticated animals. Animals are creatures created and given life by God, and as such it is required to treat them as deserving of greater consideration than other lifeless tools humans use (Preece, 4). A belief common to adherents of both Buddhism and Hinduism is the doctrine of *ahimsa*, which is a commitment to the importance of avoiding harm to all living creatures. “We bow to all beings with great reverence in the thought and knowledge that God enters them through fractioning himself as living creatures” (Preece, 22 (translated from the Mahabharata)) The Panchatantra contains a more direct restriction; “The holy first commandment runs: not harsh but kindly be—and therefore lavish mercy on the louse, the bug, and the gadfly” (Preece,

23). The Talmud instructs followers of Judaism to avoid livestock animal pain, stating “Jews must avoid plucking feathers from live geese, because it is cruel to do so” and “Animals are not to be penned up in stables on Shabbat” (Preece, 31). I mentioned in the first chapter that testimonial given by rabbis during the passing of the HMSA supports the idea that citizens with this moral doctrine would have internal reasoning agreeing with principles relating to livestock welfare. Islamic scripture also instructs followers to treat their livestock animals well; in the Hadith, Mohammed said “The curse of God be upon him who exceedingly punishes any animal...whoever has a horse and treats it well, will be treated well by God” (Preece, 33). These passages show that persons whose moral code is set by any of these major religions would likely, upon due reflection, generate reasons from within their moral doctrine agreeing with a principle of justice related to ensuring good livestock animal welfare.

Influential moral doctrines from philosophy include utilitarianism, deontology, and teleology. Arguments for animal consideration have been made from theorists of each of these traditions, using reasoning internal to their held moral doctrine. Utilitarianism is an ethic that identifies increasing overall pleasure and decreasing overall pain as the good to pursue, with those calculations counting all beings equally. From the outset, animals were explicitly counted in this calculus, with Jeremy Bentham (the founder of the tradition) famously saying that what matters for which beings to include is if they can suffer. While subsequent theorists often diminished the importance of animal suffering compared to human (or more precisely, assumes humans can experience suffering to a greater degree), contemporary utilitarians such as Peter Singer, Gary Varner and Raymond Frey have used utilitarian logic to argue for increased animal welfare (Singer 1990, 2006; Varner 2012; Frey 1983). Deontology says that what is good is following what moral laws, rules or duties state one ought to do, based on the inherent dignity

and value of humans. The most famous version of deontology comes from Immanuel Kant, who argues that rationally considering what acts could be universalizable is one of the central claims developed through his theory of ethics. The importance reason plays in the creation of Kant's ethic leads him to say that animals cannot be directly considered as moral agents. While Kant did not believe animals are owed any restriction of treatment by humans out of regard for the animal itself, he did still believe we ought not treat animals poorly due to the negative effects that type of cruelty tends to have on the human performing it. Nelson Potter argues that the language and reasoning included in Kant's *Metaphysics of Morals* results in non-human animals being the kind of beings who have rights, but are not the subjects of duties, meaning it wrongs an animal to hurt it and goes against their right as a being who can feel (Potter 2005, 302). Christine Korsgaard, a prolific modern Kantian, makes the argument that animals can be considered ends in themselves, and therefore animals will have certain rights (Korsgaard 2012). Other influential modern deontologists who have argued for some respect of animal's interests due to their intrinsic capacities include Steve Sapontzis, and Tom Regan (Sapontzis 1985, 1987; Regan 1983).

Teleology as a branch of ethics focuses on a thing's purpose to identify what is right or wrong for that thing. Virtue Ethics is a prominent type of this branch, which states that to be a good person you need to display or come to have certain virtues (these virtues stemming from what makes us able to fulfil our telos well.) Bernard Rollin, whose theory was referenced several times in the first chapter, is a prominent contemporary virtue ethicist arguing for improved livestock animal welfare. Rollin argues that it is a creature's interests that ground what counts as moral acts towards them, and animal rights should be awarded based on consideration of each animal species' interests and what for them ought to be considered essential components of life (Rollin 2006).

While this overview of the support found within popular categories of comprehensive moral and religious doctrines was brief, the intention is to show that support for the well-being of livestock animals is shared across these doctrines to a degree that resembles Rawls' requirement for how overlapping consensus can provide stability in principles of justice. Enacting the principles related to livestock welfare in regulating the institutions of the animal product industry could be supported from within a large majority of citizens' considered, reasonable comprehensive doctrines. I am not arguing that such consideration is just due to the existing consensus, but that the generated principles from within the original position and based on the fundamental idea of political society explained in the previous chapter could garner the support from a reasonable pluralism and thus has a required element of stability that could otherwise prevent its adoption.

### **Public Reason:**

The process of overlapping consensus makes up half of the two major, second-stage elements introduced in Rawls' turn to Political Liberalism and its account of stability for the principles of justice considering reasonable pluralism. The second element is the idea of public reason. Overlapping consensus accommodates reasonable pluralism by asking individuals to affirm a presented theory through their own point of view, but a political society will also have need for citizens to interact with each other to settle disagreements, through a type of debate. The fact of there being a multitude of reasonable doctrines means that differences of opinion in how things should be valued is inevitable, and as discussed in the previous section, using arguments based in a point of view someone does not believe in usually lacks the strength to convince.

However, in a well-ordered society, one that has already succeeded in moving past the stage of constitutional consensus and into overlapping consensus, each citizen shares the same political conception of justice. This gives a basis of shared beliefs from which to settle differences. Rather than using concepts of what is true or right (moral concepts), public reason involves “ways of reasoning and inference appropriate to fundamental political questions, and by appealing to beliefs, grounds, and political values it is reasonable for others also to acknowledge” (JF, 27). Giving valid arguments on its own is not sufficient to ensure public justification, as a disagreement over the soundness of premises after due reflection from each participant would lead to the argument being rejected, despite its validity. I will return to the idea of due reflection in the next section, which covers reflective equilibrium. Public reason could be thought of as a complement to overlapping consensus in the topic of public debate, as overlapping consensus involves reasoning from within one’s personal belief system, while public reason moves outside of any individual comprehensive doctrines to argue from only shared premises. In fact, public reason is not permitted to critically engage with comprehensive doctrines in any way, unless “that doctrine is incompatible with the essentials of public reason and a democratic polity” (CP, 574).

The full practice of public reason is restricted to the well-ordered society, not just because having a shared, public conception of justice is needed, but also for the background conditions ensured by having a basic structure aligned with the principles of justice. The absence of a certain conditions ensured by just institutions would prevent the publicity condition from being fulfilled, and without this public political deliberation would not be “possible and fruitful” (PL, lvii). These conditions include; public financing of elections and full availability of relevant information for policies, fair equality of opportunity (especially in education and training), social

minimums for income, societal job guarantee, and basic health care (PL, lvi-lvii). These five requirements work towards encouraging public deliberation and prevent the level of inequality that would obscure it, and they would all be present in the well-ordered society. However, as Samuel Freeman points out, the *ideal* of public reason (full public reason) being inaccessible in our current society does not mean that the *idea* of public reason is still accessible. “Rawls is not saying that a democracy cannot be governed by public reasons to any degree unless it guarantees all these background institutions” (Freeman 2007, 226). Public reasoning remains useful to democratic processes to the extent that it can take place, as the comments on shared beliefs being effective tools for fruitful deliberation still holds. However, without those background institutions ensured, many people will be unable to take part in the process, or will have biases that affect their viewpoint, and these conditions will damage the effectiveness of the debate.

Public reason is tied to the conception of the citizen as free and equal, as well as reasonable. “Publicity aims at a freedom of self-determination which citizens can exercise together despite their abiding disagreements” (Larmore 2003, 376). The autonomy of the citizen is respected in public reason by the acknowledgement that each person is a self-authentication source of valid claims (PL, 72). The (reasonable) citizen recognizes their freely made decision of moral doctrine is equally valid as those chosen by other citizens. Therefore, a part of being reasonable is restricting deliberation to the realm of public reason out of respect for others status as equal and reasonable. This restriction ties to what Rawls calls the criterion of reciprocity, which states that “Our exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions-were we to state them as government officials- are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.” (CP, 578). By acting based off conclusions generated from public reason,

government can enact politically legitimate laws (Freeman 2007, 216). To be clear, the criterion of reciprocity is a part of public reason, not a separate rule added on. It comes about when public justification moves from premises to conclusions that others could reasonably accept, about appropriately public subjects.

By ‘appropriately public’, I refer to the “family of reasonable political conceptions of justice” (CP, 574) previously discussed in the section on overlapping consensus. These make up the way in which citizens can publicly interact with each other, and how a government can appropriately interact with citizens, which are both types of political relations. Not all political questions are resolved by public reason however, only “those involving what we may call ‘constitutional essentials’ and questions of basic justice” (PL, 214). Any disagreement on these matters would need to be resolved through appeal to shared political values only, without reference to moral doctrines. Constitutional essentials are aspects that are determining to citizens’ status and ability to act as democratic citizens, such as who can vote, how the government structure is organized for broadly democratic representation and the scope of powers belonging to each branch of government. The basic rights and liberties, given equally to all citizens, would also be determined through public reason, as the list of these liberties will greatly affect the design of institutions in the basic structure and the form political relationships can take. Rawls claims that while the first type of constitutional essentials could end up with great variation in how they are specified, depending on the results of public deliberation, the second are of a category where agreeing they exist is most of what is needed, as they “are characterized in more or less the same manner in all free regimes” (PL, 228). With the inclusion of basic liberties in the category of constitutional essentials, there is some overlap between the two categories of topics appropriate to public reason, but “matters of basic justice” (PL, 225) will

involve more than determinations of rights and liberties. Rawls' description of the "principles regulating basic matters of distributive justice" (PL, 228) and how they are separate from the second category of constitutional essentials requires the reader to infer to a certain extent from the preceding sections, as Rawls provides examples rather than a more descriptive definition of what exactly is entailed by basic matters of distributive justice. These examples include freedom of movement, free choice of occupation and "reasons for or against fair opportunity and the difference principle" (PL, 229f.). The distinction between the constitutionally essential basic liberties and other liberties engaged by public reason comes from the terminology 'essential,' as some principles, while the subject of public reason to debate, are not essential in that they are more demanding, such as the full requirement of fair equality of opportunity. The content of public reason comes together to provide principles and requirements of justice that are used to design the institutions that form the basic structure and political institutions of society.

There are more aspects to the process of public reason than I have included here, however my intent was to provide enough description to be able to explain the ways in which livestock are and are not included in the practice of public reason. As normal, Rawls did not believe discussion of duties owed to animals qualified as a subject appropriate to public reason. He specifically states that the preservation of animal and plant species as an example of a political question not answered by public reason (PL, 214). Although in a footnote Rawls does say that it is possible that questions about humans' duties towards the natural world might shift to a question for constitutional essentials or basic justice, once our obligations to future generations is more robustly considered (PL, 246f.) I will discuss this potential as it relates to livestock in the final section of this chapter. The political issues that are not part of the subject matter of public reason, Jonathan Quong calls 'ordinary legislation' (Quong 2014, 266). While the rights or



protection of animals generally would be dealt with through ordinary legislation, I believe certain questions regarding livestock treatment are properly addressed by public reason.

When discussing the scope of public reason in Rawls' theory, the comparative terminology 'narrow' scope view versus 'broad' or 'wide' scope is used (e.g. Quong 2011, Pariente 2020).<sup>20</sup> The narrow-scope view is Rawls' claim<sup>21</sup>; fundamental issues and constitutional essentials are restricted to be justified through public reason, while ordinary legislation can make use of all public debate. The broad-scope view further restricts the grounds of ordinary legislation, requiring that "every instance of political power should be justified as publicly as possible, even when related to non-fundamental issues" (Pariente 2020, 108). Pariente argues that while Rawls limits himself to arguing for the narrow-scope view in PL, that he does not reject the wide-scope view, and other elements of this theory (such as the importance of publicity and the ideal of citizens using public reason) support the conclusion that the wide-scope view of public reason is what would be demanded by Rawls' theory of justice. Quong shares the same conclusion as Pariente, arguing that citizens should not be coerced by reasons they do not accept (a claim Rawls uses in his argument for the publicity condition). He argues that the same reasoning that supports the restrictions of public reasons for social discourse would apply to any legislation and therefore a wide-scope view is the preferred conception.

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<sup>20</sup> Quong uses the terms 'the narrow view' and 'the broad view', while Pariente uses the hyphenated 'narrow-scope view' and 'wide-scope view'. I have used Pariente's hyphenated terminology, as I believe it more clearly distinguishes these terms from the wide and narrow reflective equilibriums Rawls discusses.

<sup>21</sup> Another potential for confusion here with terminology is Rawls' use of the terms inclusive, exclusive and wide with regards to public reason, which he uses to distinguish different views on if non-public reasons (like those from within a comprehensive doctrine) can supplement debate of issues that fall within the scope of public reason (Quong 2011, 275). Rawls argues for the wide view in *The Idea of Public Reason revisited* (CP, 591), but remember that he is referring to a narrow-scope public reason, regardless of which inclusive, exclusive, or wide stance is decided is best regarding the permissibility of non-public, supplemental argumentation.

If the wide-scope argument put forth by Quong and Pariente is reasonable, then it will be more imperative that my proposal regarding livestock can be supported through public reason. Considering the suggestion regarding minimal welfare considerations could prevent citizens from treating animals as they wish, or even as the current industry standard allows, livestock welfare displays the coercive or restrictive quality over citizen choice identified by Quong as political power requiring justification through public reason. While the expanded conditions of the wide-scope view of public reason would certainly include fundamental permissiveness regarding human-livestock interactions, I do not think it is necessary to expand Rawls' stance in this way in order for certain questions regarding livestock to be within the scope of public reason. T. M. Scanlon critiques the wide-scope interpretation of public reason, arguing that the basic structure of society requires a special kind of justification due to not only the pervasiveness of those institutions on citizens' opportunities, but also because the structure is set up before the citizen is born, and therefore they lack the opportunity to influence it, as they would with ordinary legislation (Quong 2011, 276). As I discussed in the previous chapter, the basic structure includes the institutions governing property rights (PL, 214). Livestock make up a very large and unique type of property as living, sentient beings in our care who contribute towards the accumulation of primary goods through societal cooperation. Livestock animals do not fully cooperate and do not have the status of free and equal citizens, but their lives are managed by free and equal citizens to produce meat, dairy, eggs, leather and other byproduct consumption for (nearly all) free and equal citizens in society. The basic structure's status as the primary subject for a theory of justice comes from, in part, how "designing its institutions in the right way suffices to ensure the permissibility of what goes on 'inside' those institutions" (Quong 2011,

276). If public reason is to determine “who holds property”, it seems that a foundational corollary would be “who [what] is property?”

Throughout history, livestock animals are a unique and persistent form of property and have had a intertwined, dependency relationship with humans in nearly all, if not all societies. Public reason must determine who has basic rights and what these are (PL, 223). As I argued in the previous section, stating that livestock have no rights and are owed nothing through distributive justice, does not remove them from the basic structure; it merely makes it permissible for the institutions they live within to be structured in a way that causes them harm. The principles generated by the parties located in the heuristic of the original position come out of commitments to beings in society who can fully cooperate and who have both, full moral powers. However, the principles they come up with are intended to apply to the whole of society, including the institutions of the basic structure. Due to the persistence in citizens’ desire to raise and use domesticated animals for their byproducts, the parties of the original position would know that they must determine the way in which the principles of justice apply to a substantial category of property that can feel pain. I suggest that the shared physiological capacities of livestock animals in Rawls’ list of primary goods would cause the principles to relate to them insofar as they can share in these, which is to say that they are owed the assurance of living conditions in which they can take advantage of these capacities (health and some obtainment of their desires). If this is the generated conclusion, once the process is undertaken as described in Rawls’ theory, then its category as a fundamental issue would mean that it needs to be argued through public reasons. I have already gone through how this requirement has the support from within many widespread reasonable comprehensive doctrines, but arguing for livestock welfare would seem difficult on the surface to accomplish without reference to moral considerations.

Public reasons for accepting just conditions related to livestock would likely stem from their partial participation in relevant, common democratic values. For example, while something like ‘avoid intentionally harming others’ might be a principle that is generated out of consideration of the idealized citizen, it would apply to all who can be harmed once utilized in a non-ideal collection of beings in society. I believe the reasoning I gave in the second chapter, related to the application of principles to those who participate in society regardless of their actualized capacities, to the varying degree that they can benefit in the relevant way from those goods, would be successful as an argument that stays within the limitations of public reason.

### **Reflective Equilibrium:**

Reflective equilibrium is the last method of justification in Rawls’ political theory left to discuss, combining with public reason, the original position, and overlapping consensus to justify the principles regulating political justice. While the method of reflective equilibrium itself does not bring livestock into the realm of justice as I have argued the other three ideas have, leaving out a discussion of this process from this chapter would obfuscate the complete process of justification that supports my thesis. In Rawls theory, he offers arguments from three points of view; that of the parties in the original position, the point of view of people in the well-ordered society, and the standpoint of people reading his theory today in our current society (PL, 28). Public reason and overlapping consensus are largely the domain of the second, but reflective equilibrium is a justificatory concept for the third point of view, ours. Reflective equilibrium is a process that humans are able to perform as their two moral capacities (reason and a sense of justice) gradually develop into adulthood, enabling individuals to make decisions on issues

related to justice through their intellectual powers of “reason, imagination and judgement” (JF, 29). Individuals would use these developed capacities to consider how well the proposed theory, when taken as a whole, matches their rational intuitions of political justice “at all levels of generality, after due examination, once all adjustments and revisions that seem compelling have been made” (PL, 28). Our intuitions about justice can be made better or worse through the level of information and consideration we have afforded it; in *A Theory of Justice*, Rawls says that our moral sense of justice initially is not the best version of itself (TJ rev., 43). By examining different conceptions and considering relevant factors, the person can either modify their conception of justice in light of this information or have more confidence in their original judgement, which develops their intuitions on justice into a better, more rational intuition. This is the process directed towards acquiring reflective equilibrium. Equilibrium refers to reaching the point where “our principles and judgements coincide”, and it is reflective because “we know to what principles our judgements conform and the premises of their derivation” (TJ rev., 18).

The process of reflective equilibrium can be divided into three, general stages<sup>22</sup>. The first of these is to come up with one’s initial considered judgements about justice, making every attempt to generate these through our best attempt of reason. Rawls identifies certain optimal conditions for considered judgments where “our capacity for judgement is most likely to have been fully exercised and not affected by distorting influences” (JF, 29); such as having enough time to spend on reflection, being calm and invested in the process, but without conflicts of interest in certain outcomes. Once a person has their set of considered judgements about justice they attempt to create a set of principles that, if followed, would lead to those considered judgements. “We hope to formulate these ideas and principles clearly enough to be combined

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<sup>22</sup> The identification of these three stages comes from Scanlon’s chapter “Rawls on Justification” in *The Cambridge Companion to Rawls*, pages 140-141.

into a political conception of justice congenial to our most firmly held convictions” (PL, 8).

However, it is likely that our first attempt to do so will have contradictions between the principles and our conceptions of justice, and thus the third step is to revise either our judgements or the principles, or most likely both, until there is no conflict between the two.

Despite Rawls using the language of ‘having’ or ‘reaching’ reflective equilibrium, it is not a state that can be truly obtained, at least not permanently. This reflection and the back and forth consideration between principles and judgements continues indefinitely, as it would lose its justificatory confidence moving forward at the point that rational reflection stopped (PL, 97).

Recall that the process of reflective equilibrium is something that people reading Rawls theory can undertake, it is the way in which people can make up their mind about what to think and what they judge to be best. People could undergo this reflective process of their beliefs on merely an internal scale, which would be the process of narrow reflective equilibrium. Rawls distinguishes between wide and narrow versions of the reflective process, as while both technically fit the definition of reflective equilibrium, both do not confer the same level of justification or usefulness intended by Rawls of the process. With narrow reflection, an individual would only consider their own judgements and ensure that there is logical consistency between our principled conception of justice and our initial judgements. It is likely in the narrow scenario that the individual’s sense of justice will largely stay the same (TJ rev., 43; JF, 29). Wide, in contrast to narrow, reflection is expanded to consider all, or as many as possible, “conceptions of justice and the force of various arguments for them...this reflective equilibrium is wide, given the wide-ranging reflection and possibly many changes of view that have preceded it” (PL, 384f.). When undergoing wide reflection, the person is not looking for a theory that fits their view best. They look at all major traditions for the view that makes the most sense, while

their judgements change as they read through the arguments, and back and forth until they finally reach wide, reflective equilibrium. It is this version of reflective equilibrium in which the principles that end up matching with ones' sense of justice after this process, have their status as justified to the person who went through that process.

Reflective equilibrium gives individuals an avenue to have confidence in their beliefs of what justice is and what it requires of us and our society. "No political conception of justice could have weight with us unless it helped to put in order our considered convictions of justice at all levels of generality, from the most general to the most particular" (PL, 45). A political conception of justice that manages to do this, after careful reflection and affirmation by each citizen, gives individuals good reason to take the conclusions seriously and regard them as having authority over their lives. Wide reflective equilibrium, when taken alongside reasonable overlapping consensus, is how a theory of justice can be publicly justified.

"This basic case of public justification is one in which the shared political conception is the common ground and all reasonable citizens are taken collectively (but not acting as a corporate body) are held in general and wide reflective equilibrium in affirming the political conception on the basis of their several reasonable comprehensive doctrines" (PL, 388).

The political conception that is affirmed through wide reflective equilibrium by all citizens who hold reasonable moral doctrines, would cause the overlapping consensus required for stability of that conception of justice, and it would be fully, publicly justified. Fully justified, but not permanently, as the process of reflective equilibrium is ongoing, as discussed before. In summary, I have discussed four connected aspects that lead to the justification of principles of justice; there is *pro tanto* justification from building such principles out of the basic shared elements of political cooperation (this includes the original position), there is full justification from within each citizen (through the process of reflective equilibrium) and internal justification

through reasoning from one's own values (as part of overlapping consensus), and finally public justification through the process of public reason (PL, 386-7).

### **Intergenerational Justice:**

Considering the additional burdens of justification and reasoning for issues of basic justice, is there room for livestock to be removed from this realm if we consider their relationship with humans as nonessential? Put another way, why is it that human use of animals is essential to the extent that it would be a known fact within the original position? It is only once this relationship (or category of property usage) is included in the well-ordered society that determining the extent of their consideration under the scope of justice is required. The reason that I believe the participants in the original position would need to account for livestock animals comes out of the duties of intergenerational justice and the just savings principle. In this section I will not be providing reasoning for my claim that livestock would be owed considerations of welfare, instead I will be arguing for their importance for being included in the basic structure, which accords them the status of being within the scope of justice.

I referenced earlier, in the section on public reason, Rawls' claim that there are limited circumstances that will place questions about nature into the scope of the basic principles. He thinks this would arise out of our obligations to future generations or other societies (PL, 246f.). The obligation to other generations than the present originates in Rawls' aim for his political theory to create fair terms for social cooperation *over time*, from one generation to the next. In *Political Liberalism*, Rawls revises his theory to respond to criticisms of his solution in *Theory of Justice* to the issue of how to ensure that there are sufficient resources for future generations to



maintain a just society. His original suggestion is that the parties in the original position would be motivated to create principles that work to satisfy the needs of future generations out of their personal desires to ensure their offspring will have a good life. Thomas Nagel, Derek Parfit and Jane English all pointed out that this is an assumption of altruistic motivation that could very well not be present in the citizens the parties in the original position represent, and that adding a different constraint could remove this assumption but still ensure the parties commit to saving resources for other generations to use (PL, 274f.) In PL, Rawls takes on their suggestion and introduced the constraint that the principles chosen be ones they would want previous generations to have followed and future generations to follow (PL, 274). Therefore, principles would not be chosen that if previous generations had followed them, it would leave nothing for the current generation that the parties in the original position represent. The ‘just savings’ principle therefore is the principle agreed upon by the parties as the amount of resources saved (“what fraction of the social product”), rather than distributed to current members of society according to the principles of distributive justice (JF, 160).

Dominic Welburn advances an account of how the just savings principle will lead Rawls’ political theory to include environmental commitments in his book *Rawls and the Environmental Crisis*. He highlights the need for the parties in the original position to deliberate on what future generations will need, and what resources must be reserved, in order to determine how to enact a principle of just savings. This deliberation must include, Welburn says, “substantive discussion of green concerns” as many environmental crises would severely impact the ability of future generations pursuit of the good (Welburn 2017, 45). Even though the just savings principle is committed to out of self-interest, the way in which it commits citizens to taking up a sort of stewardship of the next generation gives Rawls’ theory an additional avenue to the breadth of it

considerations, as citizens could have a wide variety of resources essential to their personal conception of the good. Intergenerational justice works to ensure that future generations have a similar ability to thrive as current citizens, which is done in part through the parties in the original position's choice of principles that "favor principles which protect a wide range of determinate (but unknown) conceptions of the good" (PL, 325). Welburn emphasizes that Rawls' recognition of individuals as self-authenticating sources of valid claims makes their *choices* the source of this value (Welburn 2013, 61). It is in the benefit of the parties in the original position to choose institutions in the basic structure that work towards ensuring a wide variety of the things many people consider to be essential to pursuing their unique conception of the good.

Welburn gives the example of preserving access to woodlands, which would be a valued good for several types of people for different recreational reasons, such a place to hike or as an object of study for naturalists (Welburn 2013, 62). The ability to raise animals and to consume and use their byproducts is a pervasive and persistent element across a wide variety of conceptions of the goods. Husbandry (livestock rearing) is a traditional occupation that still employs and provides livelihood for 1.3 billion people globally (FAO 2022). The consumption of meat is a dietary staple for much of the globe, with 34% of global food protein supplied from livestock (FAO 2022). Livestock convert inedible to human grasses and grains into a calorie dense food source, which was as important historically as it is today, with 86% of global livestock feed intake made of resources that are not edible by humans (FAO 2022). Beyond the importance of the production of livestock animals into food, both economically and nutritionally, the human-animal interaction that this production leads to is culturally and socially important. Farm animals have played such a large social role that toddlers today still learn the names and sounds of farm animals before almost any other category of knowledge. While it is possible to imagine a society

that does not use animals, and veganism is a choice that individuals can make for their conception of the good, the principles governing the design of the basic structure are chosen by individuals who do not know their conception of the good. The importance (economically, nutritionally, morally, socially and culturally) of raising animals for consumption is strong enough for our generation, and past generations, that it would be in the best interest of the parties in the original position to enable it as a choice for future generations as well.

To be clear, meat itself is not a primary good that needs to be assured due to that status. It is the commitment to an equitable distribution of material and cultural goods for each generation, along with the status of meat and other animal products as a socially-entrenched important part of many different conceptions of the good, that causes the commitment to facilitating this category of property ownership and use of animal lives. Welburn's argument for how intergenerational justice gives robust commitment to environmental well-being does not work for livestock in the same way. Our current intensive confinement system of livestock rearing is evidence that we could ensure that livestock are around for future generations without treating them well, due to the technological advancement causing a disconnect of the traditionally linked factors of animal wellbeing and animal production (as discussed in the first chapter.) Intergenerational justice merely provides supporting evidence that livestock rearing is a desired institution in the basic structure of the well-ordered society, and thus puts the parties in the original position in a position where they would need to determine what principles regulate the treatment of these living beings as a unique type of property.

## **Conclusion:**

If such a principle were to effectively regulate the institutions of the basic structure as is required in a well-ordered society, then I suspect the consensus would be even more widespread than what I discussed is represented through beliefs found in our current society. Similar to Rawls' psychology studies showing that a person's belief regarding justice are influenced by the justice they experience growing up, experiencing positive animal welfare is likely to contribute to a person's ideas regarding the proper treatment of animals. For example, the AACCAP reports that children who grow up around animals have more respect for all living things compared to those who do not, and children who have experiences in nature are more likely to demonstrate a commitment to protecting the environment as adults (AACCAP 2022; White and Stoecklin 2008). Edward Wilson, a world-renowned biologist, advances his hypothesis of the existence of an innate emotional affiliation of human beings to other living organisms, which he calls biophilia. While this is an evolved characteristic of humans, it is interfered with in the modern world through learned patterns of opposing behavior, the primary of which is a lack of exposure and unfamiliarity with the natural world (Wilson 2013, 31). In our current society, the details of livestock rearing are unknown by most of the public and an increasingly small proportion of the population has experiences with farm animals during their lifetime. In the well-ordered society, where the public have the knowledge necessary to trust that the institutions of the basic structures are effectively regulated by the principles of justice (a part of the publicity condition), then the just treatment of livestock would be either experienced or known about to the extent where this trust would be generated. Such exposure to farm animals being treated with good welfare would seem to lead (based on the comparison with the studies on exposure to nature and animals in children) to a greater consensus from within personal comprehensive doctrines that

this treatment is owed to them. I am reminded of the parallel with lab animals; after a generation of scientists has practiced under the Animal Welfare Act and its standards for pain management in laboratory animals has been a standard for a generation of scientists, there would be strong moral resistance to returning to previous experimentation standards even if the regulations were dropped.

In this chapter I have discussed elements of Rawls' process of justification as they relate to my claim that livestock animals are subjects of justice and owed consideration of how the principles of justice would affect their treatment. I have not undertaken the process that generates these principles, which would require thorough and extensive reasoning from the standpoint of someone in the original position with the restrictions of the veil of ignorance. However, as I discussed in the previous chapter, I think that while the set of primary goods and distribution principles are determined through consideration only of those with the full moral powers, they apply to all beings in society to the extent that they have relevant participatory capacities for the goods which are distributed. Livestock animals have the capacity for a subset of primary goods, health and fulfilment of their natural desires, and with Dawkins' definition of welfare mapping onto this subset, I believe a principle of justice granting livestock minimal welfare standards for their care to be a reasonable suggestion as to what they would be owed through Rawls' theory of justice. While I am not making a moral argument regarding livestock welfare, the widespread support of this claim from many reasonable comprehensive doctrines gives it the support of overlapping consensus and the stability that comes from such consensus. This chapter and the previous one are broadly representative of Rawls' first and second stages in his account of justice as fairness. In chapter 2, I have first stage reasoning for livestock inclusion based on freestanding arguments related to the fundamental conceptions of a democratic society. In this chapter I

continue with second stage reasoning related to the stability of such principles when brought into a society characterized by moral pluralism, as Rawls says that the freestanding argument is not complete until this can be shown (PL, 141f.). While the details of the content of the principle regarding the just treatment of livestock is not thoroughly proven in this project, the necessity of such a principle being generated and the sufficiency of the second stage support are significant departures from previous attempts at animal inclusion in Rawls' theory of justice.

## **Chapter Four: Literature Survey**

The purpose of this chapter is to give a complete view of the strategies attempted for animal inclusion in Rawlsian theory, and the criticisms of such attempts. I believe that I have included a larger number of theorists here than are typically included in literature reviews, but thematically only a few strategies emerge, each of which receive nuanced alterations between theorists. Much of the debate regards the details and comparative success of an argument that has been present from the first article published on animals in Rawls' theory, which is the modification of the restrictions behind the veil of ignorance in the original position to add ignorance of species membership. This chapter is more narrowly focused on attempts and critiques of animal inclusion in Rawlsian theory and does not cover arguments for animal rights outside of the limitations of Rawls' theory. Due to its perceived inability to appropriately accommodate animal rights, references to the criticisms described in this chapter are used to justify the dismissal of contractualism in favor of other political or moral theories. This chapter aims to provide a thorough understanding of the debate surrounding Rawls' ability to accommodate animal inclusion. At the end of the existing literature review survey, I will include a final discussion of how the argument I make in this dissertation is different from any approach taken thus far.

Throughout this chapter I assume the reader is familiar with the details of Rawls' theory, due to my explication throughout the rest of this dissertation, chapters two and three specifically. The reason this literature review is located at the end of the dissertation is so that I could cover

the nuanced points regarding the original position, moral persons and further topics that are the foundation for animal inclusion without repeating much of the explication provided when giving my own theory-oriented argument. This allows me to cover more ground in this chapter, which I believe provides a comprehensive summary of this intersectional subject of Rawls and animals, setting up my ability to defend the claim that I offer a novel approach.

### **The First Decade (*Theory of Justice*-1981):**

When John Rawls published *A Theory of Justice* in 1971, it was quickly lauded as a “magisterial new work” of systematic moral and political philosophy, that provided the social contract tradition with “the most formidable defense it has yet received” (*New York Times*, 1972).<sup>23</sup> Critical responses soon followed, as expected of a quickly established canonical work, but it was the publication of another important work in moral philosophy that would inspire the first consideration of how animals fit into Rawls’ theory of justice. Peter Singer published *Animal Liberation* in 1975, a book that was foundational in the animal rights movement. Singer’s book was not the first argument for moral consideration of animals, it follows in the footsteps of other major works such as Upton Sinclair’s 1906 novel *The Jungle*, and *Animal, Men, and Morals*, published in 1972. The later book is a collection of essays by several authors, including several of the ‘Oxford Group,’ a vegetarian and animal activist group of philosophers at Oxford University. In fact, it was Singer’s review of this book for *The New York Review* in 1973 that he quickly expanded into his 1975 book, *Animal Liberation*. Singer’s persuasive utilitarian

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<sup>23</sup> Cohen, Marshall. “A Theory of Justice, by John Rawls” Book Review, *New York Times*, July 16, 1972, Section BR, Page 1.



arguments and narrative style made many who read it reconsider their preconceived notions of human-centric morality.

Donald VanDeVeer wrote of *Animal Liberation* that reading it shook him from “his dogmatic slumber.”<sup>24</sup> In 1979, just one month before VanDeVeer’s famous essay *Interspecific Justice* was published, he published the first critique of Rawls through the lens of animal rights<sup>25</sup>, titled “*Of Beasts, Persons, and the Original Position.*” In this piece, VanDeVeer is critical of Rawls’ exclusion of animals<sup>26</sup> and gives the first argument for adding a species knowledge restriction behind the veil of ignorance. Broadly considered, this strategy will remain the most influential strategy for animal inclusion through Rawls’ theory up to today. VanDeVeer starts his argument by identifying the purpose of the veil of ignorance that the participants of the original position reason from behind, which he says is to facilitate the impartial choice of principles of justice. While the participants choose principles based on rational self-interest (what they think would benefit themselves the most), they are restricted from knowing their specific position in society, including their sex, race, talents and conception of the good. All details about their life that result from the ‘natural lottery’ of the circumstances into which they are born. And due to this description of the restrictions, VanDeVeer suggests that we can “think of the participants in the original position as yet-to-be embodied or yet-to-be-born souls at least temporarily having the sophisticated capacities to rationally consider alternatives” (VanDeVeer 1981, 369). I will

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<sup>24</sup> VanDeVeer, Donald. (1979) “Interspecific Justice” *Inquiry*, 22, p. 55.

<sup>25</sup> While VanDeVeer’s essay is the earliest *published* work on animal inclusion in Rawlsian literature, it is possible that it is not the first non-published work. Edward Johnson earned his Ph.D. from Princeton in 1976 with a dissertation titled “Species and Morality,” which is one of the earliest dissertations on animal rights. It is possible that his work included references to John Rawls’ *Theory of Justice*, as Johnson’s dissertation is referenced as influencing discussions of reciprocity in works by Lily-Marlene Russow, Peter Singer and Paola Cavalieri. However, the dissertation is housed in Ann Arbor’s University Microfilms collection, and with no electronic copy available I was regrettably unable to verify if Johnson ought to be awarded the credit for first to write on this intersectional subject.

<sup>26</sup> The phrase ‘nonhuman animal’ is used each time instead of animal in several of the pieces, but apart from the context of a direct quote I will be referring to nonhuman animals as ‘animals’ throughout this chapter.

return to this step later on in the chapter, as this idea of the original position as being prior to the natural luck of birth (rather than a thought exercise of restricted reasoning) is used by several theorists before being attacked as a significant error by critics.

Having established that the veil removes bias by removing any circumstances that are the result of the natural lottery, VanDeVeer believes that this intention contradicts Rawls' claim that only moral persons deserve treatment restricted by the principles of justice. Recall from my previous explanation that moral persons are persons who have both moral capacities, a sense of justice and a conception of the good they pursue through a rational life plan. VanDeVeer points out that not everyone is born with such capacities, and therefore it comes down to natural luck whether or not you are a moral person, making moral personhood a morally arbitrary characteristic. As the veil of ignorance is meant to restrict knowledge of all such arbitrary characteristics, ones being or not being a moral person ought to be restricted as well. Principles of justice would therefore be chosen based on mitigating the risk of being born non-rational. The difference principle is identified by Rawls as the rational choice of participants who do not know their comparative level of advantage, to minimize their potential harm and disadvantage regardless of societal position. VanDeVeer reasons that nonmoral persons would be in this least advantaged position compared to persons with these capacities, and thus the rational, self-interested choice when one doesn't know if one is or is not a moral person it to include both moral and nonmoral persons in the division. The last step for VanDeVeer is to argue that animals are also included, which is straightforward once these previous premises are in place. The veil of ignorance restricts all knowledge that is arbitrary, and with knowledge of one's level of rationality already removed, in order to retain knowledge that you will be human once you are out from behind the veil of ignorance, there would need to be an argument for why 'being a

human being' is morally relevant. Without such an argument, VanDeVeer believes that he has proven that the original position has been designed to guarantee speciesist principles, which is contrary to the impartial intention of the original position (VanDeVeer 1979, 374). Therefore, the more rational version of the original position is one in which species membership is unknown. The caveat here is that this will be limited to sentient species, because if someone was born into a species who lacked the ability to be better or worse off, then they would not care about their circumstances, nor could more resources improve their level of disadvantage.

With this paper VanDeVeer sets up the trajectory for literature regarding animal inclusion in Rawls' theory of justice; nearly every paper I talk about will either support or reject a modified original position. Of course, this makes sense, the original position's fundamental role in the generation of principles that regulate conduct and award rights makes it an important starting point for the subject matter of animal rights and human conduct towards animals. Two years after VanDeVeer's paper was published, three essays are published in response, all of which become foundational for Rawlsian animal theory. Michael Pritchard and Wade Robison become the first to give a counter argument against the species-restricted veil in their 1981 co-authored article "Justice and the Treatment of Animals: A Critique of Rawls", a paper whose larger focus is a dismissal of Rawls' theory as a whole, due to its inability to accommodate animals in considerations of justice.

Pritchard and Robison's issue with VanDeVeer's modification of the original position<sup>27</sup> is that by bringing in nonmoral persons as subjects of justice, it means that the contractarianism of the theory is abandoned. The justification for accepting the principles is at least partially lost

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<sup>27</sup> They do not mention VanDeVeer by name in this paper, they only refer generically to arguments which "lower the veil of ignorance so that the participants might end up, for all they could know, being animals once the veil is removed" (Pritchard and Robison, 60).

when justice loses its condition of reciprocity. Including animals “effectively destroys one of the most powerful features of Rawls’ contractarian justification of his theory: that a strongly egalitarian theory is chosen by self-interested persons” (61). Being able to keep the terms of the contract by restricting one’s behavior in accordance to the principles of justice is an essential part of Rawls’ theory, and by including those who cannot do this, it means the principles no longer represent a contract. In order for Pritchard and Robison to come to this conclusion following the modification of the veil, they are assuming that when the participants choose to include animal protections as a result of the ignorance of their species, it means that the contract generated, once moved outside of the veil into real members of society, would also include animals. This is not necessarily the only interpretation; in choosing principles that include animals, it could be that the contract (once outside of the original position) is between only moral persons, but they have already agreed to the rights or principled treatment of animals. Pritchard and Robison do not explicitly commit to either interpretation, but for their criticism of the modified veil to work, they must be making the first sort of claim. We will see that future advocates of the modified original position will use arguments of the alternative interpretation to maintain the contractualist element. Additionally, while they do not believe it constitutes as large of an issue as the previous theoretical flaw, Pritchard and Robison also point out the difficulty of using a species-restricted veil to determine calculations of least well off for the purposes of just distributions (Pritchard and Robison, 60).

Due to their acceptance in Rawls’ claim that the domain of justice only includes moral persons, they do not have a problem with the conclusion that cruelty towards animals is not unjust. They accept that there are other categories of duties that moral persons can be restricted by outside of justice (a claim that Rawls also asserts, as we will see in more detail with Tom

Regan's article next.) The issue though is that Rawls' theory has no method by which alternative moral considerations can restrict, limit or compromise with the principles of justice. Considering the conditions that the participants in the original position are choosing under include moderate scarcity, Pritchard and Robison argue that the only rational decision is to decide to treat animals as resources to be taken advantage of, so as to increase the pool from which their goods are distributed, and thus increasing their share. Acting purely out of self-interest would determine that "it is certainly not rational for them to accede to a lesser amount by, say, granting a right to life to nonparticipant sentient beings who have no right to have their interest in such a right taken into account" (Pritchard and Robison, 57). While individuals might choose to give up their resources to animals out of respect of their moral beliefs once outside of the veil, nothing in Rawls' theory allows conceptions of justice to engage with the proper way to treat sentient animals or be limited with this respect. As covered in the first chapter of my dissertation, extreme harm has come from valuing livestock animals only in terms of their resource generation, with a theoretical refusal to engage with their sentience. And for Pritchard and Robison, that is a damning criticism for what purports to be a complete theory of justice.

In the same year that Pritchard and Robison's critical essay was published, the well-known animal rights advocate and theorist Tom Regan also wrote a critical assessment of Rawls' comments on duties and their application to animals. Regan's essay does not engage with, or mention, Pritchard and Robison's essay on the topic of duties, as presumably he wrote this piece before theirs was published, considering the close release date of the two works. In this paper, "Duties to Animals: Rawls Dilemma," Regan argues that Rawls' comments on natural duties conflict with his assessment of animals' exclusion from the theory of justice. Natural duties, for Rawls, are duties required of moral persons regardless of their voluntary desire to uphold them

(TJ, 114) and must be carried out by all persons, no matter their location in society and status with respect to level of well-off (TJ, 115). Two examples of natural duties Rawls gives are the duty of justice and the duty not to be cruel. The first of those only holds between moral persons, but the second is also applied to animals. In *A Theory of Justice*, Rawls writes “it does not follow that there are no requirements at all in regard to them (i.e., animals)...Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil” (TJ, 512). Regan takes Rawls wording in this section to affirm that moral persons have certain requirements owed directly to animals, namely, the duty not to be cruel. Regan identifies that this is proof that natural duties are being inconsistently applied (Regan, 77). If Rawls believes the duty not to be cruel applies to animals, then the duty of justice also must apply to them. And if the duty of justice does not apply to animals, then neither is there any duty to avoid being cruel to animals. This contradiction is Rawls’ dilemma identified by Regan in the title of this piece.

A reply piece to Regan’s article was published in the same issue of *Ethics and Animals*, written by Alan Fuchs, who earned his Ph.D. studying under Rawls at Harvard University. Fuchs argues that the apparent contradiction only results from a misunderstanding of Rawls’ claims about duties. Fuchs says that while Regan is correct in stating that natural duties are only due to persons, and that we have a duty to not be cruel to animals, he is wrong in assuming that this duty to not be cruel to animals is *a natural* duty (Fuchs, 85). There are several key parts of Rawls theory which show it is an ideal theory and has a restricted domain, including the conceptions of the well-ordered society, persons as free and equal and the focus on the institutions of the basic structure. Fuchs explains that because the derivation of the principles of justice is limited to these ideal scenarios, its application is similarly limited. Natural duties are among those elements limited in the same way, and thus only apply to moral persons. “Nowhere

is there any suggestion that we have any natural duty to any non-human being, nor could such a suggestion make any sense<sup>28</sup> given Rawls' general account of the principles of justice for individuals" (Fuchs, 84). The quotation that Regan indicated said otherwise, where Rawls agrees cruelty to animals is wrong due to their ability to feel pain and that duties of compassion exist, is located in a paragraph which has the stated point that such duties "are outside the scope of the theory of justice" (TJ, 512). Fuchs admits that Rawls "refuses to speculate" about what these broad moral duties are or how they are derived, but it is clear in Rawls' writing that they are not natural duties, which only include moral persons. (Fuchs, 85). While Fuchs did not respond to it (again, he likely would not have had a chance to read it before writing this essay), Pritchard and Robison's critique would still apply to Fuchs' rebuttal to Regan, as he repeats Rawls' belief that these duties could be added to individual conduct without violating the principles of justice. Dombrowski, who I will discuss more later in this chapter, also criticizes Fuchs on this point,<sup>29</sup> saying that if Fuchs believes the duty to refrain from treating animals cruelly is not a natural duty, and it does not come from the original position, then how can Rawls claim it is a duty at all?

In addition to the error regarding natural duties, Fuchs also addresses Regan and VanDeVeer's mistake about the purpose of the original position, which leads to their suggestion for a species restricted veil of ignorance. Fuchs states that the function of the veil of ignorance is not to maximize impartiality, "it is designed to model the Kantian idea of a categorical imperative, a principle that would be autonomously chosen by free and equal rational beings who merely regard themselves as such and who seek to express that nature in their choices" (Fuchs,

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<sup>28</sup> Underlined emphasis here and in future quotes of Fuchs is found in his original text.

<sup>29</sup> Dombrowski 1998, 68

85). Choosing the principles from such a position endures the characteristics of citizens as free and equal can persist in a society governed by those principles. Any argument that wants to include animals in the position would need to address this foundation, as showing that it would be more impartial is not sufficient to modify the restrictions of the veil of ignorance. As the original position prioritizes the conception of persons as free and equal over maximizing their well-being, it is similarly not sufficient to argue that because sentient animals can be better or worse off, that the original position can be used to increase their well-being. Rawls' original position is not just used to increase the well-being of the participants, but "to establish a mode of existence that best expressed and preserves their nature as free and equal rational beings" (Fuchs, 86). Since animals do not have the nature of being free and equal rational beings, they are not the sort of beings whose nature is addressed by the original position, and should not be added to the parties of the original position through a species restriction added to the veil.

Fuchs' does admit that animals are excluded only as long as they fail to have such capacities. He suggests that if we discover that dolphins have a conception of their own good and act in accordance to mutually beneficial principles, and so on (which he believes is not entirely unlikely), then we would need to include them as parties in the original position, as their nonhuman body and foreign language are not morally relevant factors of exclusion (Fuchs, 86). Fuchs doesn't address how this would change the principles generated or the basic structure, even suggesting they could be treated like infants who cannot communicate their needs. This seems suspect to me, as in the original position their needs would be communicated through the representatives, and just treatment of dolphins as equal moral subjects could radically change the makeup of the basic structure. The dolphin dilemma aside, Fuchs' conclusion is that Regan's criticism of Rawls' theory fails due to fundamental misunderstandings of Rawls' theory, but



acknowledges that Regan could well have other reasons to reject Rawls' theory due to its failure to include animals. Indeed, two years later Regan would publish his seminal book *The Case for Animal Rights*, in which he argues that contractualism fails due to its awarding rights only to those with rationality and argues instead for a theory which acknowledges the intrinsic right to life in all sentient beings. I will not include any more than this brief description of Regan's theory, as this chapter is focused only on writing as it engages with Rawls' theory.

### **The Second Decade (1982- *Political Liberalism*)**

After Fuchs' dismissal, Robert Elliot writes the next essay which argues that, once properly considered, Rawlsian principles of justice would include animals. In his 1994 article "Rawlsian Justice and non-Human Animals," Elliot argues that excluding animals results from nonreflective human chauvinism on the part of Rawls and that this exclusion will damage society by straining just institutions. Elliot begins his essay by highlighting the harm that can come from maximizing resources through animal use, as was mentioned by Pritchard and Robison earlier. One of the roles of justice is to consider which constraints of the maximization of welfare are permissible, extending such considerations to animals seems to Elliot to be a required element of a definition of justice. He gives the example of an imaginary scenario in which a rare animal is painfully trapped and skinned for its valuable fur and suggests that part of what is wrong is not just a moral disagreement, but that such actions violate justice. And he believes that how this violates justice can be verbalized through Rawls' theory of justice. As a brief aside, I'm not sure why Elliot decides to describe an imaginary scenario rather than refer to the real treatment of livestock animals that fits perfectly with his description. Even within the example of fur trapping, mink are farmed extensively in the United States, kept in cramped and poor welfare conditions,

and slaughtered through painful methods, as the fur industry is among those exempt from the Humane Methods of Slaughter Act. I find it interesting that both Pritchard and Robison and Elliot are making the point about using animals as resources, which clearly has ramifications for the meat industry, but sidestep it or judge that it would be less convincing to have concrete reference to husbandry practices.

After providing a summary of Rawls' reasoning for the exclusion of animals from considerations of justice, Elliot criticizes Rawls through the appeal to marginal cases strategy. This line of reasoning is common in discussions of animal rights; it demonstrates that for each characteristic put forth to justify why humans matter more than or rather than animals, there are some humans who do not have that capacity and/or some animals who do. Elliot uses this line of reasoning to find fault with Rawls' claim that excluding humans who fall below the line for moral personhood would strain just institutions, but excluding animals would not cause the same strain (Elliot, 96). Rawls gives no evidence supporting his conclusion that the first is true, but the second is not, as *being human* is not a relevant distinction in Rawls' theory. Elliot also points out Rawls displays human chauvinism when he links the notion of humanity with having a sense of justice in the passage "by understanding what it would be like not to have a sense of justice—that it would be to lack part of our humanity too" (TJ, 489). By having the capacity of justice identified as constitutive of humanity, rather than any other aspect, Rawls helps to secure the conclusion that only human beings are owed justice.

With these critical points laid out, Elliot can argue that removing the inconsistency in the first case and the chauvinism in the second, animals would be properly recognized as subjects of justice. Related to the marginal case argument, Elliot offers some evidence for cases where nonhuman animals demonstrate some capacity for a sense of justice as well as argue that this

capacity is realized in humans to a much lower degree than Rawls assumes. He points out that many people are self-interested or “rotten, corrupt or exploitative” (Elliot 97) to the point that they are unwilling to give fair due to *all* others, and thus demonstrate that they lack a sufficient sense of justice. Further, the three psychological laws that Rawls identifies as present and work towards developing a person’s sense of justice (TJ, 490-491), there are similar mechanisms in non-human animals, where they have socially enforced behaviors that work to maintain cooperative social life, including quite advanced social etiquette and rules, which are noted by zoologists and ethologists. Elliot rebuts the critic that tries to distinguish these as just learned behavior, and not the type of behavior that results from following a moral code (doctrine) as Rawls’ requires in his definition of the capacity for justice, that many average citizens fail to do this as well. He references Lawrence Kohlberg’s 1975 studies, which showed only 35% of the population develop at some point in their life a principled morality.<sup>30</sup> This portion of society is much greater than Rawls’ assumption that only an extreme few humans would lack such a capacity, at least at some point in their life. Elliot points out that considering how many humans lack this capacity, the idea that the theory could apply to most of society even by restricting consideration only to moral persons is undermined. Therefore, for Rawls’ theory to apply to our society, it must include beings who do not have full moral capacities (including animals), which means that the participants in the original position must not know which type of being they represent when choosing the principles (Elliot, 100). Elliot considers Pritchard and Robison’s criticism that the realistic calculus of what is owed to animals would be too complicated to be feasible and disagrees. Elliot counters that it would be easier to determine what animals are owed than it would be for humans, considering the satisfaction of animal desires is more

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<sup>30</sup> Kohlberg, Lawrence. “The cognitive development approach to moral development”, *Phi Delta Kappan*, 56, 1975. p. 10.

straightforward. Considering participants behind the veil have general facts about human function, so too would they have these about animal function. Further, primary goods already include the kinds of things that promote the interests of nonhuman animals, especially when income and wealth is thought of as procuring for themselves habitats or resources that they need to thrive (Elliot 102). While the calculus of who is owed what is hard to begin with, adding animals does not make it prohibitively more difficult than it already is.

Elliot's last defense of animal inclusion regards the contractualist, reciprocal element of Rawls' theory, which Pritchard and Robison argued prevented animals without the capacity for reciprocal treatment from being subjects of the contract. "There is a distinction between claiming that a sense of justice is required by all parties to a contract in order to ensure that it be kept and claiming that a sense of justice is required (by someone) in order that a contract be kept" (Elliot 105). While the second is true, the first goes beyond what exists of real contracts. Even human adults with full mental capacities attempt to break contracts, it is the role of societal institutions to prevent this and force all participants to abide by the terms of the contract. The contract terms (the principles of justice) are determined in a hypothetical and idealized position and are then used to define what justice is for the real world. These rules will still have to be enforced, even if society was restricted to rational persons. "What is required for justice to prevail is that those with a sense of justice be sufficiently numerous and appropriately placed to enforce justice" (Elliot 105). Therefore, while there will need to be fully moral persons for society to be structured in accordance with the principles of justice, that does not mean that only fully moral persons participate in the societal rules. While it will be helpful for the stability of a society for most humans to have the capacity for justice, so that they willingly accord to the principles, animals are actually less dangerous to instability, as animals are rather easier to be prevented

from breaking the contract (Elliot 105). Elliot concludes that the modified original position is possible, as justice, as determined in the hypothetical scenario, is not broken because in the real world an animal is unable to agree to uphold a contract with a human.

Brent Singer agrees with Elliot's conclusion that animals would be subjects of Rawlsian justice and credits his argument that not all parties to a contract need to be rational for inspiring his, slightly modified argument on the same theme. Singer claims that Rawls, contrary to Elliot's claim, is correct that all parties of the contract itself are fully rational beings. This is true due to the conditions of the original position and how Rawls describes the participants behind the veil, and this stays true even when the species restriction is added to what the participants do not know about those they represent. "Since there are no nonmoral beings *behind* the veil of ignorance, all beings who are party to the "contract" are also beings who can keep the contract" (Singer, 224). Notice that this is a different argument than Elliot gave; Elliot said that it is false that all parties must be rational, while Singer is saying that a modified veil does not require any nonrational parties be party to the contract. Fuchs therefore was mistaken, according to Singer, in thinking VanDeVeer's species-restricted veil requires nonrational members inhabit the original position.

Singer then responds to what he sees as a stronger criticism of the modified veil, which is that the chosen principles no longer represent principles *of justice*, due to the inclusion of nonmoral persons. Considering the participants in the original position are choosing principles out of self-interest, the dispute between Fuchs and Elliot is not a disagreement about how wide to cast the net of justice, but about what counts as self-interest. "Such rational beings are to choose principles that best manifest *their* freedom (TJ, 255), and hence principles of justice are *self*-interested principles, where the "self" involved is a *rational* self" (Singer, 225). A critic of

animal inclusion would suggest that a rational self-interested being could not choose principles with benefit a nonrational animal out of self-interest. However, Singer believes this is mistaken and offers two reasons for how rational self-interest would still include animals. The first reason is that requiring consideration of what is good for the rational self does not mean *only* considering what is good for the rational self; “reason is not a tyrant that perceives its own good in the disadvantage of its subjects, but a sovereign that conceives its own good in the advantage of rational and nonrational alike” (Singer, 226). Further, there is motivation to consider nonrational interests, because there is a partial but direct interest in the satisfaction of nonrational desires that animals and humans share, such as health. Such goods are chosen not just for their rational self, but as ones living self.

“On the contrary, *behind* the veil of ignorance, reasoners know that *parts of themselves* (their nonrational parts) are *the same* as parts of what might be other selves,<sup>31</sup> and hence, out of a *complete* self-interest -- that is, out of an interest for *all parts* of themselves, rational and nonrational alike -- reasoners must take into account the nonrational interests of others as well” (Singer, 226).

If the participants, once out from behind that restricted veil, turned out to be a nonrational animal, certain parts of the rational self that decided would still be present, and it is these parts that are taken into the self-interested account of principles chosen. This argument means that Singer is able to accommodate the restriction that only rational beings are participants in the original position, and that they choose principles only out of self-interest, but still have principles generated which apply to the potential that the parties represent non-humans when the veil is lifted. As Singer puts it, while the objection that an otter is different from the rational theoretical

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<sup>31</sup> This is the correct spelling, Singer uses the example of an otter throughout this section of his paper.

participant is true, different does not mean completely other, because relevant aspects will be the same in all sentient animals, including humans. At the end of this essay, Singer precipitates *Political Liberalism*'s focus on stability, when he warns that any requirement of ideal theory that requires people to give up what they wish has the potential to undermine the stability of society. However, the practical realities of implementation should not force philosophers to give up what is ideally correct. It is the job of philosophers set out the ideal, the job of politicians to prevent the implementation of such ideals from harming citizens, and the job of political philosophers "through compromise, not to lose sight of the ideal of justice toward which they nevertheless seek gradually to lead society" (Singer, 231).

Peter Carruthers utilizes an appeal to stability and the realities of real human societies to argue against the inclusion of sentient beings in the application of principles,<sup>32</sup> specifically against the marginal cases type argument we saw Elliot make. Carruthers identifies the importance of morality in the role that the selected principles play in facilitating cooperation between fully rational agents. The reason rational agents in the original position choose to include babies, or other humans without rational capacities, from benefiting from the principles, it is due to the potential for instability that leaving them out is likely to cause, knowing the details of human psychology include strong attachment to nonrational beings such as babies or family members with intellectual impairments. This motivation forms a clear line for preventing the slippery slope argument, which says that if you will include nonrational humans, then sentient animals should be included, and then without a clear division in animals, semi-sentient animals such as fish or crustaceans must be included too, and then if these are included, all living

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<sup>32</sup> Carruthers, Peter. (1992) "Contractualism and animals" *The Animals Issue*.

things should be included, and so on. Carruthers argues that this slippery slope objection to the inclusion of non-rational humans fails, because of the appeal to the stability of a society of rational humans who generally have strong attachments to non-rational humans; there is a “practical threat to the welfare of rational agents” by leaving out nonrational humans (Carruthers 115). However, this motivation is not present when applied to sentient animals, because that threat to rational humans is missing, due to significantly lower likelihoods of strong attachment to animals and other living things.

Carruthers’ appeal to stability and the slippery slope argument against the marginal cases strategy is not considered successful by future theorists. As I will cover later in this chapter, Mark Rowlands offers support for why sentience is the more reasonable division at which the slippery slope argument fails. The next theorists, whose papers came out the same year as Carruthers’ book, start from the position that the marginal case argument succeeds in highlighting a flaw in Rawls’ theory, and move on to examine what that means for the modified original position. At a conference for the Society for the Study of Ethics and Animals in 1992, which were then published in the journal *Between the Species* later that year, Steve Sapontzis and Lily-Marlene Russow and Steve Sapontzis each presented papers arguing that animal inclusion in Rawls’ theory would count as a modified version of his argument, disagreeing with Singer, Elliot and VanDeVeer’s conclusion that if the internal arguments in *Theory of Justice* were more consistently applied, they would include animals as subjects of justice. Russow and Sapontzis present differing opinions on what elements of Rawls’ theory cause the exclusion of animals to remain permanent, meaning that a modified original position, while necessary, represents an alternative theory. Both Russow and Sapontzis Russow agrees with the aforementioned theorists that the strategy of marginal cases identifies an inconsistency with Rawls’ theory, but any



attempt to resolve that inconsistency would need to come from principles outside of the theory as provided.

Russow highlights Rawls' commitment to rejecting utilitarianism, an element of Rawls' motivation in the crafting of the original position Russow believes has not been appropriately considered when arguing for its modification (Russow, 226). It is the rejection of utilitarianism that motivates the foundational respect for individuality and develops into Rawls' notion of moral personhood along with the capacities that promote moral development of individuality (having a conception of their good and being able to rationally pursue such a good.) The reason participants in the original position are motivated by self-interest is because respecting one's individuality means accepting that you cannot expect someone to have equal or more interest in fulfilling someone else's desires (Russow 226). The individual's ability to choose their own definition of what is good, what they desire and how they will pursue it, comes from their sense of individuality. The definition of a moral persons as having "a conception of their good (as expressed by a rational life plan)" (TJ, 505), comes directly from the commitment to respect for individuality. Russow critiques Elliot's position because of his failure to consider the importance of a rational life plan. While Elliot thinks we can make assessments from the position of an animal due to what we share with them, Russow believes this misses the relevant aspect of the original position, which is to respect and facilitate the pursuit of life-plans. (Russow 227). As animals are unable to choose to rationally pursue a life plan, they are not the kind of beings who can be in the original position or represented by the beings in the original position.

While Sapontzis agrees that a focus on Rawls' rejection of utilitarianism and his commitment to individuality in his generation of the original position is essential to an examination of expanding it to include animals, he disagrees that this focus inevitably leads to

identifying individuality in terms of having a rational life plan. Granting that Rawls wishes to prevent sacrificing the individual in order to maximize general welfare, individuals wanting an equitable share of goods and protection against being sacrificed would be in the interest of many species of animals, not just human (Sapontzis, 230). Rawls' rejection of utilitarianism only leads him to restrict the original position to moral persons because such persons are the only beings considered in political philosophy up to that point. "Remarks about obligations to other beings have generally been relegated to footnotes, parentheses, and afterwards, especially in the period during which a *Theory of Justice* was being written, which predates *Animal Liberation* by several years" (Sapontzis, 231). Russow is mistaken in identifying the rejection of utilitarianism as preventing the inclusion of nonhuman animals from justice. If this was the only sticking point for including animals in Rawls theory, Sapontzis argues that it would be possible to maintain the anti-utilitarian focus on individuality and have animal inclusion, as principles could be chosen which protect all beings from being sacrificed for general welfare (Sapontzis, 230) Sapontzis ends his essay by identifying the real problem as the contractarian requirement for reciprocity, and gives several criticisms of contractarianism that I've already covered in this chapter. The interesting discussion here is in how the rejection of utilitarianism should factor into discussions of modification of the original position, a point on which they disagree, but they both agree that it will mean that Rawls theory will not extend to animals without modification.

### **Transition to Political Liberalism (1993-1998):**

In 1993, Rawls' second major book, *Political Liberalism*, is released. It takes several years however for the those writing on the intersection of Rawls theory as it relates to animals to include any mention of this work. It takes time for new material, especially dense, book-length

material to be absorbed and processed to the extent that it can show up in extensionist literature. Samuel Freeman wrote in his 1994 review of the book that rather than attempt to offer a critical assessment, he would merely aim at “diminishing the sense of confusion many (including myself) have in finding their way through *Political Liberalism*” (Freeman, 1994, 622). It would take five years for the first attempt at reconciling how *Political Liberalism* changed the strategies available for those who argued for animal inclusion in Rawlsian theory and to what extent.

In the same year that *Political Liberalism* is published, a piece by Tom Huffman was published titled “Animals, Mental Defectives and the Social Contract.” In this essay, Huffman argues for adding a species restriction to the veil of ignorance and does so through the marginal cases argument. While nothing new is added to the debate in terms of subject, this piece is noteworthy for its focus on the marginal case argument as a standalone reason and the extent of the analysis. Huffman concludes that species membership is not a morally relevant characteristic and treating it as sufficient for considerations of justice fail for the same reason that racist principles fail, because of their use of exclusionary reasoning based on morally irrelevant group membership. Huffman’s treatment of the marginal case argument continues to be the exemplar for this strategy from this point forward.

Mark Bernstein also argues that human species membership is arbitrary but does so in a unique way, identifying the relevant arbitrary characteristic as a temporal one. Bernstein believes that Rawls’ requirement that the contractors in the original position have a sense of justice means that animals are not included, at least not directly. Nonrational humans, such as babies or elderly individuals with age onset dementia, maintain their status as subjects of justice because they were, at some point in the temporal line past or future, moral persons. It would be morally arbitrary to base privileges based on what particular time it happened to be at that moment, so

they are subjects at all times. Bernstein uses the phrase “temporal elucidation of fortuitous circumstances” to describe it. For this reason, without the addition of further or alternative reasoning, animals do not count for moral patienthood while (at least many) nonrational humans do. However, if the contractors in the original position, who are currently rational and human, believed that they could at some point in the future become nonhuman, then self-interest would secure moral patienthood to nonhumans as well. While Rawls did not consider this suggestion in his work, we can imagine the Rawlsian response (Bernstein says) would be to reject this possibility, saying that the participants in the original position would have sufficient general knowledge to understand that this is impossible, or at a minimum incredibly unlikely due to its failure to ever happen in the past. Responding in this manner, dismissing the potential for human to animal transformation, is a prejudiced assumption stemming from Rawls’ Western bias. “Although relatively rare in Western culture, it is the norm in the East to believe in reincarnation, where such personal migration need not be limited within a species.” It could be that reincarnation ends up being a false belief, but to dismiss that it could be true denies the belief of millions or potentially even billions of actual moral persons. Therefore, Bernstein identifies the bias in refusing to consider animal patienthood not as a speciesist bias, but a cultural one (Bernstein, 60). Further, such a belief is not a moral belief (the kind of which is disallowed in the original position), as while it has moral implications “the content of the belief itself is amoral” (Bernstein, 60). If anything, it is a metaphysical supposition that cannot be proven either way and has robust support in terms of belief on both sides.

At this point I will pause to summarize the landscape of the literature up to the point of the inclusion of *Political Liberalism*. Broadly, there have been two categories of assessment for whether or not Rawls’ principles of justice apply to animals. The first is in natural duties, or

other moral duties that would either force all duties to apply to animals or would work alongside duties of justice to include animal considerations in determinations of justice. The second, larger, strategy is via the original position and adding a restriction to the veil of ignorance that participants deciding on principles do not know the species of the individuals they represent. VanDeVeer, Regan, Elliot, Singer, Sapontzis, Huffman, and Bernstein all defend some version of such a restriction either being added on or inherent in Rawls' theory, while Pritchard and Robison, Fuchs, Carruthers, and Russow think animals would be excluded. Following the inclusion of the changes Rawls makes in *Political Liberalism*, arguments related to the modified original position will continue, but discussions related to natural duties and duties of morality stop. Accommodating competing conceptions of moral doctrines in a stable society becomes the goal for Rawls in *Political Liberalism*, as I have discussed at length in the preceding two chapters, which means that moral obligations are not reliable as any number of citizens could or could not share them. Any duties of justice are generated through the principles and justificatory processes Rawls provides, so discussing the duties separate from these theoretical mechanisms is no longer fruitful. Further, Rawls comments regarding natural duties to animals in *A Theory of Justice* are not present in *Political Liberalism*. Meanwhile, the process of the Original Position remains largely unchanged. One of the main changes was through, as we saw in Fuchs response to Regan, Rawls clarification that the original position is not to be thought of as a time or place in which people make decisions prior to being born. It is a set of restrictions that model the characteristics of people as free and equal. Before the release of *Political Liberalism*, a lot of the arguments for and against the modification of the original position confuse this point, or at least use language that would be considered imprecise for today's discussions of Rawls theory.

Rawls would have been aware of the suggestions for a species modified restricted veil of ignorance when writing *Political Liberalism*, and his later book *Justice as Fairness: A Restatement*. And Rawls does respond to other philosophical fields' criticism of his original works, but he chooses to not respond to any of the arguments put forth by VanDeVeer, Regan, Elliot or others mentioned in the first part of this chapter. Rawls potentially, or implicitly, responds by modifying the description of the original position to be clear that while participants will not know their natural talents and habits, they do know that their abilities are within a normal human range. However, he doesn't give further explanation for this, meaning the arguments from marginal cases "are not so much refuted as ignored" (Dombrowski, 74). This quote comes from Daniel Dombrowski's 1998 paper "Rawls and Animals," which includes a short section offering the first critical assessment of Rawls' treatment of animals in *Political Liberalism*. Dombrowski summarizes Rawls' attitude towards the issue of animal inclusion as ambivalent. He refers to Rawls explicit admission that his theory of justice as fairness might not be able to include animals or 'marginal cases' while simultaneously having confidence that such extensional issues can be appropriately set aside to be dealt with after justice for 'standard case' humans is worked out. Regarding the quote from Rawls I have mentioned earlier in my dissertation regarding the proper treatment of "animals and nature," Dombrowski says in a final footnote to this paper that "It is troublesome that in *Political Liberalism* Rawls lumps together animals and the rest of nature without even a hint that there might be a difference in moral status between coyotes or pigs, on the one hand, and ferns or rocks, on the other" (Dombrowski, 77). Of course, Rawls' dismissal of the relevance of animals in his theory in *Political Liberalism* does not stop theorists from arguing that there are valid methods of incorporating consideration of animals into Rawls' theory of justice.

### **After Political Liberalism (the 2000's):**

Ruth Abbey sees the release of *Political Liberalism* and its focus on pluralism as depleting most of the resources available in *Theory of Justice* for protecting animal well-being through Rawls' theory. Abbey suggests that the only potential avenue left is through an appeal to the 'reasonable' half of reasonable pluralism (Abbey, 11). If it could be proven that cruelty towards animals (or some more stringent belief of animal treatment, such as a duty to respect intrinsic value) fit Rawls' definition for unreasonable. If this could be argued, from within Rawls' theory, then any doctrine that includes such a belief or belief system would be excluded from the toleration of pluralism. There is some support for this strategy in a parallel example of avoiding racial bias, for example, comprehensive doctrines that promote the systematic superiority of white Europeans would forfeit their status as reasonable. While this example is easily dismissed due to human subordination clearly violating the principle that all humans are free and equal, arguing that certain beliefs regarding animals would not have the same theoretical resources. For this reason, Abbey concludes that it is unlikely that this strategy will succeed, and with the focus on pluralism, she believes Rawls no longer provides any resources for the protection of animal welfare (Abbey, 12).

In an argument reminiscent of Pritchard and Robison's critique that Rawls' theory is unable to accommodate duties outside of justice, David Miller criticizes Rawls assumption that environmental policies (and animal welfare regulation by extension) could be adopted as long as it occurred through the democratic process. While Rawls believes such discussion is outside the scope of justice, there is nothing that prevents policies from being implemented after democratic discussion and voting. The problem with this is that decisions regarding pro-environmental

policies will always involve a commitment of resources, and the distribution of such goods would go towards improving the condition of the worst off, rather than be saved for pro-environmental policies. Any other choice would be unjust. Miller acknowledges that certain environmental goods, such as certain levels of clean air and water, would be protected at the level of justice based on their necessity for improving the condition of the worst-off. However, a large category of environmental goods, such as many individual species and landscapes, would be outside of the scope of this consideration. And, while Miller does not consider domesticated animals, livestock would certainly count as his category of environmental goods whose welfare protection does not improve the position of those worst-off. Dominic Welburn has since published a book on Rawls and environmentalism in which he robustly argues that Rawls does have the theoretical tools to commit to a high standard of environmentalism.<sup>33</sup> For example, the just savings principle would facilitate the choice of principles citizens wish had always been in place, which would create fairly robust environmental protection. But Miller's point regarding a subset of environmental goods not being protected still stands for any species (or landscape) that is not a widespread good valued by citizens substantially enough to be saved for the improvement of citizen wellbeing. I will not delve further into the intersection of environmental philosophy and Rawls in this chapter, beyond what I've discussed in this paragraph, because the strategies that work for environmental concerns will not necessarily work for animals, as indicated with the example of just savings.

Derek Bell argues, contrary to Miller's point, that the democratic process could facilitate even animal inclusion in Rawls' theory. While Rawls theory would not require this sort of voting to occur, the fact that the difference principle is not a maximizing principle allows room for

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<sup>33</sup> Welburn, Dominic (2017). *Rawls and the Environmental Crisis*. Routledge.



humans to collectively decide to do without a certain level of luxuries, in order to secure resources for the benefit of non-humans, without violating the requirements of justice (Bell, 217). Bell doesn't believe that a restricted veil of ignorance respects the difference between moral agents and moral subjects and the unique harm that can affect moral agents. The representation of moral subjects (or any non-moral agents) is unjustified, because while both share certain interests that can be harmed, only moral agents can be harmed through exclusion from participating in deciding on the principles that restrict their conduct, which occurs in the original position. "If they are excluded from the democratic community, their capacity (*qua* moral agents) to take responsibility for their actions is not respected" (Bell, 219). Animals (and nonhuman nature more broadly), are not entitled to the status of representation during the choosing of principles, just because they ought to have their interests protected. This protection of moral subjects' interests is not assured through Rawls' theory, because it must be citizens (rational humans) who choose to commit to principles which protect nonhuman nature. Remember that Bell believes, contrary to Miller, that a democratic process which gives at least some human citizens the right to represent animals and nonhuman nature is possible and the appropriate accommodation of justice (Bell 220).

Brian Baxter disagrees with Bell's identification of responsibility as the relevant type of harm for exclusion rather than disrespect of their interests.<sup>34</sup> According to Baxter, the reason a moral agent is harmed when they are excluded from decision-making forums (which is the original position in Rawls' theory), is not due to their responsibility being undermined, but because they did not have the opportunity to articulate their interests. Babies, animals, and other

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<sup>34</sup> The dates listed in my bibliography for Baxter and Bell's work shows that Bell published two years after Baxter, which might make Baxter's ability to respond to Bell confusing. Baxter's 2004 book includes reference to a 2003 conference paper that Bell presented, which Bell later published in 2006, modifying it slightly to respond to Baxter's 2004 summary of his (Bell's) 2003 version.

non-autonomous beings also “need to have their interests represented in decision-making forums, inevitably by human proxies” but their inability to voice their interests for themselves is not a justified reason to restrict their representation in the original position, which would prevent their interests from being guaranteed consideration. While he does not find it sufficient due to the argument just covered, Baxter does agree with Bell that Rawls’s theory limits ecological justice (and animal justice) to “within the realm of competing conceptions of the good” (Baxter, 108).

While Abbey, Miller, Baxter, and Bell focus on *Political Liberalism*’s renewed focus on pluralism and overlapping consensus, theorists also continue with the earlier focus on the original position. Mark Rowlands gives what is arguably the most influential version of the modified veil of ignorance argument, post *Political Liberalism*. Rowlands claims that Rawls’ theory awards direct moral status to many non-human animals, independent of their value for or morality-directed affection from rational agents. “If a contractarian position is consistently applied, the recipients of protection offered by the contract *must* include not only rational, but also non-rational, agents” (Rowlands, 236). Rowlands does acknowledge that Rawls’ primary subject of justice is to determine the just method for organizing the institutions of the basic structure, and that assigning the broad rights he argues for would fall outside of that scope. And so in (only) this sense, Rowlands says that his argument is not Rawlsian, but that as far as Rawls intends the theory to be used to continue the project past the starting point of the basic structure (which he does), then this application is entirely consistent (Rowlands, 236).

Rowlands believes he has identified the error made by those who argue against the subjects of justice including animals, which is in moving from the claim that only rational agents formulate and agree to the principles of justice, to the conclusion that those principles apply only to rational agents.

Rowlands argues that this conclusion is false and that contractarianism, including Rawls version of it, is capable of assigning rights to both nonrational humans and nonrational, non-human animals (Rowlands, 238). Rowlands identifies two arguments for the generation of Rawls' first and second principles of distributive justice. The first is what he calls the intuitive equality argument and the second is the social contract argument, and Rowlands further argues that the second is dependent on the first, making the intuitive equality argument the more fundamental of the two (Rowlands, 238). The intuitive equality argument has to do with moral desert, stating that if someone has a property based on the luck of the circumstances of their birth, rather than something they have done, then they are not morally entitled to any benefits that result from having that property. This grounds the justification for the restrictions in the original position; it isn't the fault of someone that they have certain preferences, qualities, and family wealth, but it would be unfair for these undeserved traits to make their life better or worse simply for the luck that they have them.

The intuitive equality argument leads to the social contract argument, which states that due to their cause of natural chance, these traits should not factor in when making decisions about what principles are best (Rowlands, 239). The veil of ignorance is put into place to restrict such information, ensuring that

“no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of a fair agreement or bargain” (TJ, 10).

While the original position is not a real place and the veil of ignorance does not constitute a representation of a person, it is a useful heuristic device used to test and evaluate fairness. The

principles chosen in this manner, which will be used to derive the rights distributed in society, are not restricted to rational agents, because having that rational capacity is in itself an morally undeserved property of the person. In order to not violate the intuitive equality argument, the principles should apply to all regardless of their natural chance properties, it would be unjust to distribute entitlements only to those with the possession of something they did nothing to deserve. Knowledge of one's rationality would be restricted in the original position so that it is a better tool to choose fair principles through, just like it does for other undeserved properties. By choosing with the knowledge of the rationality of the being represented, it brings non-rational beings into the scope of the principles application once chosen. The final step is to restrict knowledge of the represented parties human-being (pun intended), which is a straight forward step once non-rational beings are included, as species is another clear instance of natural chance, and thus is restricted as well.

Rowlands defends his argument from two criticisms we saw Carruthers give in an earlier section. The first is his claim that morality is constructed by humans for the purposes of human cooperation. Rather than engage with proving this claim false, Rowlands points out that any appeal to the origin of morality, even if it is true, will commit a genetic fallacy, which confuses "the origin of morality with the content of morality" (Rowlands, 245). Even if morality is something humans constructed to facilitate human cooperation, this doesn't restrict it from evolving to include a larger scope than it had at the beginning. Rowlands also explains why sentience is the relevant cut off for Carruthers' slippery slope objection. A non-sentient animal or living object would not be able to mind what happens to it, and thus the participants in the original position would have no rational reason to worry about those circumstances happening to them.

Rowlands conclusion that Rawls would assign rights to sentient animals, rests on his identification of the intuitive equality principle (IEP) as the foundational aspect of Rawls' generation of his first and second principle. David Svolba argues that Rowlands misinterprets Rawls' description of intuitive equality, and that Rawls endorses instead an intuitive equality of persons principle (IEPP). "What Rowlands overlooks, I think, is that Rawls's objection to undeserved inequalities is grounded in his affirmation of the moral equality of persons" (Svolba, 979). Rawls' commitment to the Kantian idea of equality, as discussed earlier in this chapter, comes from the respect of moral persons as free and equal. If Rowlands was correct, Rawls would be denying the Kantian principle that persons deserve equal respect. IEP states that all undeserved qualities are morally irrelevant, which means that the capacity for justice and a conception of the good are morally irrelevant, which goes against much of Rawls' writing for the importance of the conception of persons as free and equal. Svolba believes this makes it clear that Rawls does have a commitment to an intuitive equality principle, but it is secondary to its restriction to being only in regard to moral persons. What is worse for Rowlands proposal is that the IEP, even when taken as its own modified version of Rawlsian theory, would still fail to provide a cohesive theory for animal rights. The IEP would prevent nearly every attribute from being considered relevant for an individual's moral entitlements (Svolba, 981). Even sentience, the factor Rowlands picks out as most relevant for moral consideration, is gained through the circumstantial luck of one's birth, and thus would be restricted by the IEP.

A potential avenue for avoiding Svolba's criticism of Rowlands would be to temper his claim that Rawls theory requires animal inclusion to saying instead that it allows for it. Hallie Liberto argues that while Rowlands' arguments prove that species membership knowledge could be restricted behind the veil of ignorance, that those parties would no longer choose Rawls' two

principles of justice (Liberto 299). While this is not necessarily a criticism of Rawls' argument, it is an unintended consequence of animal inclusion that should be considered. Rawls' two principles would be chosen by representatives of rational humans because primary goods distribution allows for a straightforward maximin strategy in increasing the likelihood of raising their level of satisfied desires. When the satisfaction of all animal species interests is included, contradictory species interests will arise. "The problems 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" (Liberto 316). With each case of conflict, principles will need to adjudicate fair use of resources. The reasoning Rawls provides for why agents would prefer Rawls' two principles over the utilitarian principle of maximum average utility would no longer be the most attractive option for agents representing many species of animals.

There is one final argumentative strategy for locating nonhuman animals as subjects of Rawlsian justice, different from those I have discussed so far, which is advanced by Mark Coeckelbergh in his 2009 essay "Distributive Justice and Co-Operation in a World of Humans and Non-Humans." Coeckelbergh argues that the necessary capacity for engaging in a social contract is through the act of cooperation itself, rather than any ontological requirement. Coeckelbergh offers an account of justice that focuses on the relationships between beings rather than on the capacities of the beings. Cooperation in this sense identifies that animals and humans work interdependently to generate advantages. Since justice is aimed at distributing the gained resources of societal cooperation, animals are owed *something* due to their participation in cooperation. "These entities are not drawn into the sphere of justice because they are rational, self-interested, or because they have capabilities, but because they are part of a larger

cooperative scheme that is not completely within our control but that exists and on which human society depends for its operation.” (Coeckelbergh, 75). This certainly doesn’t imply that non-humans are on equal to humans in terms of power, but they can be considered both “equal parties to the contract” in the sense that they both are contributing to the social cooperation. Once Coeckelbergh establishes that animals can be parties to the contract, instances of injustice can be reframed in terms of diminishing the gap between the least advantaged participant of cooperative society and the most. Coeckelbergh’s use of the term cooperation is unique in that it doesn’t rely on the notion of voluntariness nor rationality; the beings who contribute don’t need to have agreed to do so to count as cooperating, nor do they need to understand what they are contributing. He defends these omissions through the standard marginal cases argument; there are human beings who do not understand the role they play in the social cooperation, but are still counted as parties of the social contract. Coeckelbergh suggests rewording our terminology of relevant cooperation; “To avoid confusion, I propose to change the requirement ‘that the entity have a capacity for co-operation’ (an ontological requirement) into ‘that the entity co-operates’ (something that can be observed or experienced).” (Coeckelbergh, 79).

Coeckelbergh’s suggestion that Rawls’ foundational interest in fair terms of cooperation could include animals who can cooperate does provide the beginning of a new approach for animals as subjects for Rawls’ distributive justice, but it falls short by not engaging with how the removal of the importance of citizens as free and equal persons can be resolved with the rest of Rawls’ theory. Coeckelbergh has established that there is interdependent cooperation between moral persons and nonrational animals, but not why this relationship establishes limits on such cooperative behavior for citizens. While it is an engaging (and I believe enlightening) point, Coeckelbergh is criticized for his claim that this would cause animals to count as subjects of

justice for Rawls; “Coeckelbergh cannot simply plug this kind of cooperative community into the old contractualist argument and have a valid argument for including nonhuman animals in the sphere of justice” (Mandle and Roberts-Cady, 270). Robert Garner believes that Coeckelbergh overattributes the importance of Rawls claim that the cooperative scheme of society’s accumulation of benefits and burdens constitutes the subject of justice, it is only partially constitutive (Garner, 170). If only contributing was to matter, and not an aspect of voluntariness, then streams and mountains would also gain obligations of justice. While this might not seem offensive, placing the dependency solely on contributions to cooperative gains would cause plenty of people of various abilities, stages in their life, or periods of mental aptitude to be excluded from being beneficiaries, which goes against our intuitions of fairness (and thus would be hard to bring into alignment through reflective equilibrium), (Garner, 171).

Garner also disagrees with Rowland that Rawls’ theory of justice as fairness, or even contractarianism more generally, offers a beneficial or successful theory for animal rights. Garner points out that Rawls excludes animals prior to using the contractual device of the original position, by modeling it based on the conception of persons as having both moral capacities. “Principles emanating from the contract are, therefore, not the result of an objective account of what participants in the original position would choose, but reflect pre-existing normative judgements” (Garner, 169). Any principle (such as Rowlands’ version of the IEP) which claims the authority to include animals must come from outside the contract itself, as the contract doesn’t determine who does or does not count as full moral subjects. For this reason, Garner does not believe that Rawls’ theory provides the animal rights theorist with anything useful; “what is the value-added of preserving with a contractarian approach for those interested in the protection of animals?” (Garner, 169). Garner answers his question “it adds very little” and



suggests instead that using freestanding principles, like Rowlands' suggested IEP would be far more successful if the point is to protect animals.

I think Garner's dismissal here loses sight of the value of Rawls' justice as fairness in structuring a just society *for* moral persons. A freestanding intuitive equality principle would lose the justificatory support of all citizens with reasonable and competing comprehensive doctrines, which exists due to the way in which Rawls' theory is generated. Yes, the preexisting conceptions made before the heuristic of the original position determine the support of the principles, but they come from the foundational beliefs of democratic society, the society for which they are formed to structure. What is the value of continuing to attempt to include justice for animals in a contractarian approach like Rawls? For those who think Rawls has a good theory of justice for humans, then there is much to be gained for including animals, especially if doing so preserves the stability and justification found in Rawls' description of his theory. Tess Vickery also responds to Garner's claim that the device of the original position isn't of much use, highlighting its capacity to "render vivid our intuitions," a function which should not be overlooked" (Vickery, 31). She also references the utilization of reflective equilibrium to test intuitions and the usefulness of such a device. When Rawls wrote *A Theory of Justice*, he fixed flaws common to other intuitionist arguments at the time, which were a lack of ordering to generated foundational principles, which Vickery calls the priority problem. Rawls responds to this issue with his clear description and order of the first and second principle, as well as a way to ensure the setup of principles or institutions of justice are not clouded by biases of the circumstances of one's upbringing, which is why the veil of ignorance also needs the process of reflective equilibrium. Vickery argues that any standalone principle loses the justification and support Rowlands argument for a modified contractarianism retains by including it within

Rawls' general theory. While Vickery believes Rowlands' argument for adding the species knowledge restriction to the veil of ignorance "emerges largely unscathed" (Vickery, 32), she is writing several years before the criticisms of Svolba and Liberto, and so refers only to her assessment of Rowlands' theory's ability to defend against Garners' criticisms.

## **Conclusions**

In this final section, I will clarify the ways in which my argument in this dissertation represents a novel strategy of animal inclusion for literature on Rawlsian theory. While most of the literature on animal inclusion in Rawls does not pick out the animals that we eat (or whose byproducts we use) as distinct in a relevant manner from other animals, I am not the first person to consider the recommendations Rawls theory has for this subsectional topic of animal rights. In order to defend my claim that my theory offers a new, different way of including (some) animals in Rawls' theory, I will go through the existing direct considerations of livestock alongside an explanation of how they differ from my argument. Before moving on to this task, I will revisit my account to set out clearly the structure of my argument given in this dissertation, to help facilitate a clearer understanding of the distinctive aspects of my work in comparison to others.

Rawls' theory of distributive justice gives a procedure for determining the fair terms of cooperation, designed out of rational consideration of initial premises (model-conceptions) taken from the intrinsic values of a democratic society. The content of the model-conceptions is not open to modification without destabilizing the justification of the resulting terms of cooperation from this procedure. While it might be possible to modify or supplement the model-conceptions to generate an alternative, better account of procedural justice that maintains the benefits of Rawls' version, my project is not engaged in such a task. Rather than challenge the generation of principles out of sole consideration of moral persons, I argue that this restricted consideration necessarily ends after the principles are generated, at the point of using them to structure the

primary institutions of the basic structure. The restriction that only moral persons are considered through the self-interested choices of representatives of persons with full moral powers justifies the content of the principles generated, and the corresponding model-conception of the well-ordered society justifies setting out the goal for structuring a society as constructing societal institutions to enable full cooperation between citizens who are free and equal. But the actual design of the well-ordered society (even restricted only to the primary institutions of the basic structure) to fulfil the model conception will include real, non-idealized members of society. Rawls doesn't intend his theory to be entirely unable to map onto a generalized, democratic society, it is meant to be 'realistically utopian', and the realistic nature of human society includes members without full moral powers. The restrictions of considering only moral persons when generating the principles and structuring society for the cooperation of free and equal persons, are not contradictory to the inclusion of considerations of how such ideals will be applied to nonmoral persons. By pointing out that determinations involving nonmoral persons will be required to apply these principles, I have not removed or modified the justification of Rawls' theory as it results from the model-conceptions.

Certain, foundational decisions relating to the application of the principles in structuring society are made from the original position. The parties in the original position would not know details of their conception of the good, so they make choices that would increase their likelihood of having more ability to pursue it, which means promoting a plurality of elements widely shared by a plurality of comprehensive doctrines. The importance (economically, nutritionally, morally, socially and culturally) of raising animals for consumption is strong enough for our generation, and past generations, that it would be in the best interest of the parties in the original position to enable it as a choice for future generations as well. As there is evidence that animal husbandry

would be chosen to incorporate, the institution providing this would fit into the basic structure, which structures access to goods for citizens. This brings the parties in the original position to a point where they would need to determine what principles regulate the treatment of these living beings as a unique type of property. The information available in the original position for parties to make this decision (or more properly put, the information available after restricting ones reasoning process in accordance with the heuristic of the original position) includes the basic facts about livestock welfare, of the sort included in the first chapter, because scientific knowledge is intended to guide this deliberation. This decision about how the principles apply to structuring the raising of livestock leads to livestock rights, because of the limits or lack thereof placed on property rights related to sentient beings will have corresponding rights (or lack thereof) for the animals in this part of society. If the participants were choosing principles for a society characterized by extreme scarcity, it is more likely they would determine that the principles of justice enable the unrestricted use of living beings as additional resources, but Rawls' well-ordered society is characterized by moderate scarcity, in which citizens needs can be fulfilled, but there are restrictions on additional desire satisfaction. This means that the choice regarding whether or not the principles would distribute partial rights to livestock is made knowing that the allocation of such would not prevent just distribution and structuring for full citizens, as I argue in the first chapter.

It seems to me that the reasonable decision made by participants in the original position who are required to consider the application of principles designed for moral persons to the nonmoral beings who inhabit the society would be to apply the subsection of primary goods that can be engaged with by nonmoral persons and animals, through a distribution structure intended for moral persons. The list of primary goods is determined only through consideration of free and

equal persons, this is how Rawls' theory generates the content of just ideals. But once generated, I have argued that they need to be applied to a broader category of members of society than just moral persons. A reasonable way to apply this is to distinguish property between those that can not experience bad welfare and those that can, and provide minimal welfare rights for those that can, out of respect of their shared participation in a subset of primary goods such as health and preference satisfaction.

Once I have suggested a principle that seems to be a reasonable application of the principles of justice in how they would structure this part of the basic structure, it is here where Rawls' secondary justificatory structures of reflective equilibrium, overlapping consensus and public reason would play a role in determining how the principles apply. It is how all principles, generated from the original position, are then fully considered and is the topic of my third chapter. I argue that livestock's location in the basic structure and intertwining of property rights make it a fundamental issue, which means a minimal welfare right would be argued through public reasons. Public reasons for accepting just conditions related to livestock would likely stem from their partial participation in relevant aspects of values generated from moral persons. For example, while the interest in avoiding causing intentional harm is generated out of consideration of the idealized citizen, it would apply to all parts of society who can experience harm, up to the point where granting these rights fits with the distributive structure intended for free and equal persons, which required welfare standards would. Further, a minimal welfare right for livestock does not fail the stability condition, which while this does not prove it is a just principle, it does provide confidence that it could be enacted without what would be an otherwise fatal flaw of damaging the stability of the society.

The process of reflective equilibrium (which goes back and forth from held intuitions to principles) would be more likely to support such a principle, due to its support of overlapping consensus from widely held reasonable comprehensive doctrines. Additionally, the satisfaction of the publicity condition and the need to maintain the integrity of the just character of institutions of the basic structure in the well-ordered society, means that the current opacity of animal treatment in these facilities would need to be resolved. The just treatment of livestock, whatever that ends up being determined to be, would need to be ensured for citizens to maintain their belief in the justice of their institutions. I argue that any generated suggestion for the layout or general restrictions of the institutions of the meat industry, including no restrictions at all, would need to go through the process of reaching reflective equilibrium, engaging them through public reason and ensuring overlapping consensus of the suggestions from within popular reasonable comprehensive doctrines. My thesis here is to argue that such an undertaking is appropriate and, at least for our societies' desires, demanded of a theory of justice such as Rawls' justice as fairness. Now that I have presented a summary of the steps of my argument, I will compare it with existing literature on how livestock would be incorporated in Rawls' theory of justice, in order to demonstrate my final claim in this dissertation, which is that my argument is a novel avenue of animal inclusion in Rawlsian justice.

Both Rowlands and Vickery argue for the prohibition of animal slaughter for meat consumption. Their belief stems from their argument for a modified original position; when the principles are generated from an original position in which the parties do not know whether they are a human or nonhuman animal, rational self-interest would weight the cultural displacement and loss of enjoyment of eating meat as less harmful to the pain and fear of livestock animals (Vickery 33). Rowlands does not believe it would be possible to have high welfare meat (animals

raised without suffering and killed painlessly) at the scale required for global consumption, although he does not engage with proving this claim, or considering if it would remain true in the conditions of Rawls' well-ordered society (Rowlands 2009, 163). Vickery agrees with Rowlands, arguing that even perfect conditions would not change the prohibition on animal slaughter, because any rational agent would be unwilling to advocate for principles which put them in the position of having their life ended by another for the sake of desire satisfaction (Vickery, 33). She is less certain what principles would be determined regarding vegetarian-level use of animals; "Is the risk of losing the pleasure of consuming non-human animal products better or worse than the risk of being milked as a cow, or having eggs taken from you as a chicken?" (Vickery, 35). However, being unable to determine answers to borderline circumstances is a limitation Rawls mentions in other subjects as well, so this in itself does not represent a defeating limitation of this strategy for animal inclusion. Julie Hilden has a suggested answer for what the principles of justice would determine in this situation as well. Hilden suggests that participants behind the veil would choose to allow animal use of natural byproducts with the caveat that such use is strictly controlled and compensated financially, to be put towards advancing the good of the animals, considering their status change from property to person (Hilden, 24).

John Zeis combines the argument seen in other avenues of animal rights against vegetarianism with Rowlands modified original position to disagree with Rowlands' conclusion that meat eating prohibitions would be chosen. To reach this conclusion, Zeis first suggests that as the original position ought to be used for generating principles for like choices, including nonrational members would mean that the principles are considered from separate (but simultaneous) tiers (Zeis, 67). Principles made for those who are rational, and so on for each category. When the question is posed in this version of the original position, it highlights that



Rowlands has framed the choice regarding veganism in a disingenuous manner. Zeis says that the choice isn't between allowing the possibility of being a pig in a world where you could be killed and eaten versus being a pig in a world where you are not killed and eaten, because of what the world looks like for pigs in the version in which their consumption is prohibited (Zeis, 69). In our livestock intensive world, the chance of existing as a pig is quite high compared to a world where meat eating is prohibited, and thus has no incentives to raise the billions of livestock animals as is currently the case. Zeis says that (especially if livestock are treated well), the rational choice related to being a pig is to choose the world that you might exist and get to live (what he calls a piggish life) in rather than the one you are likely not to exist at all in, and thus animal husbandry ought not be prohibited by the participants in the original position (Zeis, 70).

Arguments which divide animals into different grouping for the purposes of awarding separate considerations for each group (like my argument), exist as well. I've already discussed how Coeckelbergh's suggestion for interspecies cooperation would award rights for animals that humans have a cooperative relationship with and not for those outside of this societal relationship. Separate from the context of Rawls' theory, Roger Scruton distinguishes three categories of animals (pets, animals reared for human use, and wild animals), each of which are owed different sorts of duties from humans (Scruton, 88). Sue Donaldson and Will Kymlicka, in their book *Zoopolis*, also divide animals into three groups, and argue for substantially more robust rights than could likely ever be accommodated with Rawls' theory; their inviolable rights theory awards full citizenship to domesticated animal, partial citizenship to liminal animals (urban wildlife) and sovereign nationality to wild animals.

The way in which my approach is different from the arguments described in this chapter is that my limited approach to animal inclusion adheres to Rawls' claim that the basic structure is the primary subject of justice. Brian Berkey argues that one of the main barriers to animal inclusion in Rawls is that the principles are intended to structure institutions and not the conduct of individuals (Berkey, 679). Vickery and Rowlands both make this point as well when they discuss that Rowlands' suggested modifications for the original position go beyond Rawls' stated focus on the institutions which form the basic structure (Rowlands, 236). By restricting the subject of inclusion to the structure of human use of livestock, my argument preserves the focus on institutions and their role in providing access and determining opportunities available to citizens in their pursuit of their own conceptions of the good. Unlike the majority of the theories discussed in this chapter, the restrictions on the representatives in the original position are not modified at all, I keep Rawls' description and justification for the original position completely unchanged. Animals are only 'in the original position' in the sense that knowledge required to determine what just institutions related to animal use would look like, which includes biologic facts about livestock animals and the historical importance of animal use in order to determine if such use is rationally motivated. Only the interests of free and equal citizens are considered when generating the content of the principles, the inclusion of animal rights happens at the level of applying the generated principles to all aspects of the basic structure. I suggest that the extent to which such principles will apply to the structuring of animal use industries will be to the extent that the biologic realities of livestock animal sentience can share in distribution of primary goods. To the extent that welfare assurances can be guaranteed, which the research in the first chapter suggests is possible without harming citizens, then this is what a justly configured institution gives the animals located within it as their rights. Assuring that this institution

matches the considered judgments is a part of what justice requires, not morality or public debate, both of which could encompass and impart more extensive considerations.

Garner criticizes Coeckelbergh's emphasis on cooperation, on the basis that it seems counter to our intuitions of justice that "animals are only due justice while they are being exploited" (Garner, 171). Garner is mistaken however that this means that eating animals is a just act. As Berkey points out, justice for Rawls is involved in setting up the conditions through which humans can act from their own moral doctrines, not in the actions themselves. The morally evaluative claim that eating animals is right or wrong remains in the domain of moral pluralism. Including animal use in the basic structure is just because of the role it fulfils for a society that will not legislate individual moral conceptions of the good, and due to the importance of animal use that is present in many of such conceptions. Garner is correct that liberated animals aren't owed justice directly, but this should not be surprising considering the designation of justice as facilitating fair terms of cooperation through the designs of societal institutions. Animals outside of that cooperation between equals or outside of the realm of those institutional design, are not going to be under the umbrella of justice, but instead of ethical judgements on the correct stance towards moral assessment of animal or natures' intrinsic worth. I don't disagree with Garner's conclusion that Rawls did not intend to allocate significant protection for animals, and that (outside of the protections and rights I argue for in this dissertation) there is reason to worry that animals are not defended against the preferences of individuals when the state refuses to interfere or make a judgement call out of respect for moral pluralism (Garner, 171). However, considering the scale of animals that are within the umbrella of justice who are granted substantial welfare protections even when only considering livestock, I think Rawls' theory offers a substantial avenue for animal rights for livestock and is able to

maintain the benefits of a stable society that grants justice to all humans with competing ideas of how to treat animals. My goal is to convince even the most staunchly pure Rawlsian that the generation of principles out of the conception of full citizens with both moral powers and their status as free and equal, still means that livestock welfare is a subject of justice and the restrictions placed on citizens' treatment and use of them would be determined through the tools Rawls provides for resolving fundamental, political concerns.

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