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Rawls and Non-rational Beneficiaries

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What is a just society? How to distribute limited resources, opportunities, access, guarantees, and so forth, to members of a community who are of vastly different natural and acquired capacities? Perhaps the most promising approach to an answer is that suggested by John Rawls. Rawls' famous thought-experiment, in *A Theory of Justice* – the invitation to take up the perspective of “the original position” and to pick some basic principles on which to base a just society -- has the simplicity of genius. The particular constraint of having to make this choice from behind the “veil of ignorance,” and thus not know who one will be in the imagined society, will be long remembered as a key contribution of 20th century philosophy.

Rawls simply asks us to pick (the rules for) a socio-political system – in a context materially and psychologically like our current world -- while stripped of personal favoritisms? Not knowing one's role in the imagined community to be organized around the chosen rules induces one to take the broad and impartial view. It induces one to consider how the basic rules would affect everyone in it.

Whatever rules one chooses from this impartial perspective are likely to be the fair rules, since everyone's interest is likely to be equally considered. Hence this approach should lead to a community that is fair to all – or at least as fair as any community can be.^[1]

This basic intuition regarding the method for identifying a just system in an *impartial* way – choosing among systems without knowing one's place in any of them -- is so obvious and elegant that it is a wonder we did not have this intuition many thousands of years ago.^[2] Perhaps the implicit generosity toward the weaker members of one's community that a truly impartial viewpoint produces was echoed in the spiritual teachings of figures like Jesus (in the "Sermon on the Mount") or Gautama (in his compassion for sentient beings). Even so, Rawls' way of formulating and of motivating this view remains distinctive and remarkable.

While Rawls surely deserves credit for this intellectual contribution, I will argue that his own *use* of the justice-identifying method is unduly narrow. That is, I have some concerns about the membership scope of his ideal community. The manner in which Rawls *applies* his method results in a vision of a "just" community that morally undervalues mentally deprived humans and morally worthy members of non-human species. This result need not have been the case. The impartial and generous spirit behind Rawls' vision can easily be extended to include these otherwise neglected groups. An attempt at such an expansion, and a justification for it, are the objectives of this essay.

Agents and Beneficiaries

We should clearly agree with Rawls regarding *who* is eligible to play Rawls' imaginative game. Any rational being interested in a self-serving future would do. One must possess the capacity for abstract and imaginative thought. In particular, one must be capable of imagining oneself in the role of someone else situated in a different context. One does not have to be an actor or a political thinker to do this. Any college students can do this. On the other hand, young children, imagination-deprived humans, and cats could not play this game.^[3]

Does that mean that those unable to engage in this imaginative exercise should not be included among the beneficiaries of the exercise? Whose interests should I *represent* when I imagine the foundational rules for a society that takes everyone's interests into equal account?^[4] Should I choose only on behalf of *any* fully rational human?^[5] Or should I *also* choose on behalf of those humans who during their current life span *cannot* engage in rational future-aiming choices (like permanently mentally handicapped ones; or children who never get to develop their rationality because of untimely death)?

Rawls' own view seems to be that strictly speaking the original contractor *represents* only oneself. After all, a goal of Rawls' theory is to motivate the choice of a just system by first appealing to a person's enlightened self-interest (by inviting questions like: "To which social system would *you* choose to belong, if *you* did not know which features and which position *you* would have in any of the available systems?"). Since, however, any other rational person could

replace “you” as the subject of this self-interested thought-experiment, without changing the choice-results, Rawls’ “original contractor” ends up choosing for any current (or, perhaps, any possible) rational being.^[6]

This reasoning appears to imply that anyone permanently incapable of engaging in this thought-experiment is not represented. Some humans are clearly so incapable – due to genetic impairments, early disease, or early death. Hence, some cognitively handicapped humans are not going to be represented in Rawls’ imaginative exercise. Even if one were to take a generous reading of rationality, as Rawls suggests, and have it apply not just to those who are actually rational but also those who have the capacity or the potential for rationality, the permanently impaired humans would still be left out.^[7] Though Rawls seems to be aware of this difficulty, he does nothing to resolve it.^[8]

Might there be a less strict reading of Rawls that is more inclusive, and yet is consistent with the impartial ethical goal of his position? I believe so. We would need to put extra stress on the part of Rawls’ theory intended to protect the interests of the weak and unfortunate (as captured, say, by the second part of Rawls’ “difference principle”). Then we would need to enlarge the class of the weak and unfortunate so as to include not only rational humans who happen to be poor, unskilled, mediocre, sickly, *but also* (initially) humans whose potential for rationality is either non-existent, or cut short. This more inclusive Rawlsian stance could, then, result in a rational person (who takes up the ‘original position’ perspective) choosing also on behalf of non-rationally endowed humans.^[9]

Why should one concern oneself with the risks and opportunities of the non-rationally endowed humans also?

The main reason for this is that any one of us who engages in this imaginative game – who is currently fully rational – could find oneself in the role of the less mentally endowed in the chosen hypothetical system. The facts of our world make it highly likely that some humans are condemned to such a mentally deprived status. The hypothetical society does *not* presuppose a change in the current distribution of impaired human capacities. The physical and psychological make up the constituents of the imagined society must remain much like ours – and similarly with the limitations on resources, etc.

Consequently, impartiality and “self-interest” dictate that a rational “original” chooser pick a system that would also serve the interests of less-endowed humans. Recall, in this context, that the contractors are to possess general knowledge about human psychology and sociology. They must know that people have diverse talents and interests. They must be aware of the general types of situations in which humans *can* find themselves (that people can be sick or healthy, rich or poor, indebted or free from debt, in a healthy natural environment or a degraded one, enslaved or free). This general knowledge must include the possibility of humans finding themselves in the position of permanently mentally handicapped individuals.^[10] To rule this out this possibility is to imagine a world considerably different than ours.

It would be a mistake, here to try to block this attempt at representing the interests of human “non-rationals” by attacking the metaphysical possibility of a

current rational person, P, becoming the cognitively deprived individual P*, in the hypothetical chosen society.

Recall that a central purpose of Rawls' imaginative what-if exercise is to achieve a level of *ethical impartiality* – so that the contractor would not favor a system simply because it provides advantages to the contractor's own position in it. To attain this impartiality Rawls does not really need P to imagine herself, P, in that system. P could imagine *someone she cares about* being positioned in an undetermined role in that system. That someone she cares about could be her brother. For current purposes, it could be the disembodied soul of Socrates who is ready to take on a new human incarnation in a randomly assigned role.

Suppose the latter were the case, and that I were asked to pick the system that best maximizes Socrates' soul's opportunities and best minimizes its risks, which system (which basic rules) would I choose on this soul's behalf? That is the heart of Rawls' challenge. How the identity is preserved between, say, Socrates' disembodied soul and the new embodiment is irrelevant for this ethical purpose (or, in any case, a soul-substance mode of identity-preservation might do). The usual way of construing Rawls' exercise, with its *self-interested* appeal to the contractor, may be practically useful but is really unnecessary. If this self-interested aspect causes metaphysical problems, it could be dropped. I conclude that the attempt to extend Rawls' view to include non-rational humans cannot be blocked by appealing to strict metaphysical identity requirements.

Someone could object that Socrates' soul could only be imagined to take on the role of a person, and non-rational humans are not "persons." Perhaps a

complex and rational mental life is necessary for personhood (Rawls himself focuses only on “moral persons”). However, I am disputing precisely whether the range of roles that Socrates’ soul could take on in Rawls’ ideal society – hence the range of individuals falling under the scope of justice concerns – should be confined to “persons” only. After all, we are to imagine a world like ours, as far as constituents of a community.^[11] Such a world will include non-rational humans (hence humans who are not “persons”). I see no reason why Socrates’ soul could not be such a human (I am assuming a randomly determined role-taking, not one based on some karmic merit).^[12]

I conclude, thus, that as an “original” contractor one must care about the interests of the rationally less-endowed humans in the imagined alternate society. By implication, one aspect of one’s *current* status that one must *ignore* is one’s good fortune in the cognitive-rationality area. One’s current full rationality must be viewed – at least for purposes of this exercise in ethical impartiality -- as a contingent trait that, like natural physical talents, one need not have possessed.^[13]

Here is the second step. If the less rationally endowed can and would be “members” of the chosen hypothetical system – not as active participants, but as “patients” whose interests the rational “original” contractor must keep in mind in choosing the right rules – then those less endowed in our *current* system would have to have their interests now *represented*. We cannot treat their current inability to engage in imaginative exercises as grounds for representational exclusion. That is because their handicap must be viewed, for present ethical

purposes, as a contingent misfortune (just as we should view our rational status as a contingent good fortune). It is, after all, undeniable that one's nervous system being invaded, *or not*, by some strange virus during one's infancy -- leading to permanent brain damage -- will determine whether or not one comes to possess either this handicap or one's rationality (and "personhood").

!

If this last conclusion is plausible, it follows that when any one of us, as a fully rational being, engages in the Rawlsian "original position" exercise, he or she should choose *also on behalf of the less than rational humans*. This would be an extended and more compassionate version of Rawls' view.^[14] Rawls perhaps would not have approved, but he should have!

Human and Non-Human Beneficiaries

A further implication becomes unavoidable. If humans who could not themselves take part in the "original position" game must be *represented* by those who can, then this representation would have to extend to that non-rational group of *non-humans* whose current psychology approximates that of the handicapped (like adult monkeys, horses, dolphins, and dogs). They certainly have interests. They have some degree of rationality – they engage in means-ends reasoning, they form relationships, they can be happy or sad, etc. So, why exclude them – other than on speciesist grounds?

Should they be excluded from representation on the grounds that their more deprived (or perhaps just different) current status is contingent in a different way than that of non-rational humans – in that their status as dog or chimp is “natural”? It seems not, since the status of gifted humans is similarly “natural” and no less contingent. Moreover, the status of some innately non-rational humans is also due to “natural” conditions. Recall also that in some traditions – the Buddhist and Hindu ones in particular – there are no strict boundaries between human and non-human roles across our many alleged incarnations. One’s basic “self” could take on both human and non-human forms. In such traditions the contingency of the human form is much more evident.

Again, why, in principle, must a just society (or, more broadly, a just community) include only humans? Why, more precisely, must matters of distributive justice apply *only* to humans?

I understand that in our western traditions – and many others, such as the Confucian -- justice concerns have not been applied to non-humans. However, that fact alone counts for little. Just as our traditions have moved to include slaves and women within the sphere of social justice, the same could happen with respect to some non-humans. We are only beginning to seriously consider non-humans in our moral discussions. Thus, in the future a recognized just society might take on a more inclusive look.

A small scale parallel of a just community is the example of an extended household. Such a household might include parents, children, weird uncles, cats and dogs (particularly cats and dogs that are born within, or in some other

“natural” way come to belong to, the confines of the household). The cats and the dogs may not take part in the decisions regarding the running of this household. However, their presence and their moral standing can surely have an impact on what gets decided, and how the household resources get distributed. The just household would not lock the crazy but harmless uncle in the dark basement to avoid embarrassments with the neighbors; nor would the just household starve the cats for the sake of a more luxurious set of curtains. Even if the cats do no job – not even that of catching mice – they would still be fed (in non-crises circumstances). A similarly more inclusive larger community could, and I believe should, include as stakeholders not only active socio-political role-players, but also passive (or, better, less able) beneficiaries of social activities. Among the passive beneficiaries why not include some non-humans?

Non-humans, in fact, have more of a claim to partake of resources in the larger earthly community than they do in a typical small-scale household. In the household case the resources at its disposal normally belong to the adult and rational members of the household. The same cannot *ultimately* be said of many earthly resources. No matter what our law books and religious texts say, we cannot act as if natural resources were meant only for humans. Any extreme anthropocentric view claiming exclusive human ownership of earthly resources would need justification -- and I do not see it as forthcoming. Given the immense portions of those resources that are currently subject to human control *and to their distributive choices and policies*, non-humans must be included among the stakeholders of these social choices and policies. ^[15]

Possible Objections

The possible reasons for excluding non-humans as potential beneficiaries of the veil of ignorance exercise are not convincing. Consider the most plausible ones:

(A) Only humans can be considered in thinking of a just system!

This is blatantly speciesistic, without *additional* arguments. What if there were smart and imaginative non-humans – angels or dolphins?

(B) Only those who have the genetic potential for full rationality should be represented by the “original” contractor!

Genetic potential is too meager a condition. Having the genetic potential for rationality, while lacking any actual possibility for it -- due to congenital disease or infant death – is to have no potential at all for it in this current life. If so, then this position reverts to the previous speciesist one.

(C) Well, then, the rational choosers must choose only on behalf of all (and only) *actual* rational beings, and of those statistically likely to become so (like, say, most twelve year olds).

This, as I argued, is unfair to those *actual* humans (and others?) who happen to be mentally deprived. We lucky ones could have easily been born or ended up in their shoes. Again, the genius of Rawls’ method lies in the veil of ignorance. It lies in its getting us to choose a system’s just principles while

ignoring our current position of privilege and good fortune (and other current features we just happen to have). Yes, we are to *use* our full rationality in choosing our ideal system; but we are not really entitled to treat that full rationality as guaranteed in the imagined community. The key “rational” feature that is supposed to count in the imagined future is that of some content-neutral desire to maximize our well being. Such a desire can be present – albeit with limited content-ranges -- in mentally handicapped humans (and in non-humans similarly psychologically equipped).

(D) Justice is simply a political notion, and as such excludes those who cannot participate in political activities.

Even if this narrow scope for justice were granted, the presence of humans who are beneficiaries but non-participants (due to incapacity) in political activities falsifies this exclusive claim. More importantly, there is no reason to apply justice only to distribution issues within politics. Consider just distribution issues in schools, households, or even nature. The distribution of grades, for instance, in a classroom setting is clearly subject justice concerns. In fact, a classroom of the “inclusive” variety -- having mentally handicapped alongside highly intelligent students – provides a nice analogy to the inclusive Rawlsian viewpoint I am proposing. The just teacher of an “inclusive” group of students would not assign “grades” and other rewards only on the basis of intellectual achievement. Some rewards could be assigned for effort, for good behavior, or simply for being there. The teacher

could justify this varied distribution scheme by inviting the Rawlsian question: “If you were to belong to this hypothetical classroom without knowing your role in it, how would you want your grades and other rewards to be determined?”

(E) Morality is, in fact, a human construction. Morality is constructed by human beings in order to facilitate interactions between human beings, and to make possible a co-operative community. Since morality includes justice, the latter is also a human construction. This is the point of contractarian views: they aim at generating artificial “moral” rules by appealing only to the self-interest of the contractors.

This not only is not Rawls’ own view; even if it were, there is no independent reason for us to agree with it.^[16] We are entitled to hold that certain practices are immoral independently of social agreements or conventions (e.g., human sacrifices). In particular, our dealings with those non-human beings that can *suffer* are moral dealings, since suffering is undeniably a morally pertinent phenomenon. If this latter claim is inconsistent with some contractarian views (among which Rawls’ view is often classified), so much the worse for these contractarian views.

Fortunately, would-be dismissals of suffering or sentience as moral phenomena are not essential traits of contractarianism. Rawls deserves credit for his passing recognition of the moral relevance of animal suffering (“it is wrong to be cruel to animals”).^[17] He deserves criticism for claiming,

regarding animals, that “it does not seem possible to extend the contract doctrine so as to include them in a natural way.”^[18] Including them in the same category of non-rational but morally worthy humans is the natural way of extending his contractarian view.

(F) Why must the well-being of rationally impaired creatures – both humans and non-humans -- fall inside the sphere of distributive justice? Why could their well-being be a matter of beneficence? This, after all, seems to be Rawls’ actual view. Let the (fundamental rules for the) justice of a system determine the allocation of desirable positions, financial rewards, and things of this sort. Concerns for non-rational cohabitants who have some moral standing but who cannot participate in the rules- and policy-making of a society should be left to the wider moral duties of the social participants.

In response I will assume that justice deals with getting what one is due, from those who owe one. As alluded to previously, if these non-rationals fell outside the scope of the community that Rawls is envisaging, and had no natural claim to the resources that this community will control and distribute, *then* this objection would have some force. As it is, neither of these conditions obtains. Any realistic current human community that aspires to justice will include non-rationals of both the human and non-human variety. Further, some of the resources that large scale modern communities – like nations -- *de facto* control and allocate (according to just distribution principles) have in effect been stolen or usurped. These are natural

resources that humans have historically acquired by the forced dispossession (and often killing) of members of other sentient species – even by forced extinction of entire species. Such resources *also* belonged rightly to these other creatures. Cats, dogs, chimps, dolphins, horses were not put into this earth as human tools and possessions, but as independent fellow creatures (I am dismissing some morally dubious religious claims here). We humans have usurped most of their share of the earth by expanding recklessly, and by conquering and destroying non-human sentient lives that were in the way. Any just earthly current community must face up to these facts. Since the manner in which big chunks of earthly resources are allocated – by human organized policies -- is indeed one of the concerns of justice, justice bears directly on the claims of our non-human co-travelers. Compensatory claims advanced on behalf of many animal species would not, for example, be out of the question in a cosmic tribunal.

Perhaps if the setting for a hypothetical just society were *not* (like) our current world, but one without the history of animal abuse, and if the natural resources were not to be shared with non-rational animals, things would be different. In such a world only beneficence concerns might apply in our dealings with other animals.

Again, we could go along with a Rawlsian imaginative exercise based on an abstract model of our world, for certain limited purposes. In such a limited exercise we could relegate concerns for animals to beneficence. However, we

cannot be expected to extend the lessons derived from this limited exercise to our much different world.

(G) If an “original position” contractor were to represent non-rational humans, would this not result in too inclusive an imagined community? Would they not have to include insects and plants? This result would be absurd.

Yes, the wider community here being hypothesized would be much more inclusive. However, lines could still be drawn. Sentience could be the natural cut off point. Only beings capable of feeling need be included. As suggested previously, suffering and enjoyment are natural moral phenomena, whereas wider traits like life are less clearly so.

Regarding how to recognize who does or does not possess sentience (do insects? do plants?), this would be an empirical matter for proper scientists to determine, and should not affect our principled position.

Conclusion

What are the likely results of including at least some non-humans within the scope of those on whose behalf Rawls’ contractors choose?

A just system so derived will rest on rules that will guarantee at least some consideration, some resources, and some protections for these non-humans. A Rawlsian ideal society would permit differential treatments in many areas (wealth and educational opportunities, for example), but recall that these differences and

gaps must work also for the benefit of the less fortunate. The class of the “less fortunate” which would benefit from permissible inequities would simply be more inclusive than Rawls thought it should be.

What would the inclusion of these non-rational beings among the claimants of justice mean? This would have to be worked out with more care than I can do here. Presumably, however, we could establish a range outside of which the proper set of justice-duties must not fall. On one end of this range, the mentally handicapped and many psychologically similar non-humans could not claim access to social roles and resources that rest on advanced intellectual prerequisites (such as to political participation or to major educational opportunities). Nor could they claim luxurious lifestyles that would suck too many resources from the system – making it unproductive, and thus unable to sustain itself and sustain these weaker members. On the other end of the range, they would have a legitimate claim not to be eaten or to be used for scientific experiments (at least not in normal and non-“lifeboat” circumstances).

I hope that this implication is moderate and reasonable. My proposal is a moderate cousin of the “equal basic rights” view made famous by Tom Regan – who has similar lines of objection to Rawls.^[19] I am not advocating a rights perspective (certainly not some “equal rights” perspective). My general view is closer to a common sense (and utilitarian) “harm” perspective. I hold that those who can be harmed should be given *some* moral consideration. How much consideration they deserve would depend on their level of psychological capacities, and on the nature of the circumstances (including circumstances of

shared resources, and of historical treatment). I am convinced of the following minimalist principle: if the fully-rational beings (who oversee and distribute the resources, opportunities, roles, in a community) can provide for their own *serious* needs without violating the *serious* interests (such as life and non-suffering) of the sentient but not-fully-rational members of that community, they ought to do so.^[20]

This minimalist approach need not contradict *the spirit* of Rawls' position. In particular, it need not call into question the non-egalitarian features of his view. He wants a system in which the demand for equality of treatment not result in egalitarian social arrangements that would stifle the opportunities and motivations of the more gifted humans (or, better, rational beings). Rawls' veil of ignorance thought-experiment indicates that none of us would want to be born in a system that would stifle our opportunities, should we turn out to be highly talented. This non-egalitarian concern is consistent with my minimalist but not speciesist understanding of "social arrangements" (that includes some animals as deserving to be among the also-beneficiaries of social inequalities).

^[1] No society can remove natural injustices derived from unequal natural talents and limitations.

[2] One could apply this impartiality-fostering intuition in many other contexts. Students, for instance, could be asked to choose which rules should govern classroom interactions (say, regarding grading) by imagining themselves in the class while not knowing whether they will be the student or the teacher, a bright student or a dull one, a shy or a talkative one, etc. One could apply this intuition to determine the right family interactions, by imagining not knowing if one is the parent or the child. One could apply it, as Rawls goes on to do, in the areas of international relations, and intergenerational relations. The flexibility and generality of this imaginative approach, in resolving distributive issues, is a major sign of its validity.

[3] With regard to normal children Rawls is willing to allow that as long as they have the potential for becoming rational , they should deserve “the full protection of the principles of justice.”

John Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1971), sect. 77, p. 509.

I do not suppose this to mean that as children they are eligible to be original contractors. His reasoning seems to be that since they could become so eligible, they should be treated as equal beneficiaries of the contract. Or perhaps the reasoning is that since it matters not *when* one engages in the contract thought-experiment, the fact that at a particular time they are not ready to so engage does not matter. If they can do so *at some* time, say a later one, then they count as possible contractors (see note # 4).

[4] Rawls flirted with having the original choosers imagine turning out to be heads of families in the imagined society. This was intended to prompt the “contractors” into caring about the effects of social arrangements on one’s immediate family descendants. On such a view, would Rawls’ contractor choose on behalf of the members of one’s *current* family (in some special way, besides choosing on their behalf as typical rational humans)? The other members of the contractor’s current family might turn out, in the hypothetical future, to belong to other families.

Rawls’ concern in his early remarks about family lines is that that the rules of the system picked not permit the exhaustion of natural resources during any one generation – the difference principle would have to apply to future people (one is also not supposed to know the temporal location of one’s imagined system).

See John Rawls, *A Theory of Justice*, sect. 22, p. 128.

[5] This appears to be Rawls’ own view. He writes:

“...the original position is not to be thought of as a general assembly which includes at one moment everyone who will live at some time; much less, as an assembly of everyone who could live at some time. It is not a gathering of all actual or possible persons. To conceive of the original position in either of these ways is to stretch fantasy too far; the conception would cease to be a natural guide to intuition. In any case, it is important that the original position be interpreted so that *one* can *at any time* adopt

its perspective. *It must make no difference when one takes up this viewpoint, or who does...*” [italics mine]

A Theory of Justice, sect. 24, p. 139.

[6] See previous note. Recall that one appears to choose on behalf of those present young children who in actuality do become rational. I suppose these children fall in the category of possible rational beings. I also suppose that the same cannot be said for those children who die in infancy.

In regard to who is entitled to equal justice in the hypothesized society, Rawls’ answer is that this status is confined to “moral persons” – beings having a conception of the good, and having a sense of justice to some minimal degree.

See, *A Theory of Justice*, sect.77, p. 505-506.

[7] See, *A Theory of Justice*, sect.77, p. 509.

[8] He states that “those more or less permanently deprived of moral personality may present a difficulty. I cannot examine this problem here.”

A Theory of Justice, sect.77, p. 510.

See similar comments in John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), p. 21.

[9] There are hints of the possibility of this more compassionate stance in Rawls. For instance, Rawls contends that

“Undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow

compensated for.... [I]n order to treat all persons equally, to provide genuine equality of opportunity, *society must give more attention to those with fewer native assets.*" (italics mine)

A Theory of Justice, pp. 100-101.

He also says this about "having a sense of justice," which appears to be a necessary condition for deserving equal justice consideration in his imagined society:

"...While individuals presumably have varying capacities for a sense of justice, *this fact is not a reason for depriving those with lesser capacity of the full protection of justice.* Once a certain minimum is met, a person is entitled to equal liberty on a par with everyone else." (italics mine)

A Theory of Justice, p. 506.

We would simply need to lower the minimum capacity, below that envisaged by Rawls himself, to arrive at my more compassionate Rawlsian position.

^[10] That this is a revised stance, and not necessarily Rawls' own stance – his stance requiring that a member of the hypothesized system be a "moral person," who in turn possesses a sense of justice and a conception of the good – should not distract us.

Naturally, in Rawls' defense, it is perfectly legitimate to use an abstract model of the real world (see following note). Scientists and philosophers do this all the time, and with good results. It is, thus, legitimate to think about what rights and duties a group consisting *only* of fully (or minimally) rational individuals would have vis-à-vis each other. Such an abstract exercise might yield some results

that are useful for certain purposes. One such result would be an answer to the question: “What is the just society for a group of rational humans with diverse conceptions of the good?” And this result might, in turn, explain why basic freedom-rights (with limits for mutual protection of each other’s freedoms) are essential in any just society.

Note, however, how the *extent* of the limits on such a group’s freedoms could change once this model is extended to the real world. Because in the real world there are also non-rational beings with significant moral status, the limitations on freedom must go beyond the rationals’ mutual self-protection. Such limitations must also deal with the well being of morally worthy non-rationals.

[11] Rawls would perhaps dispute this. There are many indications that he is asking us to imagine an abstract model of our world. Such a model limits its focus on rational and “roughly equal” constituents, so as to draw specific principles of justice that apply only to such equals. Thus, for instance, in the Dewey Lectures he claims that his “cooperating members of society” must have “sufficient intellectual powers to play a normal part in society”, so as to avoid “difficult complications” so as to “work out a theory that covers the fundamental case” and later “try to extend it to other cases.”

Rawls, John, *Kantian Constructivism in Moral Theory*, *The Journal of Philosophy* 77 (1980), p. 546.

See, also, similar claims in John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), pp. 20-21

[12] Could one object here that Socrates could not have been a human non-person (while he *could* have been a female instead of a male, Chinese instead of Greek, a shepherd instead of a philosopher, etc.)? If he could have been these other types of humans, I see no reason why he could not have been cognitively so disabled as not to have rationality.

[13] I am aware that for a long line of thinkers, going through Kant back to Aristotle, rationality may be a *sine qua non* of moral standing and even of humanity as a species. However, in the real world there are plenty of humans, to whom we ordinarily attribute moral standing, that lack most cognitive powers linked with rationality and imagination. Most of us have some loved ones so deprived – whether their cognitive deprivations are native or acquired. Having the rational powers necessary to carry out the Rawlsian thought-experiment is an undeniably fortunate *contingency*, even if statistically it is the norm among humans (and even if we do not normally speak of good fortune in connection with having such faculties).

See, in this connection, Rawls' brief and revealing comment on cruelty to animals. *A Theory of Justice*, sect.77, p. 512.

[14] Such a “trustee” view is suggested, but not endorsed, by Thomas Scanlon as a possible way out “for contractarian” views.

Thomas Scanlon, *What We Owe Each Other* (Cambridge, MA: Harvard University Press, 1999) pp. 177-187.

In a brief discussion of such a “trustee” possibility Martha Nussbaum rejects it on surprisingly unconvincing grounds. She claims that within a contractarian context the “trustee” view would call for respecting the interests of the mentally handicapped, etc., “only on account of some relationship in which they stand to the so-called ‘fully-cooperating’ people;” that is, only because a “contracting party cares about their interests.”

Martha Nussbaum, *Capabilities and Disabilities: Justice for Mentally Disabled Citizens* (The Religion and Culture Web Forum, The University of Chicago, March 2003), p. 19.

Since I am not basing my present form of “trustee” solution for the mentally disabled on an indirect care-relationship, but on the claim that a rational “original contractor” could have been currently in their place, and could be in their place in the imagined community, I am not impressed by Nussbaum’s otherwise legitimate concern.

^[15] I am assuming, again, that the imagined Rawlsian community is not an abstract model of our world (where issues of interspecific property/resource claims are set aside). I am assuming that it reflects the rich complexity of this world.

^[16] Rawls allows for there to be a broader sense of morality outside the realm of a theory of justice (captured by a contract view). He writes:

“...We should recall the limits of a theory of justice. Not only are many aspects of morality left aside but no account is given of right conduct in regard to animals and the rest of nature. A conception of justice is but one

part of a moral view. While I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity. But it does not follow that there are no requirements at all in regard to them, or in our relations with the natural order. Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for forms of life of which animals are capable clearly impose duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of a theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way. A correct conception of our relations to animals and to nature would seem to depend upon a theory of the natural order and our place in it.”

A Theory of Justice, sect.77, p. 512.

I am arguing that there is a rather obvious way to extend the “contract” doctrine to include at least the justice duties to at least some animals. I suspect that it is precisely due to presupposed speciesist and anthropocentric theories “of the natural order” that justice duties are viewed as *not* owed to animals.

^[17] Ibid.

^[18] Ibid.

^[19] See Tom Regan, *The Case for Animal Rights*, (Berkeley, Calif.: University of California Press, 1983), ch. 5.4.

^[20] I find myself tending to agree with the position taken by Donald VanDeVeer, "Interspecific Justice," *Inquiry*, Vol 22, No. 1-2 (Summer 1979).