Justice and Personhood: 
*The Role of Nonpersons in John Rawls’s Justice as Fairness*

by

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Chapter 1

John Rawls in Perspective
Justice is the first virtue of social institutions, as truth is of systems of thought.¹

§1 Political Philosophy: Modern and Contemporary

Historically, political philosophy has treated the interests of particular persons as a means rather than an end in the political process. Kant serves as a prominent example of this:

As hard as it may sound, the problem of setting up a state can be solved even by a nation of devils (so longs as they possess understanding). It may be stated as follows: ‘In order to organize a group of rational beings who together require universal laws for their survival, but of whom each separate individual is secretly inclined to exempt himself from them, the constitution must be so designed that, although the citizens are opposed to one another in their private attitudes, these opposing views may inhibit one another in such a way that the public conduct of the citizens will be the same as if they did not have such evil attitudes.’ (Emphases mine)²

In modern political philosophy, the goal was to create the most efficient arrangement possible. Persons were treated merely as objects to be organized. Their interests were only significant insofar as they represented a potential danger to the stability of the system and needed to be checked. For modern political thinkers such as Hobbes and Kant, preserving the ability of persons to pursue their interests within a polity was by no means the priority.

By contrast, contemporary political philosophy recognizes that the ideal polity is one in which as many persons as possible can pursue their interests, insofar as those interests and those persons are reasonable. Political liberalism

¹ A Theory of Justice 3
² Political Writings 112-113
is the tradition that has historically been most committed to this ideal. As a project, contemporary political liberalism is fundamentally concerned with equality and freedom for as many persons as possible. Its most basic contention is that this is the best manner by which the reasonable interests of the greatest possible number of persons can be accommodated.

Perhaps the greatest difference between modern political philosophy (represented best by Kant and Hobbes) and contemporary political philosophy is the fact of reasonable pluralism. The fact of reasonable pluralism is the recognition that citizens in society possess a variety of different conceptions of what the good is that cannot be unified. Each of these plurality of views is worthy of pursuit insofar as its conception of the good is reasonable. That a conception of the good is reasonable signifies that it accommodates the fact of reasonable pluralism.

Additionally, the fact of reasonable pluralism implies that any polity governed by a single conception of the good cannot be legitimate. John Rawls—an important contemporary political thinker whose work I focus on below—says the following of this type of society:

A...general fact is that a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power. If we think of political society as a community united in affirming one and the same comprehensive doctrine, then the oppressive use of state power is necessary for political community. In the society of the Middle Ages, more or less united in affirming the Catholic faith, the Inquisition was not an accident; its suppression of heresy was needed to preserve that shared religious belief. The same holds, I believe, for any reasonable

3 Classical political liberalism is exemplified best in the work of John Stuart Mill and John Locke.
comprehensive philosophical and moral doctrine, whether religious or nonreligious. A society united on a reasonable form of utilitarianism, or on the reasonable liberalisms of Kant or Mill, would likewise require the sanctions of state power to remain so. Call this “the fact of oppression.”

If citizens in society hold a plurality of different doctrines, then it is unreasonable to expect them to accept one overarching one with which they may fundamentally disagree.

The goal of contemporary political philosophy—and specifically of political liberalism—is to provide a conception of justice that accepts the fact of reasonable pluralism and allows for the pursuit of as many reasonable conceptions of the good as possible. Additionally, political liberalism assumes that the optimal organization is one that is mutually advantageous. That means that ideally, the institutions of a society should work to the benefit of all those within that society. If, for example (in an ideal context), an institution were damaging to a particular group of citizens, that institution would not be acceptable in political liberalism.

§2 The Evolution of John Rawls

John Rawls is by far the most prominent example of a thinker in the contemporary tradition of political liberalism. Rawls’s form of political liberalism, which he refers to as justice as fairness, represents the most

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4 Political Liberalism 37
5 I explain the difference between ideal theory and the non-ideal theory below in §12 (The Ideal and the Non-Ideal)
comprehensive political account of justice in the history of political philosophy. Rawls developed justice as fairness in numerous texts and thousands of pages across 50 odd years. The secondary literature on his body of work is staggering in its size. Put bluntly, it would be a shocking development in political philosophy if Rawls was not still being read seriously in a century.

In his first major work, *A Theory of Justice*, which was published in 1971, Rawls lays out a comprehensive account of justice as fairness for the first time. He had developed the basic idea in a 1958 paper entitled *Justice as Fairness* but first gave his idea a systematic treatment in *Theory*. The goal of *Theory* was to resuscitate political philosophy and moral theory, which at the time was dominated by utilitarianism. In attempting to achieve this, Rawls adopted a Kantian approach to moral and political philosophy. In keeping with this, Rawls’s theory is a self-described contractarian theory.

After its publication, *Theory* was criticized heavily by a number of different political philosophers for a variety of different reasons. One critique was the claim that *Theory* was framed ideologically. Justice as fairness was based in a conception of the good (or comprehensive doctrine) that was imposed upon citizens. Rawls was himself very obviously a believer in liberalism. The basic idea of liberalism framed ideologically is that freedom and equality are the most important values to be preserved. Critics raised the point that in *Theory*, justice as fairness imposed this ideological conception upon free and equal persons regardless of their conceptions of the good. Rawls admitted that *Theory* was
framed from within a comprehensive doctrine and attempts to defend a *political* conception of justice against this type of criticism in his later work.

A second damaging critique related to the supposed ability of the framework to make moral claims. The moral theory contributed in large part to the first critique, that justice as fairness was ideological. In particular, Rawls argues in Chapter VII of *Theory* that a good person is a moral person in the way that he describes. He also outlines the moral development of persons in Chapter VIII. These claims were criticized heavily and cited as evidence of the ideological commitments of justice as fairness by Rawls’s critics.

Although he never abandoned the comprehensive doctrine represented in *Theory*, Rawls recognized that the presence of a moral theory within justice as fairness weakened the political values it was trying to advance. From the preface for the revised edition of *Theory*:

> Despite many criticisms of the original work, I still accept its main outlines and defend its central doctrines. Of course, I wish as one might expect, that I had done certain things differently, and I would now make a number of important revisions. But if I were writing *A Theory of Justice* over again, I would not write, as authors sometimes say, a completely different book.⁶

Indeed, Rawls continued to defend a majority of the theory as it was laid out in *Theory*. *Political Liberalism* was Rawls’s attempt to respond to many of the criticisms leveled against *Theory*. Beginning in papers published after *Theory*, Rawls begins to advance justice as fairness specifically as a political conception of justice. He frames justice as fairness as political not metaphysical. The goal of the project in Rawls’s later work is to develop justice as fairness specifically as a

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⁶ *A Theory of Justice*: Preface for the Revised Edition xi
political conception of justice. Justice as fairness no longer incorporates the moral claims that it did in Theory. Rawls specifically seeks to combat the idea that his theory is framed ideologically and based in a comprehensive doctrine.

Instead, he attempts to frame justice as fairness generally and in such a way that any reasonable person could accept it:

To use a current phrase, the political conception is a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it.7

This, in large part, is what Rawls means by a practical or political conception of justice. Rawls did acknowledge that Theory was a comprehensive doctrine rather than a political conception of justice later in his career:

A Theory of Justice was a comprehensive doctrine of liberalism designed to set out a certain classical theory of justice—the theory of the social contract—so as to make it immune to various objections. The difference is that, in Political Liberalism, the problem is how do you see religion and comprehensive secular doctrines as compatible and supportive of the basic institutions of a constitutional regime.8

Rawls defines a comprehensive doctrine as one that aspires to cover all of life. In contrast, a political conception only applies to the major institutions of a society. Rawls in his later work seeks to ground his theory not in ideology, but in practical concerns. Justice as fairness serves as an agreement among reasonable persons that justice is best thought of as fairness in order to organize society. Rawls does not claim that justice is fairness. That type of claim would only be metaphysical if it attempted to define justice ahistorically and finally irrespective

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7 Political Liberalism 12
8 Collected Papers 617
of any contingency. Rawls does not do this; his only claim is that justice is best thought of as fairness.

§3 The Original Position

The original position is the thought experiment that serves as the basis for the arguments that comprise justice as fairness. In the original position, parties conceived of as rational agents deliberate from behind a veil of ignorance and determine what to agree to in a political conception of justice. This veil of ignorance deprives the parties of any knowledge of their position in society: “the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons that they represent.”9 They are unaware of their gender, race, social position, and comprehensive doctrine. The veil of ignorance is specifically designed to remove what Rawls calls the burdens of judgment, which are the elements of the judgment of free and equal persons that cause them to disagree about questions of justice. Rawls believes that free and equal persons disagree on the basis of their opposing comprehensive doctrines. The goal then becomes to situate an initial situation in which the parties can come to an agreement on a conception of justice. The veil of ignorance is the means by which this is accomplished and ensures fairness in the conception of justice that is selected from this position.

9 Justice as Fairness 15
Rawls describes the parties as rational agents of construction. In being artificial agents of construction, the parties do not resemble real persons. Rawls states that the parties are reasonable and rational. This idea of rationality only extends to a type of thin rational choice theory, wherein a pile of four water bottles is preferable to a pile with one, in every case.\(^\text{10}\) It is not a type of metaphysical rationality similar to the idea employed in Kantian philosophy. Rawls assumes that this thin conception of rationality would be difficult to argue against.

The parties are conceived of as rational in the following way:

Put in terms of a game, we might say: they strive for as high an absolute score as possible. They do not wish a high or a low score for their opponents, nor do they seek to maximize or minimize the difference between their successes and those of others. The idea of a game does not really apply, since the parties are not concerned to win but to get as many points as possible judged by their own system of ends.\(^\text{11}\)

Conceiving of the agents of construction (the parties) as rational allows for the modeling of what individuals in society would want. The parties do not seek to gain any advantage relative to one another. They simply attempt to obtain the best bundle possible. Rawls refers to this as *disinterested rationality*. The parties only seek to attain the highest score possible. There is no winning or losing for any one party relative to the other parties with whom they deliberate.

The reasonability of the parties indicates only that the parties take the agreement that they reach at the conclusion of the original position as binding and see themselves, after the lifting of the veil of ignorance, as involved in a

\(^{10}\) Assuming that the water is clean, etc.
\(^{11}\) *A Theory of Justice* 125
scheme of social cooperation. If particular parties had the possibility of emerging from behind the veil of ignorance outside the scheme of social cooperation this would profoundly affect the procedure itself and would not make sense as a device for formulating laws.

It should be noted that the original position is entirely hypothetical. Nothing like it need ever occur. One can reason from the original position at any point, simply by considering how the parties would deliberate from their position behind the veil of ignorance. Rawls states that the original position thought experiment is “hypothetical, since we ask what the parties (as described) could, or would agree to, not what they have agreed to.” And that “It is nonhistorical, since we do not suppose the agreement has ever, or indeed ever could actually be entered into. And even if it could, that would make no difference.” In a further explication:

When, in this way, we simulate being in the original position, our reasoning no more commits us to a particular metaphysical doctrine about the nature of the self than our acting a part in a play, say of Macbeth or Lady Macbeth, commits us to thinking that we are really a king or a queen engaged in a desperate struggle for political power.

For Rawls, the original position is entirely hypothetical and does not require that we endorse the conception of the parties as indicative of the most basic elements of the individual in the political sphere. That is to say that in structuring the political, rational agents behind a veil of ignorance represent a fair initial choice situation:

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12 A Theory of Justice 16
13 A Theory of Justice 16-17
14 Political Liberalism 27
As I have said, justice as fairness begins from the idea that the most appropriate conception of justice for the basic structure of a democratic society is one that its citizens would adopt in a situation that is fair between them and in which they are represented solely as free and equal moral persons. This situation is the original position: we conjecture that the fairness of the circumstances under which agreement is reached transfers to the principles of justice agreed to; since the original position situates free and equal moral persons fairly with respect to one another, any conception of justice they adopt is likewise fair. Thus the name “justice as fairness.”

In this way, the conception of justice that they decide upon will be fair and does not rest on a metaphysical conception of the self. Insofar as one who considers the thought experiment recognizes the initial situation as the fairest possible, she accepts its conclusions on that basis.

§4 The Principles of Justice

In the first stage of the original position, the parties are offered a variety of different potential principles of justice by which they could organize society. These include utilitarian and egoistic principles. Rawls argues that the parties would agree on the principles of justice that he formulates. Although these principles changed from Rawls’s early to later work, the idea behind them remains largely consistent. Because I am concerned with Rawls's later work in

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15 *Collected Papers* 310. It should be noted that in the political conception of justice, Rawls no longer characterizes the parties as free and equal moral persons. The idea of fairness still applies, however.

16 For the changes to the first principle of justice, which are significant, see *The Basic Liberties and Their Priority* in *Political Liberalism*. The changes in the second principle are largely stylistic.
this examination, the formulation of the principles that I make use of is the mature statement of each:

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

The first principle of justice is commonly referred to as the liberty principle. The second is composed of the fair equality of opportunity principle as well as the difference principle. The principles of justice are lexically ordered, which means that the liberty principle has priority over both the difference principle and the principle of fair equality of opportunity. This essentially means that legislation recommended by the difference principle cannot violate the first principle. To violate the first principle might involve the removal of a liberty, for example. Additionally, the principle of fair equality of opportunity is lexically prior to the difference principle in the second perspective. Changes recommended by the difference principle cannot impose on the ability of all persons in society to compete fairly for the same offices and positions.

Rawls gives a substantive argument for why the parties would prefer these principles to others that they consider. However, the specific details of how the parties determine the principles of justice are not relevant to this

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17 Justice as Fairness 43
investigation. At any rate, I do not wish to dispute the manner by which Rawls argues that the parties come to decide upon these principles.\footnote{18}

\section*{§5 Primary Goods}

The parties in the original position distribute resources that Rawls refers to as primary goods. Primary goods are the types of goods that the parties would want regardless of the comprehensive doctrine they hold or the social position they occupy. It is not that primary goods are rational to want within every comprehensive doctrine. Rather, having access to primary goods is constitutive of even having a plan of life. If, for example, a person is starving, it is likely that their only concern would be to obtain food. And if this is the case, the starving person cannot be said to have a plan of life.

The primary goods, defined as resources that are distributed by the parties in the original position, play a central role in the thought experiment. Rawls describes primary goods as “things needed and required by persons seen in the light of the political conception of persons, as citizens who are fully cooperating members of society, and not merely as human beings apart form any normative conception.”\footnote{19} Citizens require a minimum amount of these goods in order to live full and productive lives. These types of goods are various in forms; in a basic sense, they are food, water, shelter, security, etc. But this extends

\footnote{18}{For the reasoning behind the selection of these two principles of justice, see Part II of \textit{Justice as Fairness} entitled “The Principles of Justice.”}

\footnote{19}{\textit{Justice as Fairness} 58}
further; primary goods are the rights and liberties that allow one to participate in political society and the resources that allow one to respect one’s own plan of life, as well as wealth and income for pursuing one’s interests. Rawls considers a variety of different political and social goods as primary goods. “Basic rights and liberties”, “freedom of movement and free choice of occupation,” “powers and prerogatives of office,” “income and wealth,” and “the social bases of self-respect” are all considered primary goods.20

Given this situation, Rawls believes that the parties would distribute the primary goods as equally as possible given the fact that favoring any one social group with more primary goods could potentially work in their disfavor if they are not members of that social group. In the original position, the parties attempt to obtain the best package of primary goods for themselves. As they stand behind the veil of ignorance, the parties are unaware of what citizens they might represent and are risk averse as a consequence. This is necessary insofar as the parties are rational. If the results of the original position are taken to be final, then the distribution that is determined after the veil is lifted is also final. Insofar as this is the case, if the parties were to give a greater amount of primary goods to a particular group of individuals, they would effectively be gambling that they themselves would end up as a member of that group with no method of recourse if they were not.

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20 Justice as Fairness 58-59
§6 Four-Stage Sequence

The original position consists of a four-stage sequence in which the veil of ignorance gradually lifts. In each stage, the parties receive a larger amount of information, but only as much as is necessary to make decisions. The first stage involves the formulation of the principles of justice. These principles of justice are the most basic element of justice as fairness as a political conception of justice. They serve as the framework for answering any political question. Rawls considers one option of principles of justice to be superior to any other.

After the principles of justice are formulated, the parties move into the constitutional stage of the original position, in which they receive further information about the nature of their society. At this stage, they do not know their comprehensive doctrine or their social position. They are only aware of general facts about the society in which they reside, and they use these as a basis for their decision-making. Rawls refers to the third stage as the legislative stage. This stage serves as the application of the constitution as it was formulated in the second stage. Because the constitution is itself based in the principles of justice, the legislation passed is also based in these. At this stage, the parties receive general information about their society that they use in order to pass legislation that conforms properly with the principles of justice formulated in the first stage, and to the constitution formulated in the second. The final stage is the distribution stage, in which the veil of ignorance is completely lifted, and the
parties become aware of their comprehensive doctrine and social position and receive the benefits to which they are entitled as a consequence of that position.

In the fourth (distributive) stage of the original position, when the veil of ignorance is lifted, if the parties find that their conception of the good does not require certain primary goods, they are not forced to accept those goods. If for example, a representative discovers that her conception of the good involves a religious vow of silence, she need not speak. But the primary good of freedom of speech is hers should she choose to take it.

§7 The Basic Structure and a Well-Ordered Society

The goal of the original position is to specify the role of justice in what Rawls calls the basic structure of society:

For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements. Thus the legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and the monogamous family are examples of major social institutions. Taken together as one scheme, the major institutions define men’s rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start.\(^{21}\)

Effectively, the basic structure is the background in which citizens pursue their conceptions of the good and interact with their fellows. It is in this context that

\(^{21}\) A Theory of Justice 6-7
the parties attempt to stipulate fair conditions of justice. One’s social position within the basic structure can severely impact one’s life chances if the basic structure is not just. From this it follows that a just basic structure is required in order for as wide a variety of persons to have the ability to live full and meaningful lives.

Having a just basic structure is one of the main components of what Rawls refers to as a well-ordered society. To say that a society is well-ordered in justice as fairness conveys three things:

First, and implied by the idea of a public conception of justice, it is a society in which everyone accepts, and knows that everyone else accepts, the very same political conception of justice (and so the same principles of political justice). Moreover, this knowledge is mutually recognized: that is, people know everything they would know if their acceptance of those principles were a matter of public agreement.22

This is the publicity condition. All citizens within a well-ordered society recognize the same principles of justice and this recognition is mutual. In this way, all citizens act in accordance with those principles and know that others do so as well. Justice is specified in a public manner that is available to all citizens.

Second, and implied by the idea of effective regulation by a public conception of justice, society’s basic structure—that is, its main political and social institutions and the way they hang together as one system of cooperation—is publicly known, or with good reason believed, to satisfy those principles of justice.23

In addition to the specification that there be a public conception of justice, the principles of justice that comprise this public conception must also be reflected in the institutions of that society. The institutions of the basic structure must

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22 *Justice as Fairness* 8
23 *Justice as Fairness* 8-9
“hang together” with each other and the political conception of justice, which is to say that those institutions must be in accordance with those principles of justice.

Third, and also implied by the idea of effective regulation, citizens have a normally effective sense of justice, that is, one that enables them to understand and apply the publicly recognized principles of justice, and for the most part to act accordingly as their position in society, with its duties and obligations, requires.24

The third requirement for a well-ordered society is that the individuals in that society possess an effective sense of justice. This allows them to understand and act from the principles of justice. It should be noted that the idea of the sense of justice changed dramatically from Rawls’s earlier work to his later. In Theory, the idea of the sense of justice is a component of the moral theory that Rawls develops. From Political Liberalism onwards, the definition is considerably thinner than its counterpart in Theory.25

After stating these three conditions that the term well-ordered society implies, Rawls goes on further to say that:

In a well-ordered society, then, the public conception of justice provides a mutually recognized point of view from which citizens can adjudicate their claims of political right on their political institutions or against one another.26

Crucially, a well-ordered society is characterized by its agreement upon a perspective from which political problems can be effectively dealt with. That is

24 Justice as Fairness 9
25 Because I am largely concerned with the political framework of Rawls’s later work, I do not treat the idea of the sense of justice present in Theory. I do deal with some components of the moral theory of Theory, but only in an abstract sense. See Chapter VIII of Theory, entitled The Sense of Justice, for a detailed discussion of the earlier term.
26 Justice as Fairness 9
not to say that disagreement will be nonexistent. On the contrary, Rawls is clear that conflict—particularly between persons holding opposing comprehensive doctrines—is impossible to avoid. Instead, the goal is to foster agreement on a conception of right as the basic method for solving any question of justice.

Insofar as citizens recognize a public conception of justice based upon the two principles of justice, they agree on the basic solution to any political problem. The answer is to apply the principles of justice. But the means by which this might be accomplished for any specific question of justice is to be debated by free and equal citizens in public reason. I discuss the specifics of public reason below. Because justice as fairness is an abstract theory, it does not provide solutions to specific questions of justice. The validity of these different types of solutions is to be argued for within each particular well-ordered society.

§8 The Three Perspectives of Justice as Fairness

Rawls limits knowledge in certain circumstances in presenting justice as fairness. As a consequence of this, it is important for him to specify the perspectives that the project contains:

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—of you and me who are elaborating justice as fairness and examining it as a political conception of justice.\(^\text{28}\)

\(^{27}\) See section §10 (Public Reason)
\(^{28}\) *Political Liberalism* 28
In assessing the political conception of justice as fairness, Rawls speaks from the third point of view. Crucially, the perspectives of both the original position and of a well-ordered society are hypothetical, although the former is more so than the latter. Perhaps the most appropriate way of thinking about the distinction between each perspective is in reference to the level of knowledge available in each. Comparatively, the parties in the original position have the least amount of information, while Rawls in the third has the most. The citizens come to endorse the public conception of justice on the basis of the implications of the deliberation of the parties in the original position as a fair way of organizing the basic structure of society.

We are observers of the hypothetical parties in the original position when we imagine the deliberation of the parties given these conditions. It should be noted that the parties from the original position never actually emerge from behind the veil of ignorance. We merely think of them as emerging. There is no connection between the parties in the original position and citizens in a well-ordered society; they are separate entities. The persons in the well-ordered society that Rawls discusses can be thought of as having themselves performed and endorsed the conclusions of the thought experiment, if only implicitly.
§9 Free and Equal Persons

Rawls refers to citizens who are capable of recognizing the public conception of justice as *free and equal persons*. Free and equal persons are characterized as possessing two moral powers:

(i) One such power is the capacity for a sense of justice: it is the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.

(ii) The other moral power is a capacity for a conception of the good: it is the capacity to have, to revise, and rationally to pursue a conception of the good. 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, or, alternatively, of what is regarded as a fully worthwhile life.²⁹

In saying that free and equal persons possess two moral powers, Rawls thinks of them as being rational and reasonable. That one possesses a sense of justice is roughly equivalent to the idea that one is reasonable. The capacity for a conception of the good and a plan of life is equivalent to rationality. Rawls discusses the rational and the reasonable in the following way:

To explain full autonomy, let us note two elements of any notion of social cooperation. The first is a conception of the *fair terms of cooperation*, that is, terms each participant may reasonably be expected to accept, provided that everyone else likewise accepts them. 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 as judged by a suitable benchmark of comparison. This element in social cooperation I call the *Reasonable*. The other element corresponds to the *Rational*: it expresses a conception of each participant’s rational advantage, what, as individuals, they are trying to advance.³⁰

²⁹ *Justice as Fairness* 18-19  
³⁰ *Collected Papers* 316
Reasonable persons possess and exercise their moral powers and “have an enduring desire to honor fair terms of cooperation and to be fully cooperating members of society.” They can be expected to hold to the standards of a public conception of justice: “Reasonable persons see that the burdens of judgment set limits on what can be reasonably justified to others, and so they endorse some form of liberty of conscience and freedom of thought.” To say that a person is reasonable is to say that they recognize the rightful place of others in society. They place their own interests below their responsibility to their fellows when these conflict.

To be rational is distinct from being reasonable. An individual can be rational without being reasonable but not vice versa:

The Reasonable presupposes the Rational, because, without conceptions of the good that move members of the group, there is no point to social cooperation nor to notions of right and justice, even though such cooperation realizes values that go beyond what conceptions of the good specify taken alone. The Reasonable subordinates the Rational because its principles limit, and in a Kantian doctrine limit absolutely, the final ends that can be pursued.

That one is reasonable implies that one is rational and can understand and endorse the political conception of justice and accept the priority of that conception over their own conception of the good in cases where those conflict.

Rawls describes the distinction between the rational and the reasonable as one, “that parallels Kant’s distinction between the hypothetical imperative

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31 Political Liberalism 55
32 Political Liberalism 61
33 Collected Papers 317
and the categorical imperative.\textsuperscript{34} For an example of this distinction, suppose an individual possesses a large farm in a remote area, which is the only source of work for those in the area. In determining the pay scale of her workers, it makes sense for the farmer to offer the lowest amount of money possible ($1 per day perhaps), particularly if she knows that her potential employees have no other potential source of income.\textsuperscript{35} Doing this would be rational, but not reasonable. It is rational because it makes sense given the farmer’s plan of life, which one would assume involves profiting from farming. Insofar as this is the case, the rational plan for the farmer is one that is the most cost efficient. But to do this would be to act against the political conception of justice in justice as fairness. If we were to consider the example of the rational farmer as a micro society (indeed, how else could we consider it), both the difference principle and the principle of fair equality of opportunity are in opposition to the farmer’s action. In the context of a Rawlsian well-ordered society, the actions of the farmer would not be reasonable because she was prioritizing her own interests over the public conception of justice in a case in which those conflicted.

Additionally, Rawls makes clear that a reasonable comprehensive doctrine may in fact lead to unreasonable positions. But this does not necessarily make the doctrine unreasonable according to Rawls:

\begin{quote}
In a particular case someone may, of course, affirm a reasonable doctrine in an unreasonable way, for example, blindly or capriciously. This does
\end{quote}

\textsuperscript{34} *Justice as Fairness* 81

\textsuperscript{35} For the context of this example, assume that no minimum wage laws apply. If minimum wage laws did apply and the violation of those laws represented a serious penalty, it would not be rational for the farmer to act in this way. It is in this way that the reasonable subordinates the rational.
not make the doctrine as such unreasonable. A reasonable doctrine is one that can be affirmed in a reasonable way.\textsuperscript{36}

Reasonable comprehensive doctrines are those that are capable of being endorsed reasonably by persons within a well-ordered society. Christianity, for example, can be reasonably endorsed but may also be unreasonably endorsed by an individual who wishes to introduce its ideological commitments into the political institutions of society as a whole. But because Christianity \textit{can be} reasonably endorsed, it is a reasonable comprehensive doctrine.

\section*{§10 Public Reason}

Introduced in \textit{Political Liberalism}, the idea of \textit{public reason} is a crucial component of Rawls's later work. Public reason provides a space for public justification in the public sphere. An argument in the public sphere hopes to achieve public justification, which amounts to an appeal to the public conception of justice. If a well-ordered society is to have a debate about potential solutions to a question of justice, the goal of each side presenting arguments is to achieve public justification. The idea of public reason operates with the idea of reasonable persons at its basis:

The first basic aspect of the reasonable, then, is the willingness to propose fair terms of cooperation and to abide by them provided others do. The second basic aspect, as I review now, is the willingness to recognize the burdens of judgment and to accept their consequences for

\footnote{\textit{Political Liberalism} 60f}
the use of public reason in directing the legitimate exercise of political power in a constitutional regime.\textsuperscript{37}

Reasonable persons are those that can participate in public reason by accepting the burdens of judgment. As has been stated above, the answer to any question of justice on a basic level is to apply the principles of justice. But the best method for doing this is left open to debate in public reason in the context of the particular question of justice.

Public reason is best thought of as an element of what Rawls refers to as \textit{background justice}. Background justice ensures that the basic structure remains just over time. The idea, then, is that any legislation must achieve public justification if it is to be enacted in society. Rawls specifies background justice as an element of the basic structure that works to keep the basic structure just as time passes:

What is needed, then, is a division of labor between two kinds of principles, each kind suitably specified: first, those that regulate the basic structure over time and are designed to preserve background justice from one generation to the next; and second, those that apply directly to the separate and free transactions between individuals and associations. Defects in either kind of principle can result in a serious failure of the conception of justice as a whole.\textsuperscript{38}

The function of background justice is to keep the basic structure just from one generation to the next. Public reason is effectively an element of background justice that ensures that the legislation considered by a well-ordered society passes the test of public justification in order for it to be enacted.

\textsuperscript{37} \textit{Political Liberalism} 54
\textsuperscript{38} \textit{Justice as Fairness} 53-54
Achieving public justification amounts to the ability to convince others through public reason:

To justify our political judgments to others is to convince them by public reason, that is, by 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.\(^{39}\)

Public justification itself amounts to an appeal to the public conception of justice. An argument fails to achieve public justification “when the premises and conclusions are not acceptable on due reflection to all parties in disagreement, valid argument falls short of public justification.”\(^{40}\) The idea is that public justification is based on valid argument for the law that best conforms to the principles of justice. If free and equal persons cannot accept the premises and conclusions of the argument, then it fails to achieve public justification.

Justification in public reason, does not signify complete agreement in the public sphere:

Of course, it is too much to expect complete agreement on all political questions. The practicable aim is to narrow disagreement at least regarding the most divisive controversies, and in particular those that involve the constitutional essentials; for what is of greatest urgency is consensus on those essentials...\(^{41}\)

This idea corresponds roughly to the priority of the first principle of justice insofar as liberties are to be given the highest priority in public reason. If agreement can be reached on constitutional essentials, then the scheme of social cooperation is made considerably more resilient.

\(^{39}\) Justice as Fairness 27 
\(^{40}\) Justice as Fairness 27 
\(^{41}\) Justice as Fairness 28
§11 The Idea of an Overlapping Consensus

Well-ordered societies may form an overlapping consensus if a wide enough group of reasonable persons within that society can endorse the same set of principles from within their respective comprehensive doctrines:

The idea of an overlapping consensus is introduced to make the idea of a well-ordered society more realistic and to adjust it to the historical and social conditions of democratic societies, which include the fact of reasonable pluralism. While in a well-ordered society all citizens affirm the same political conception of justice, we do not assume they do so for all the same reasons, all the way down. Citizens have conflicting religious, philosophical, and moral views and so they affirm the political conception from being a shared point of view from which they can resolve questions concerning the constitutional essentials.\(^4\)

The idea of an overlapping consensus is that a variety of free and equal persons hold the same political principles to be true for different reasons. For example, the Vatican Council supports religious freedom for the reason that everyone is equally deserving of the opportunity to be saved from Hell by the grace of God. In contrast, an atheist might simply believe in freedom of religion as a component of freedom of expression that must be guaranteed to all. Despite this difference in conceptions of the good, members of the Vatican council and atheists are able to endorse the same principle of religious freedom.

The purpose of an overlapping consensus is to provide stability for liberal societies. In framing what an overlapping consensus should not be, Rawls gives the following example:

\(^4\) Justice as Fairness 32
In negotiating a treaty, each state would be wise and prudent to make sure that the treaty is drawn up in such a way that it is public knowledge that it is not advantageous for either state to violate it. Both states, however, are ready to pursue their goals at the expense of the other, and should conditions change they may do so.\(^\text{43}\)

This kind of agreement is merely a \textit{modus vivendi} and does not represent the type of shared commitment to political principles that an overlapping consensus does: “What is essential for an overlapping consensus is stability with respect to the distribution of power: this requires that the political conception be affirmed by citizens irrespective of the political strength of their comprehensive view.”\(^\text{44}\)

The purpose of the consensus is to stabilize the position of individuals in that society such that they feel secure in the fact that though they might be in the minority, their plan of life is not threatened. To return to the previous example, if the atheist gains political power within society and an overlapping consensus does exist, the Catholic individual feels secure that her conception of the good is not threatened.

\textbf{§12 The Ideal and the Non-Ideal}

The idea of the original position is to determine how we might form society in the fairest way possible, irrespective of the constraints imposed by reality. From this we form an ideal or well-ordered society given the implications of the

\(^{43}\textit{Justice as Fairness} 192\)

\(^{44}\textit{Justice as Fairness} 193\)
agreement of the parties in the original position. This type of theorizing, in which the conditions assumed are “ideal” Rawls refers to as ideal theory:

The intuitive idea is to split the theory of justice into two parts. The first or ideal part assumes strict compliance and works out the principles that characterize a well-ordered society under favorable circumstances. It develops the conception of a perfectly just basic structure and the corresponding duties and obligations of persons under the fixed constraints of human life. My main concern is with this part of the theory. Nonideal theory, the second part, is worked out after an ideal conception of justice has been chosen; only then do the parties ask which principles to adopt under less happy conditions. This division of the theory has, as I have indicated, two rather different subparts. One consists of the principles for governing adjustments to natural limitations and historical contingencies, and the other of principles for meeting injustice.45

Ideal theory is political philosophy done outside of the scope of historical constraints. The idea of the original position is abstract, and the society it suggests could never be implemented in reality. Ideal theory assumes strict compliance by all citizens with the laws of the polity. Additionally, ideal theory assumes conditions of moderate scarcity. This is a necessary assumption, insofar as persons are unlikely to act rationally in a society with severe scarcity. It would be difficult to argue for the effectiveness of any political conception of justice in a polity where food is scarce and the multitude is starving. Additionally, Rawls assumes no state of war or of constant violence. These types of assumptions constitute the basis of ideal theory.

By contrast, non-ideal theory is political philosophy done with respect to natural limitations and historical contingencies. Non-ideal theory does not assume strict compliance, but instead partial compliance with the laws of the polity. Additionally, in theorizing the non-ideal, no assumptions about scarcity or

45 A Theory of Justice 216
status of war are made. Rawls refers to this type of theory as non-ideal or partial compliance interchangeably.

The question remains of how the ideal theory would theoretically work with non-ideal conceptions of justice:

Thus as far as circumstances permit, we have a natural duty to remove any injustices, beginning with the most grievous as identified by the extent of the deviation from perfect justice. Of course, this idea is extremely rough. The measure of departures from the ideal is left importantly to intuition. Still our judgment is guided by the priority indicated by the lexical ordering. If we have a reasonably clear picture of what is just, our considered convictions of justice may fall more closely into line even though we cannot formulate precisely how this greater convergence comes about. Thus while the principles of justice belong to the theory of an ideal state of affairs, they are generally relevant. Rawls’s statement that the principles of justice are generally relevant should be qualified. Indeed, the principles of justice are relevant in specifying the ideal. Insofar as we (as theorists) construct an ideal, we posit that it is in and of itself worth striving for and use it to make normative claims about justice. But Rawls is uncertain whether the non-ideal might require a different set of principles of justice altogether. This is outside the scope of his theory.

The general idea of ideal theory is to construct an ideal well-ordered society and then to bring the non-ideal into closer conformity with our "reasonably clear picture of what is just." But in doing this, we do not necessarily apply the same principles of justice that are used in ideal theory. Instead, we measure the non-ideal against the ideal and determine what the best action is to bring the former closer to the latter.

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46 A Theory of Justice 216
Take, for example, the idea of affirmative action. Affirmative action is wholly unacceptable from the standpoint of the original position. Inherent in enacting any legislation that resembles affirmative action is the privileging of one racial group over another. This type of preference is explicitly forbidden by the original position. But the goal in the non-ideal is not to strictly enact the principles of justice. It is to bring the non-ideal into closer conformity with the ideal. Insofar as this is the goal, affirmative action legislation would be justified in cases in which it brings about greater equality of opportunity, which is the impetus for instituting this type of law in non-ideal contexts. In support of this point, Rawls was himself supportive of affirmative action.47

§13 Summing Up

Rawls’s project of political liberalism seeks to ground legitimate authority in the public sphere for a well-ordered society as a direct result of argumentation made from the conclusions reached by the parties in the original position. It is in the context of his commitment to public reason that Rawls is often regarded as one of the most prominent proponents of deliberative democracy. Regardless of whether or not one accepts its principles, justice as fairness is by far the most impressive systematic conception of justice in the history of political philosophy. Its scope is ambitious and its project is admirable, irrespective of whether one subscribes to the system.

In the context of this goal of legitimation, the idea is to make society acceptable from the point of view of those who would have the greatest reason to object: the least-advantaged. In *Justice as Fairness*, Rawls lays out what he believes to be the four roles of political philosophy, the third of which is as follows:48

A third role, stressed by Hegel in his *Philosophy of Right*, is that of reconciliation: political philosophy may try to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when properly understood from a philosophical point of view, are rational, and developed over time as they did to attain their present, rational form. This fits one of Hegel's well-known sayings: “When we look at the world rationally, the world looks rationally back.”49

The best way of fulfilling this role is to make the least-advantaged the focus of the inquiry. In the original position, the parties, in being risk-averse, essentially assume that they will be placed in the position of the least advantaged and act accordingly.

It is with these persons that Rawls is most concerned. His project is in many ways geared towards making the least-advantaged as advantaged as possible. Justice as fairness aims to do this through the preservation of their liberty50 as well as the principle of fair equality of opportunity and the difference principle. In many respects, Rawls’s entire project can be understood in this way as an attempt to legitimate society from any perspective. Insofar as this is the goal, the least-advantaged become crucial in justice as fairness.

48 For the remaining three roles, see the opening section of *Justice as Fairness*
49 *Justice as Fairness* 3
50 Here I have in mind the historical case of slavery, in which the least-advantaged were deprived of every liberty.
Rawls is one of the most prominent deliberative democratic theorists as well as one of the most prominent philosophers involved in contemporary liberalism. Even after his death in 2002, political philosophy continues to be dominated by his shadow, as political philosophers alternately wrestle with his conclusions or attempt to build upon them. He is truly a towering figure in the field and is of profound importance not only to philosophers but to anyone truly concerned with justice.

§14 Looking Ahead

In the chapters that follow, I suggest problems with the framework of justice as fairness. My focus is mainly on Rawls’s later work. Specifically, I attempt to problematize the failure to account for sentient nonpersons within the political conception of justice. Rawls attempts to push this problem aside. He gives sentient nonpersons moral standing, but not political standing. It is my contention, however, that in doing so, Rawls’s conception of justice is vulnerable in certain ways, which I explain below.

The solution to these difficulties most likely lies in modifications to the first perspective (the original position). However, it is not my intention to work out a comprehensive account of what a Rawlsian solution to the difficulties I present. Regrettably, I do not have the space here to work out this type of account within the framework.

51 I define nonpersons fully in §26 (Subpersons and Nonpersons)
This critique attempts to be Rawlsian as much as is possible. By this it is meant that the criticism is intended as one addressed specifically in ideal theory.\textsuperscript{52} Beyond this, it seems more likely to me that Rawls (and by extension, Rawlsians) would be receptive to criticism framed in ideal contexts. The critique presented in the chapters that follow is not intended to be an indictment of the basic premise of Rawls’s political framework. I view the framework as an indispensable tool for examining political institutions abstractly and evaluating them. However, limitations to the theory should be acknowledged.

I proceed with the intention of problematizing the failure to account for nonpersons in the framework. In the next several chapters, the difficulties will be detailed more fully. Chapter 2 (Practical Application) deals with the three perspectives and what constitutes the distinction between person and nonperson in the framework as a whole. Chapter 3 (Exploitation in the Original Position) presents a thought experiment of a society that appears to be unjust and yet seems to be justified in justice as fairness. Chapter 4 (The Difference Principle and Nonpersons) analyzes the various implications of the thought experiment presented in Chapter 3 for the framework as a whole.

\textsuperscript{52} I do not, like Charles Mills for example, hold that ideal theory is useless. In my view, ideal theory is constitutive for making any normative claim about justice: there can be no way of circumventing ideal theory without abandoning claims of justice. For Mills’s position, see \textit{Ideal Theory as Ideology}. 
Chapter 2

Practical Application
One such [moral] power is the capacity for a sense of justice: it is the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.\textsuperscript{53}

§15 Tuning Up

In this chapter, I attempt to frame the discussion of the chapters that follow. It is my intention to stay close to Rawls in this section. I do not attempt to say anything critical of Rawls here; I only attempt to set up the argument I make in the following chapters.

The basic idea of this chapter is to establish how objects fit within the concept of political personhood. In this respect, the idea of practical application is crucial. Practical application is the action of applying the principles of justice by free and equal persons (in the second perspective) when confronted by a single question of justice. That an object is capable of practical application is indicative that that object fits within the concept of political person. The reason for stressing capable here is that although the reasonable presupposes the rational (and thus it is impossible to be reasonable but not rational), it is possible that persons can be rational but not reasonable. This does not itself eliminate these persons from consideration in the way that they would be if they were not rational. Non-rational objects are not capable of practical application, while rational but not reasonable persons are capable of practical application. This distinction is made more clearly below.

\textsuperscript{53} Justice as Fairness 18-19
In this chapter, I begin with a discussion of Rawls’s conception of the political person, which figures prominently in my criticism. I proceed to discuss the Kantian elements of Rawls’s account of justice as fairness. Specifically, I identify the ways in which Rawls’s account is constructivist. I then characterize how the account provides practical objectivity in the second perspective. Following this, I define *practical application*. I conclude by framing the discussion of this chapter in reference to the chapters that follow.54

§16 The Political Person

The idea of the person in the Rawlsian framework is a thin or political conception. It is more substantive than the conception of the person present in a rational intuitionist doctrine,55 but only insofar as it requires basic forms of reasonability and rationality. Political constructivism is based in the idea that separate persons can make the same basic judgments independent of one another when faced with the same question of justice. This is not to say that the specific solution to any question of justice will be the same for different persons. Instead, it suggests that the *aims* (or the basis) of each of their proposed

54 It should be noted that the idea of the practical as I use it does not indicate some perspective outside of Rawls (i.e. in the non-ideal). The manner in which I use the term is consistent with the way in which Rawls uses it. Practicality refers to the second perspective (and thus is still in ideal theory) and is characterized by the manner in which free and equal citizens who live in a well-ordered society can endorse a public conception of justice regardless of their comprehensive doctrine.

55 The moral philosophy of Leibniz serves as a prominent example of a rational intuitionist doctrine.
solutions will be the same. In justice as fairness, this means that each solution will aim to be in conformity with the principles of justice. Put another way, when a person proposes a solution in ideal theory, they suggest that enacting it is the most appropriate manner by which to make the basic structure adhere more closely to the principles of justice.

Rawls’s uniquely formulated Kantian constructivism has been criticized as unable to fully move past the transcendental idealism that is (considered by some to be inextricably) linked with the idea of the categorical imperative. This critique has been leveled in a variety of ways from an even wider variety of philosophical perspectives. Some (notably Habermas) have critiqued Rawls’s Kantian roots as being too substantive and as evidence of his theory’s reliance on a metaphysical notion of the self. This subject matter will not be dealt with here. Regardless of how it is formulated, this type of critique is largely uninteresting. It is nothing but a dogmatic rejection of an aspect of the framework; it introduces no better set of arguments. Considered in this way, it is not a productive criticism.

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56 See Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism
57 Rawls’s response is that “to the extent that Kant’s moral doctrine depends upon what to some may appear to be a constructivist account of truth in the First Critique (I don’t mean to imply that such an interpretation is correct), justice as fairness departs from that aspect of Kant’s view and seeks to preserve the overall structure of his moral conception apart from that background.” (cf. Collected Papers 352). I find this response to be satisfactory. Additionally, for Rawls’s reply to a critique of this kind, see Political Liberalism Lecture IX: ‘Reply to Habermas.’
58 With the exception of Habermas’s criticism, which I find interesting if not persuasive
To recapitulate, political constructivism is inextricably linked to the idea of the political conception of the person. The political conception of the person must be thin enough that it cannot be considered metaphysical, and thick enough that individuals can produce the same basic solution to the same question of justice. The idea of the free and equal person is built upon the idea of the parties in the original position. Free and equal persons must be able to recognize the agreement that the parties reach behind the veil of ignorance as binding upon them, regardless of their comprehensive doctrine.

§17 Tenets of Kantian Constructivism

Before beginning this section, it should be stated that my intention is not to provide a comprehensive account of Kantian moral theory. This section is instead, an attempt to identify certain elements in Kant’s philosophy that are useful in drawing out parallels between Rawls and Kant. Rawls himself makes this point:

But the adjective ‘Kantian’ expresses analogy and not identity; it means roughly that a doctrine sufficiently resembles Kant’s in enough fundamental respects so that it is far closer to his view than to the other traditional moral conceptions that are appropriate for use as benchmarks of comparison.59 (Emphases mine)

59 Collected Papers 304-305
Rawls’s incorporation of Kant implies only that the theory is thinly Kantian. I take it as a given that Rawls’s reading of Kant is correct, insofar as it is the impetus for his constructivist project.\(^6^0\)

Kant’s moral philosophy is the central example of a constructivist theory in the history of moral philosophy. For Kant, moral truths are derived from pure practical reason inherent in all persons. The procedure that Kant develops his theory upon is the categorical imperative. Importantly for Kant, moral life is viewed as an ongoing process. The categorical imperative does not inherently imply all elements of the moral law: persons engage in a moral project where the content of the doctrine is constructed by their application of the procedure.\(^6^1\) Those who possess pure practical reason (this, for Kant, is constitutive of being a moral agent) are capable of recognizing the validity of the categorical imperative and therefore endorse it as their standard for evaluating different maxims that they formulate. For Kant, individuals cannot have a complete moral theory. Instead, they apply a particular standard with the intention of creating a more morally perfect society in which they can live, which Kant refers to as the Kingdom of Ends.

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\(^6^0\) Rawls’s reading of Kant is, to steal a phrase, behind the veil of ignorance. 
\(^6^1\) For context on this point, see the third formulation of the categorical imperative in *Groundwork for the Metaphysics of Morals*. 

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§18 Formal Elements of Construction

Much of Rawls’s project is characterized by his reading of Kantian moral and political philosophy.62 Despite this, Rawls is careful to note when he moves away from Kant:

Another observation is that, although I regard justice as fairness as a Kantian view, it differs from Kant’s doctrine in important respects. Here I note that justice as fairness assigns a certain primacy to the social; that is, the first subject of justice is the basic structure of society, and citizens must arrive at a public understanding on a conception of justice for this subject first.63

The idea of a procedure is inherent in constructivist theory, and Rawls’s project is no exception. Yet his procedure is different than Kant’s, in both its form and application. For Rawls, this procedure is the original position, which is only interested in deriving acceptable principles of justice as political values. It is not structured so as to produce moral truths; this allows it to serve as the basis for a political and practical conception of justice.64

For Rawls, the parallels to Kant extend further:

The description of the original position resembles the point of view of noumenal selves, of what it means to be a free and equal rational being...The original position may be viewed, then, as a procedural interpretation of Kant’s conception of autonomy and the categorical imperative within the framework of an empirical theory.65

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62 For context on this point, see A Theory of Justice §40 and Kantian Constructivism in Moral Theory in Collected Papers.
63 Collected Papers 339
64 I am here referring exclusively to justice as fairness post-Theory
65 A Theory of Justice 225-226
The original position is only intended for persons who are reasonable and rational insofar as the parties in the imagined original position are considered to be reasonable and rational. The reasonable and the rational as Rawls uses them are derived from the ability to endorse the conclusions of the parties in the original position. Rawls constructs the category of the political person specifically with reference to the original position. Free and equal persons are those sentient objects that can understand the original position and recognize the validity of its conclusions (the principles of justice). In endorsing the conclusions of the parties in the original position, free and equal persons endorse a public conception of justice that serves as the basis for a well-ordered society.

The point I wish to draw out here is that insofar as Kant’s account is constructivist, a moral agent is one who can apply and understand the procedure. In the same way, for Rawls, a political person is one who can apply and understand the procedure. A constructivist doctrine must draw this line between person and nonperson politically (if it is a political constructivist doctrine), between moral agent and non-moral agent (if it is a moral constructivist doctrine). Rawls’s theory implies this type of distinction, insofar as it is a form of political constructivism.
Consider again Rawls’s distinction between the three perspectives that his project uses:

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—of you and me who are elaborating justice as fairness and examining it as a political conception of justice.\footnote{Political Liberalism 28}

The first perspective is that of the parties in the original position. The parties stand behind a veil of ignorance and thus have the least amount of knowledge when compared with the other perspectives. The second perspective is that of free and equal persons and the institutions they would establish in light of their endorsement of the principles of justice as the public conception of justice. Rawls refers to such a society as well-ordered.\footnote{For a full description of the characteristics of a well-ordered society, I refer back to section §7 (The Basic Structure and a Well-Ordered Society)} By contrast, free and equal persons do not stand behind a veil of ignorance.

Free and equal persons endorse the conclusions reached by the parties in the original position as the public conception of justice for their society. In saying that this endorsement is necessary for a society to be well-ordered, Rawls is claiming that viewed from the perspective of rational agents without the burdens of judgment, a scheme of social cooperation that promotes reciprocity can be more readily achieved. When free and equal persons endorse the conclusions of the parties, they recognize their obligation to construct society in
a way that is in accordance with the two principles of justice as the public conception of justice. This agreement effectively amounts to the idea that for any question of justice, a general answer is to apply the principles of justice. Thus, there is a clear distinction between free and equal persons in the second perspective and the parties as artificial agents of construction in the first perspective.

The third perspective is that of “you and I,” referring to the theorist (in this case Rawls) and her reader. In this perspective, the theorist analyzes and argues for the principles of justice. In doing so, she considers societies abstractly. Information is divided such that the parties in the first perspective have the least information (they are, after all, behind a veil of ignorance). Free and equal persons in the second perspective are aware of their comprehensive doctrine and natural endowments, while the theorist in the third perspective has all information.

§20 Practical Objectivity

Rawls is clear that the content is constructed in constructivism rather than the procedure: “First, in moral constructivism, what is it that is constructed? The answer is the content of the doctrine.”68 In political constructivism, as in moral constructivism, the procedure is not itself constructed; it is the content of the

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68 *Lectures on the History of Moral Philosophy* 239
doctrine that is constructed. A constructivist political philosophy uses a procedure to provide answers to questions of justice.

Justice as fairness is an attempt to provide a system in political philosophy that develops a basic solution to any question of justice through the original position as a device of representation. The endorsement of the principles of justice by free and equal persons in the second perspective is the acceptance of the public conception of justice in that well-ordered society. This agreement can be reached because free and equal persons who consider the original position separately should all endorse the conclusions of the parties in the thought experiment: “Constructivism says: the result is correct because it issues from the correct reasonable and rational procedure correctly followed.”

This objectivity is achieved through the veil of ignorance applied to the parties contained within the procedure:

Kant held, I believe, that a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and rational being...Now the veil of ignorance deprives the persons in the original position of the knowledge that would enable them to choose heteronomous principles.

Rawls views the veil of ignorance as a way of achieving freedom from heteronomy and subjectivity. When different free and equal persons consider the reasoning of the parties for the two principles, they should accept those principles as the public conception of justice for a well-ordered society.

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69 Lectures on the History of Moral Philosophy 242
70 A Theory of Justice 222
independent from one another.\textsuperscript{71} This in turn allows for a \textit{practical objectivity} between citizens considered as participants in society in the second perspective who endorse the same publicly available conception of justice. Practical objectivity signifies that the goal of all free and equal persons is the same in attempting to answer questions of justice. For each free and equal person, the aim is to produce the result in which the basic structure best adheres to the principles of justice.

The original position itself does not function directly as a means of applying the Rawlsian standard to practical issues in the second perspective. It is only the procedure that produces the principles of justice to be applied. To return to Kant as a means of analogy, Rawls has the following to say in \textit{Theory}:

The principles of justice are also analogous to categorical imperatives. For by a categorical imperative Kant understands a principle of conduct that applies to a person in virtue of his nature as a free and equal rational being. The validity of the principle does not presuppose that one has a particular desire or aim. Whereas a hypothetical imperative by contrast does assume this: it directs us to take certain steps as effective means to achieve a specific end.\textsuperscript{72}

The original position is the procedure that is used to produce the content of the doctrine: the principles of justice. It is these principles that are endorsed as the public conception of justice by free and equal persons in the second perspective. In ideal theory, citizens of a well-ordered society achieve practical objectivity when they all agree that the purpose of legislation in society is to apply the principles of justice in the most appropriate way possible. While they might

\textsuperscript{71} It should be noted that this endorsement occurs in the second perspective and thus only in ideal theory.

\textsuperscript{72} \textit{A Theory of Justice} 222-223
disagree on how this is to be done, they agree on the basic task and work together to achieve it.

To reiterate, the original position is a means by which free and equal persons with varying conceptions of the good can endorse the same conclusion: the principles of justice. It is not a process of abstracting from one’s self. No one imagines herself behind the veil of ignorance; this itself would be a different procedure. The original position is the means for different persons with competing comprehensive doctrines to affirm the same public conception of justice. The original position pushes any citizen in a well-ordered society to recognize that her place in that society is a product (at least to a certain degree) of moral luck. The distribution of natural endowments is uncontrolled; no one can claim responsibility for the fact that they are physically or mentally gifted. Ability is not earned and natural differences exist between individuals. This is necessarily so. But this does not mean that any hope of equality in society should be abandoned. The focus should instead be placed upon a finding a way for society’s institutions to work for everyone. Practical objectivity is a means by which this can be achieved.

§21 Practical Application

How should the original position be understood as it relates to persons applying it as constructivist procedure to particular questions of justice in the second
perspective? The idea of the original position as a repeatable procedure comes from Rawls himself:

Thus it may be helpful to observe that one or more persons can at any time enter this position, or perhaps better, simulate the deliberations of this hypothetical situation, simply by reasoning in accordance with the appropriate restrictions.\(^73\)

The simulation that Rawls refers to here is the original position. *Practical application* is the act of consideration and endorsement of the agreement of the parties in the original position in response to a single question of justice (the principles of justice) by free and equal persons in the second perspective. A person practically applies when they aim to enact the principles of justice in response to a particular question of justice. Strict compliance theory assumes practical application in response to every question of justice.

It is not Rawls’s intention to create a fully developed political philosophy that can answer any question of justice regardless of its circumstance. He does not think that creating this type of political philosophy is feasible. The objectivity in the second perspective is practical in that it is intended to provide a basis of agreement (the principles of justice) for any question of justice that free and equal persons might face in their well-ordered society.

Practical application consists in both the understanding of the implications of the deliberations of the parties in the original position as well as the understanding that the public conception of justice that the parties agree to has precedence over one’s own interests in response to a particular question of justice. It is the idea that free and equal persons recognize the public conception

\(^{73}\) *A Theory of Justice* 119
of justice as superior to their own interests when those conflict in working towards a solution for a given question of justice.

It is here that the line between political person and nonperson becomes clear. If one fails to understand the procedure (i.e. if one is not rational) then one is not capable of practical application. To understand the procedure and not recognize that it is binding over one’s own interests does not constitute practical application either. But this case is crucially different, insofar as it represents a person who is rational, but not reasonable. Thus, we say that the distinction between political person and nonperson is between those who are capable of practical application and those who are not. Those who are capable of practical application but do not recognize the public conception of justice are still owed consideration but only in accordance with the priority of liberty. For if the liberty they receive harms the liberty of others, it can be restricted.

This point is crucial. To restate it, the capability for practical application is that which divides sentient objects into free and equal persons and nonpersons. Free and equal persons are sentient objects capable of practical application. The idea of the nonperson is anything that is incapable of practical application. In non-ideal theory, the best examples of this type of object are

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74 This does not limit itself to objects that are sentient. A box of tissues, for example, is incapable of practical application and is thus a nonperson. The issue becomes far more difficult in cases where the object is sentient and it is for this reason that I refer to sentient objects in making the distinction. I take it as a given that no one would claim with any degree of seriousness that a box of tissues is deserving of the status of personhood. In any case, sentient objects represent more difficult cases and in most instances when I use the term nonperson, I am mostly referring to sentient objects. As concerned as I might be with the plight of tissue boxes, it is not my intention to argue substantively for
nonhuman animals and the severely mentally disabled. Insofar as these specific subjects belong to non-ideal theory, I treat these subjects only abstractly. They are evidently the objects of the type of arguments I develop but insofar as this critique is placed in ideal theory, the object is to work out the idea of sentient nonpersons specifically in the ideal sense before determining the implications of these arguments for the non-ideal.

Additionally, that a sentient object is capable of practical application implies that it is capable of participating in public reason and presenting arguments for public justification. This condition is rather intuitive: only sentient objects that can understand the principles of justice and consider themselves bound by those principles can present arguments in accordance with them. By contrast, sentient nonpersons are incapable of participating in public reason. Insofar as they are incapable of practical application, they cannot understand or recognize the public conception of justice as binding, and thus cannot present arguments in accordance with it.\footnote{It should be noted that practical application does not represent a fourth perspective in Rawls. It is contained entirely within the second perspective. It is not the endorsement by the reader of the principles of justice in non-ideal contexts. That action by the reader indicates an application of ideal theory to non-ideal theory that is obviously outside the scope of ideal theory. One could argue that this is implicitly the goal of the framework (though I would not), but this application to the non-ideal could require entirely different principles of justice. The issues that present themselves in non-ideal contexts have historical implications that the principles of justice do not consider. Rawls himself is clear about this. The idea is to formulate the ideal and then compare this ideal society to societies in non-ideal contexts. From this, it can be determined what changes are necessary in order to bring the non-ideal closer to the ideal separately. This, if anything, could be said to be the fourth perspective, insofar as another theorist their rights in this examination. Rather, I am concerned specifically with sentient objects that fall outside the extension of the concept of the political person.}

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The idea of practical application is that each person who practically applies uses the principles of justice as the basic resolution for a particular question of justice. To be reasonable in ideal theory implies that one practically applies in response to every question of justice. In this way, the practical application is the use of the constructivist procedure in the second perspective. It is necessary to assume practical application insofar as justice as fairness is a constructivist doctrine. One of the key assumptions of ideal theory is of strict compliance. Insofar as free and equal persons are reasonable in ideal theory, they practically apply in response to every question of justice. They fully comply with the political conception of justice in this way.\footnote{I return to this idea in section §40 (Practical Application in Ideal Contexts)}

To recapitulate:

(i) \textit{Practical objectivity} is the result of the agreement in the second perspective by free and equal persons. It stipulates that the answer to any question of justice is to apply the principles of justice.

(ii) \textit{Practical application} is the use of the principles of justice in answering \textit{a single question of justice} by free and equal persons in the second perspective. To be capable of practical application is what separates political persons from nonpersons.

\footnote{I return to this idea in section §40 (Practical Application in Ideal Contexts)}
§22 Framing What Follows

It has been my intention in this section to argue that Rawls, in relying on a constructivist approach, implies that free and equal persons consistently practically apply in the second perspective. I do not think that Rawls would disagree with any of the ideas I have pushed for in this section. I have simply named the constructivist application of the principles of justice by free and equal persons that occurs in the second perspective and isolated it as a particular act in response to a single question of justice. Free and equal citizens must accept the publicly available conception of justice in the second perspective; this is one of the necessary components of a well-ordered society. To recapitulate, practical application is the endorsement of free and equal persons in the second perspective of the principles of justice that the parties in the original position agree upon in response to a single question of justice. This, in turn, leads them to accept a public conception of justice that is binding upon them. Practical objectivity is a basic agreement on the general direction in which to work when attempting to solve a question of justice.

Practical application and practical objectivity are both components of ideal theory. This cannot be stressed enough. It would be a misreading to say that practical application consists in the reader applying the theory in non-ideal cases. Practical objectivity exists between citizens as the basic agreement on how to solve questions of justice in the second perspective.
The line for what objects fall within the extension of the political person and those that do not becomes an important question throughout the remainder of this examination. The idea of what objects are *capable* of practical application is what distinguishes person from nonperson in the political sense. Insofar as the doctrine is constructivist, it must make this distinction between those who are capable of practical application (considered as a single instance of applying the principles of justice) and those objects that are not. Given that this is the case, the idea of the free and equal person and how those free and equal persons relate to objects that cannot practically apply becomes crucial. This idea is referred to and developed in the chapters that follow. The purpose of this chapter has been to make clear what constitutes the division between person and nonperson politically and that this division is a necessary one.
Chapter 3

Exploitation in the Original Position
"There is no alternative to social cooperation except unwilling and resentful compliance, or resistance and civil war."77

§23 Orienting the Project

My intention in this short opening section is to frame the discussion that follows in a way that makes it as clear as possible. The thought experiment I present deals exclusively in ideal theory. The beings it suggests do not strictly correspond with entities in the world. To steal a phrase from Rawls, they are simply agents of construction.78 They might be best considered as domestic animals in human form. In considering them and their subjugation, I proceed in a manner similar to Rawls; the ideal suggests implications for the non-ideal. Put another way, the goal is to work out the problem specifically in ideal theory before examining the types of implications it has for non-ideal issues. I touch on these implications at various points where the discussion is relevant, but I do not treat the non-ideal in any substantive way.

This critique is specifically internal, which is to say that its scope does not extend further than the political conception of justice. My intention is to explicate the problems that are inherent in creating a political conception of justice that is functional. One such problem is that of questions of justice for nonpersons. I realize that Rawls would very much like to push this concern to the side in formulating a political conception of justice. But I shall argue that it is precisely this failure to account for nonpersons that is problematic in the

77 Political Liberalism 301
78 Crucially though, they are not rational agents of construction.
account. Insofar as the political conception of justice does not include these beings, it is unconcerned with them. The impetus for this concern is that the manner in which Rawls relies upon a conception of the person and specifically the extension of that concept in distributing primary goods is problematic. With the absence of any kind of moral theory a political conception of justice can justify undesirable social arrangements, which are being based upon the exploitation and subjugation of these beings.

My intention in this chapter is merely to present a society that would be described as just by the framework. I do not argue specifically against Rawls in this chapter. I merely attempt to demonstrate that the society I describe would be acceptable from the standpoint of justice as fairness. I then use this hypothetical society as the impetus for criticizing aspects of the political conception of justice in the next chapter (The Difference Principle and Nonpersons).

While it is my opinion that the thought experiment I present is best thought of specifically in the context of ideal theory, for the sake of clarity, the real world entities with which I am primarily concerned are the severely mentally handicapped and nonhuman animals. These types of concerns are components of non-ideal theory, and should thus be kept in the background while considering the thought experiment. I am offering them here only as a means of clarifying what my intention is.
§24 Framing the Political Person

The Rawlsian framework depends fundamentally on the extension of the political conception of the person. The thought experiment presented here is intended to show the extent to which this limitation of the political framework is damaging. Insofar as the use of an extension of a conception of the person designates certain objects, it also fails to designate others. It is this set of sentient objects not in the extension of the concept of the political person that are problematic.\(^79\) This critique does not deal with the absence of principles that might be necessary for dealing with racial or gender justice in non-ideal theory insofar as African-Americans or women could have at times in American history been considered as subpersons politically speaking.\(^80\)

The idea of the thought experiment presented below is to show that the way in which the conception of the person fits within the political conception of justice is problematic in answering questions of justice. In orienting the basic structure only toward those who fit under the extension of this concept, Rawls does not account for obligations to political nonpersons. Rawls acknowledges that this could be problematic:

Since we begin from the idea of society as a fair system of cooperation, we assume that persons as citizens have all the capacities that enable them to

\(^79\) I make the distinction between sentient nonpersons and nonpersons because my argument deals specifically with objects or beings that can feel pain, rather than inanimate objects that would technically also fit under the idea of a nonperson. The idea of merely being alive does not quite describe the set of objects I refer to, as prokaryotes plainly fall into this category and are not objects that I wish to address here.

\(^80\) See §26 on this point (Nonpersons and Subpersons)
be cooperating members of society. This is done to achieve a clear and uncluttered view of what, for us, is the most fundamental question of political justice: namely, what is the most appropriate conception of justice for specifying the terms of social cooperation between citizens regarded as free and equal over a complete life?

Rawls continues:

By taking this as the fundamental question we do not mean to say, of course, that no one ever suffers from illness and accident; such misfortunes are to be expected in the ordinary course of life, and provision for these contingencies must be made. But given our aim, I put aside for the time being these temporary disabilities and also permanent disabilities or mental disorders so severe as to prevent people from being cooperating members of society in the usual sense. Thus, while we begin with an idea of the person implicit in the public political culture, we idealize and simply this idea in various ways in order to focus first on the main question.81

Rawls is referring in this section to the problem of political nonpersons, specifically the mentally handicapped and nonhuman animals. Later in the same section Rawls acknowledges “the problem of what is owed to animals and the rest of nature.” Rawls stipulates that these questions are outside the scope of a political conception of justice:

While we would like eventually to answer all these questions, I very much doubt whether that is possible within the scope of justice as fairness as a political conception. I think it yields reasonable answers to the first two problems of extension: to future generations and to the law of peoples, and to part of the third, to the problem of providing what we may call normal health care.82

Rawls’s rationale for not dealing with these concerns is that the political conception of justice needs to assume certain conditions in order to answer questions of justice and that it should not be expected to answer all questions of justice. Yet it is exactly this move of pushing aside concern for nonpersons that is

81 Political Liberalism 20
82 Political Liberalism 21
problematic in justice as fairness. The problem inherent in this type of move is that it prioritizes justice for persons and sets the terms of the social relations between persons as a question separate from what is owed to nonpersons.

A hypothetical society is offered as an example of a potential problem in the way in which Rawls does not account for nonpersons. Rawls's argument relies upon a political conception of the person that the reader should be able to accept regardless of the comprehensive doctrine she may hold:

To use a current phrase, the political conception is a module, an essential constituent part, that fits into and can be supported by various reasonable comprehensive doctrines that endure in the society regulated by it.

The goal of a political conception of justice is to propose a way of thinking about justice that can be endorsed by all free and equal citizens, regardless of their comprehensive doctrine. Insofar as the idea of a free and equal citizen does not depend on any one particular conception of the good but in the idea of having a conception of the good, the way in which the free and equal person is defined becomes crucial for the theory as a whole.

Rawls thinks of the concept of the person in its most basic form in the following way:

Beginning with the ancient world, the concept of the person can be understood, in both philosophy and law as the concept of someone who can take part in, or who can play a role in, social life, and hence exercise and respect its various rights and duties. Thus, we say that a person is

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83 My intention in this chapter is mainly to justify the society in justice as fairness. I discuss the implications of this in the next chapter (The Difference Principle and Nonpersons).

84 Political Liberalism 12
someone who can be a citizen, that is, a normal and fully cooperating member of society over a complete life.\textsuperscript{85} (Emphasis mine)

This notion serves as the basis for the political person that Rawls uses in his theory. It is in this way that the person understood in a strictly political sense is a result of her place in the scheme of social cooperation. She is considered a person precisely because she can participate in that scheme of cooperation. That she exercises and respects the various rights and duties that it implies suggests that she understands those duties.

In order to characterize this type of political conception, Rawls frames the conception of the political person as fundamentally related to the basic structure:

Thus, from the start the conception of the person is regarded as part of a conception of political and social justice. That is, it characterizes how citizens are to think of themselves and of one another in their political and social relationships as specified by the basic structure.\textsuperscript{86}

The person as an agent interacting in the political sphere is conceived as a result of the various patterns of social interaction. Rawls is clear that the political conception of the person cannot be separated from the basic structure of society as a whole. A political person in the Rawlsian sense is characterized by how her having a conception of the good and a rational plan of life while being in interaction with other persons in society, in such a way that she can further her rational plan of life and her conception of the good (with the stipulation that both are reasonable). The basic structure is oriented towards these political (or free and equal) persons. Insofar as they have reasonable rational plans of life,

\textsuperscript{85} Political Liberalism 18
\textsuperscript{86} Political Liberalism 300
the basic institutions of society should be designed to further those plans. Additionally, as stated above, free and equal persons have the capacity for a sense of justice, which Rawls describes as “the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.”

This, along with the ability to possess a rational plan of life, Rawls refers to as the two moral powers of free and equal persons. The idea of the free and equal person is synonymous with what Rawls refers to as his political conception of the person.

### §25 Subjugation in a Well-Ordered Society

Consider a society characterized by the widespread subjugation of nonpersons who are not rational. Free and equal persons in the society do not consider the subjugated to be persons in the political sense and brutally and violently exploit the nonpersons, who despite their limited capacities are capable of feeling pain. This inferior group is not rational and only capable of limited language use; they are not capable of practical application. Despite this, the society’s institutions are set up in such a way that they benefit the least advantaged in the scheme of social cooperation. Any legislation that does not adhere to the principles of justice is immediately repealed. A plurality of free and equal citizens recognizes the principles of justice as the publicly available conception

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87 Justice as Fairness 19
88 Strictly speaking, the beings may or may not be capable of limited language use. This is insignificant to the larger point.
of justice from within their comprehensive doctrines as the basis of an overlapping consensus. Additionally, the institutions of society are oriented towards benefiting the least-advantaged, which is to say that they are designed in a way that advances the conceptions of the good of all members of the scheme of social cooperation (insofar as those persons, those conceptions, and those persons’ endorsement of those conceptions are reasonable). Thus, the society meets the qualifications of a well-ordered society.

Now, if a political person in this society were to be challenged by the claim that her society is unjust, how might she respond? Suppose that she were to explain her political commitments within a Rawlsian framework. Insofar as she and her fellow citizens are practically applying the principles of justice in response to every question of justice, those principles are responsible for the organization of society. It follows from this that the principles of justice that the person practically applies are what are challenged as unjust if the society is to be challenged as unjust. When she reasons from the original position, the subjugator views these nonpersons as property. If we suppose that property is a component of the primary good of wealth and income, then it follows that property is to be distributed as equally as possible. Thus, if objects outside the extension of the concept of the political person are considered as property, then they are to be distributed as equally as possible.89 The extension of the political

89 Strictly speaking, it is not specifically the nonpersons that must be distributed as equally as possible, but property. Insofar as nonpersons belong to that larger category, and insofar as that larger category is a primary good (which it undoubtedly is as a component of wealth) they should be distributed as equally as possible.
conception of the person is only said to include individuals if they are rational (i.e. capable of practical application), and thus, any considerations that would be due to political persons are not due to objects outside that extension. The principles of justice only organize the scheme of social cooperation, and political nonpersons are not included.

Suppose we were to challenge the subjugator on the basis that the nonpersons should be considered as persons within the framework. If this claim could be justified, the subjugator would have to recognize that the claim that her society was well-ordered was unfounded, insofar as sentient objects that fall under the extension of the concept of the political person were being subjugated.

Recall the moral powers that characterize Rawls's conception of the free and equal person. The first of which is:

The capacity for a sense of justice: it is the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation. (Emphases mine).90

Insofar as a person exercises various rights and acts in accordance with duties, she understands the public principles of justice upon which the fair terms of social cooperation are specified. If we suppose that she cannot understand (i.e. if she is not rational), then she plainly does not fit within the extension of the concept of the political person. This is true insofar as she is incapable of practical application. If this is indeed the case, the parties in the original position cannot

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90 Justice as Fairness 18-19
consider her as a *point of entry*. It follows from this that within the framework the hypothetical subjugator is justified in considering the subjugated as political nonpersons insofar as they are not rational. Thus, the original position makes no specification about how nonpersons should be organized politically.

The second moral power, Rawls defines as follows:

The other moral power is a capacity for a conception of the good: it is the capacity to have, to revise, and *rationally* to pursue a conception of the good. 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 or, alternatively, of what is regarded as a fully worthwhile life. The elements of such a conception are normally set within, and interpreted by, certain comprehensive religious, philosophical, or moral doctrines in the light of which the various ends and aims are ordered and understood. (Emphases mine)\(^92\)

Because objects in the subjugated group are not rational, they do not have the ability to rationally pursue a conception of the good. Given that this is the case, it can be stated that the subjugated group possesses neither moral power. The reasonable subordinates the rational. Because the nonpersons are not rational, they are neither rational nor reasonable.\(^93\) If she is not rational she cannot

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\(^91\) I use this term to describe positions that the parties consider as possibilities for themselves after the veil of ignorance lifts in the original position. A point of entry is the position of a sentient object after the lifting of the veil of ignorance. Insofar as this position can only be that of a free and equal person, the idea of a point of entry is constrained by sentient objects that are capable of practical application. One cannot consider a nonperson to be a point of entry.\(^92\) *Justice as Fairness* 19

\(^93\) If a sentient object is rational it would be capable of understanding the original position. But insofar as it is not reasonable, it does not recognize that the public conception of justice has priority over her own interests in cases where those conflict. The case of the person who is rational but not reasonable is plainly different than those who lack a rational capacity. For Rawls, the reasonable presupposes the rational insofar as it is necessary to understand the political conception of justice and accept its implications. The main qualification of personhood in justice as fairness is the rational. For this reason, one would
understand the idea of the original position. Thus, the sentient objects exploited in the thought experiment fall outside the extension of the concept of the political person. The claim that the subjugated should be considered as members of the extension of the concept of the political person is unfounded within the framework.

It should be noted before proceeding that in this thought experiment, the hypothetical society is not, as it were, formed directly out of the original position: it should not be said that the society actually emerges from the original position from behind the veil of ignorance to its current form. There is no historical connection between the original position and the society. It is instead considered only as a thought experiment for individuals in the society, serving a justificatory purpose for the principles of justice. It is therefore consistent with the second perspective as Rawls lays that perspective out. The original position is only a procedure considered by citizens that allows them to endorse the publicly available conception of justice, namely, the principles of justice.

§26 Subpersons and Nonpersons

At this point, I should like to draw a distinction between political subpersons and political nonpersons. Subpersons possess rationality but for whatever reason not be justified in treating a being that was rational but not reasonable as property. This case plainly belongs to the idea of paternalism and the penal system. I discuss this more fully in section §32 below (The Social Coordination Objection).
(usually based on social and historical context) the equal stature that they deserve in society is not accorded to them. They are rational and the failure of society to recognize this is simply due to bias on the part of those who consider themselves and those like them as political persons. This bias can be the result of a variety of differences between persons and subpersons. Racial or gender considerations are prominent examples. They are capable of practical application but this capacity is unrecognized.

Given that subpersons and their capacity for practical application are not recognized—as they deserve to be—their case belongs to non-ideal or partial compliance theory. Subpersons fall under the extension of the political conception of the person insofar as they are rational and reasonable. If a society is considered in which subpersons exist, that society is only partially applying (and partially complying with) the principles of justice. This is the case insofar as persons who are capable of practical application are not recognized correctly. Given that this is the case, that society is not in ideal theory and cannot be considered a well-ordered society. Additionally, the limitations placed on subpersons must be acceptable from their point of view if they are to be acceptable at all. Insofar as they are capable of practical application, subpersons must be considered as a point of entry. This is, after all, the empirical qualification for being a free and equal person. If the subpersons are able to contribute and participate in society while affirming the public conception of justice, justice as fairness dictates that the parties in the original position must
recognize them as points of entry. It follows from this that the parties in the original position would not accept the position of subperson. Thus, any society that considers a set of persons to be subpersons cannot be well-ordered.

Political nonpersons have no standing in political society that they create for themselves. If they do have standing, this standing is moral rather than political and is a consequence of political persons in society giving them this consideration. Nonpersons would be incapable of speaking up for their rights in the way that subpersons would be able to if they were not restricted from public reason. Restriction makes no difference for political nonpersons because regardless of whether they are restricted, they are unable to participate in public reason. In short, this means that subpersons can argue for their status in public reason, while nonpersons cannot do so.

Recall the idea that the status of subperson is unjustifiable within justice as fairness because that position could never be accepted from the point of view of a subperson. But this *ipso facto* signifies that the subperson is capable of understanding her condition and of opposing it in public reason; for she could not *rationally* oppose a position that she did not understand. Her ability to understand is itself contingent upon her rationality, which the nonpersons in the hypothetical society do not possess.

To recapitulate:

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94 I stress *able* here to suggest that it is not necessary for subpersons to affirm the public conception of justice in order to be recognized as persons politically.
(i) Subpersons are rational but are not given the consideration due to persons in society because of historical and social contingencies. Subpersons are capable of practical application.

(ii) Nonpersons are not rational (and not reasonable insofar as the rational presupposes the reasonable). This is true regardless of historical or social contingencies. Nonpersons are incapable of practical application.

§27 A Note on Language Use

Throughout this criticism, I have used (and will continue to use) the terms *forced labor* and *subjugation*.95 This choice was a conscious one. In considering Rawlsian objections, it seems necessary to justify this choice over and against the term *slavery*. This is important at this point because Rawls himself uses the term *slavery* in many of the selections that I consider as possible objections to the thought experiment.

*Slavery* as a concept denotes a situation in which a person enslaves another person. If, for example, someone were to object that houseplants were enslaved, this would be almost nonsensical. The reply to the houseplant abolitionist would be to simply say that plants do not fall within the extension of the concept person (assuming, of course, that we were being properly philosophical in our reasoning). To use Rawls's terminology, slavery only applies

95 By way of clarification, I italicize the terms when I am referring to them specifically as linguistic terms. I leave them un-italicized when I discuss the idea that the term denotes.
in cases where rational persons (capable of practical application) are held in a relationship of forced labor. Because the idea of forced labor seems to be at the basis of the application of the term, I choose to use it rather than *slavery*.

Beyond this, in any argument against slavery, it is difficult to consider the word *slavery* without its historical extension affecting deliberation. When slavery is treated as a historical institution, arguments against it seem almost superfluous. It is evident that slavery was horrible enough that it should not be considered as something to be argued for in any political context. But in using the word *slavery*, one should be careful of the historical connotations of such a term.

To recapitulate, I use the terms ‘forced labor’ and ‘subjugation’ for two reasons:

(i) Slavery refers to a situation in which a rational and reasonable person is held in a situation of forced labor. Forced labor is the best intersection between the historical example and the hypothetical example.96

(ii) Slavery has a particular historical context that I wish to avoid, given the fact that this critique remains in ideal (or strict compliance) theory rather than non-ideal (or partial compliance) theory.

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96 Forced labor is a component of the term slavery. Plainly, other types of forced labor (indentured servitude, for example) contain forced labor as well. The idea is to avoid the other aspects inherent in the term slavery historically (humiliation, treatment of persons as non-human property, etc.). The forced labor of the hypothetical differs from slavery in these ways, most importantly with respect to how the idea of the person operates in each.
I have explained this word selection specifically because it seemed unavoidable given the nature of Rawls’s own language use. In considering potential objections, I use *slavery* and *slaveholder* to refer to Rawls’s discussion of related issues in the context of his theory, and *forced labor* and *subjugation* to refer to my own arguments.

The thought experiment presented here, insofar as it deals with political nonpersons, should not be subject to any of the claims that Rawls makes about the organization of political persons in society. Any Rawlsian objections that could hypothetically be addressed to the subjugator should fail precisely on this basis. I now present several Rawlsian objections as a means of illustrating this point.

§28 Basic Objections

The first simplistic objection comes from one of Rawls’s earliest papers:

Now the conception of justice as fairness, when applied to the practice of slavery with its offices of slaveholder and slave, would not allow one to consider the advantages of the slaveholder in the first place. As that office is not in accordance with principles which could be mutually acknowledged, the gains accruing to the slaveholder, assuming them to exist, cannot be counted as in *any* way mitigating the injustice of the practice. The question whether these gains outweigh the disadvantages to the slave and society cannot arise, since in considering the justice of slavery these gains have no weight at all which requires that they be overridden. Where the conception of justice as fairness applies, slavery is *always* unjust.\(^{97}\)

\(^{97}\) *Collected Papers* 67. It should be noted for the sake of clarity that this selection deals specifically with the justification of slavery by classic utilitarian theory as providing benefits to society as a whole.
Justice as fairness, in considering both the slaveholder and the slave, eliminates the possibility of slavery. Because Rawls does not rely on a conception of utility, he believes (rightly) that there is no way in which his theory can be said to justify a society in which the practice of slavery is pervasive.

But suppose an objection of this type were to be posed to the subjugator. The objection might suggest that the subjugator was enslaving nonpersons and attempt to establish that the society in which she resides could not be considered well-ordered as a consequence. In response, she might wholeheartedly agree that slavery is politically unjustifiable. She would not consider herself to be a slaveholder, nor would she consider any member of the non-rational group to be enslaved. Slavery as a concept only applies when objects that fall within the extension of person are held in a relationship of forced labor against their will; it is unjustifiable in justice as fairness only insofar as the parties in the original position consider the slave state to be a point of entry. This is itself constrained by the political idea of the person as being involved in a scheme of social cooperation.

The fact remains that the original position occurs between parties in the same scheme of social cooperation, in the same society. Were it to be framed in such a way that the parties could consider points of entry outside the scheme of social cooperation, this would make little sense. To be outside the scheme of social cooperation is to be outside of society, and if the original position were formulated such that it distributed primary goods to those outside of society, then those individuals would ipso facto then be considered in society. A political
conception of justice cannot be said to extend past the borders of influence of the society whose members accept it. Even if it were to attempt to do so, it would have no means by which to fulfill the expectations of primary goods that it promised outside of its bounds. If, for example, a constitution attempted to provide legal rights to those in other polities, this could not possibly be supported. A simple appeal to the basic idea of justice as fairness cannot then be said to solve the problem.

§29 The Equal Liberty Objection

Consider a different objection based upon the first principle of justice. Rawls’s most mature statement98 of this principle is as follows: “Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.”99 Yet the first principle applies only to persons considered as such in the political sense and not to those objects that fall outside the extension of that concept.

Consider Rawls’s specification of these liberties:

The remaining (and supporting) basic liberties—the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation) and the rights and liberties covered by the rule of law—can be connected to the two

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98 The first principle is revised in order to deal with objections made to its formulation in Theory. For Rawls’s rationale behind this decision, see Justice as Fairness 13.3 and The Basic Liberties and Their Priority in Political Liberalism.
99 Justice as Fairness 42
fundamental cases by noting that they are necessary if the preceding basic liberties are to be guaranteed.\textsuperscript{100}

If we accept the premise that political persons are entitled to liberty and integrity of their bodily personhood, then slavery can never be justified because slavery violates this integrity, which is a primary good. The objection is basically that free and equal persons in the hypothetical society are violating the rights of the subjugated, which is explicitly forbidden by the first principle. But only persons are subject to the provisions of the first principle. Insofar as any given object is not in the extension of the conception of the political person, that object is not entitled to a distribution of primary goods within the framework. Nonpersons do not fall within the extension of the concept of the political person. Insofar as this is the case, the principle of freedom and integrity of the person cannot apply to them.\textsuperscript{101}

The Rawlsian objection that the first principle provides a fully adequate scheme of basic liberties for all functions only to exclude states of forced labor for persons who receive freedom and integrity of the person as a primary good,

\begin{itemize}
\item \textsuperscript{100} *Political Liberalism* 335
\item \textsuperscript{101} My contention is only that sentient nonpersons receive no political consideration in justice as fairness. Certainly some moral consideration is owed to sentient nonpersons in non-ideal contexts. Consider the case of nonhuman animals, to which intuitionally there is clearly some form of obligation. This is not to such an extent, however, that the resulting moral claim on us is more than our obligation to a fellow human being. Yet there are laws against abusing nonhuman animals. This in and of itself seems like a clear prioritization of the severity of violations of the moral status of nonhuman animals above the liberty of the particular individual doing the violating. The case of nonhuman animals is only of general interest insofar as it fits within the category of political nonpersons that possess sentience. Beyond this, I do not consider nonhuman animals specifically, although plainly this critique has implications for nonhuman animals. For a discussion of nonhuman animals and moral personhood, see Lori Gruen’s *Ethics and Animals.*
\end{itemize}
and not for nonpersons. The basic liberty of freedom and integrity of the person does not hold for those nonpersons; it is a primary good that they do not receive as a consequence of the fact that their status in society is not considered as a point of entry from behind the veil of ignorance. Any objection based upon the freedom and integrity of the person to the thought experiment implicitly relies upon an application of the conception of the political person beyond those sentient objects to whom Rawls specifies that it should apply, which are only those capable of practical application.

§30 The ‘Reasonable’ Objection

Suppose the subjugator were to be challenged in a different context. To phrase the objection in Rawls's own terms: the subjugator holds a comprehensive doctrine that is unreasonable in that it is premised upon an unjust conception of the person and a refusal to live in a cooperative society.

This objection relies on the idea of the reasonable as formulated in Rawls. Recall the definition of the reasonable that Rawls gives:

As applied to the simplest case, namely to persons engaged in cooperation and situated as equals in relevant respects (or symmetrically for short), reasonable persons are ready to propose, or to acknowledge when proposed by others, the principles needed to specify what can be seen by all as fair terms of cooperation. Reasonable persons also understand that they are to honor these principles, even at the expense of their own interests as circumstances may require, provided others likewise may be expected to honor them.102

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102 Justice as Fairness 7
To say that someone is reasonable signifies that that individual recognizes the obligations produced by the public conception of justice over and above the particular interests that they hold, insofar as these might conflict. As such, it may not be the most rational thing to be reasonable:

Yet while it is unreasonable, it is not, in general not rational [to be ready to violate the fair terms of social cooperation]. For it may be that some have a superior political power or are placed in more fortunate circumstances; and though these conditions are irrelevant, let us assume, in distinguishing between the persons in question as equals, it may be rational for those so placed to take advantage of their situation. In everyday life we imply this distinction, as when we say of certain people that, given their superior bargaining position their proposal is perfectly rational, but unreasonable all the same. Common sense views the reasonable but not, in general, the rational as a moral idea involving moral sensibility.103

For Rawls, rationality is only the principle of self-interest present in the social sciences. Rawls does not hold, as for example Kant does, that it is rational to be moral. It is, rather, reasonable to be moral, given the fact that one should like to be accorded those same moral considerations.

Returning to the objection, the subjugator is more than willing to affirm the principles of justice above her own interests when those conflict. We, as theorists (in the third perspective) apply principles that the subjugator does not acknowledge, but these principles (insofar as they are not contained within the political conception of justice) do not apply to the subjugator’s standing within that conception of justice (from her perspective). But the conception of the political person in the framework does not include the subjugated insofar as

103 Justice as Fairness 7
they are not rational and incapable of practical application. Thus, the subjugator's endorsement of the principles seems to be a separate issue.

From the standpoint of the hypothetical subjugator, it is rational to accrue as much property as possible. If nonpersons are only considered as property, then it is rational for the subjugator to want as much as possible. If the principle of property were to be revised in such a way that anything sentient could not be considered property, this might solve the problem. But this measure itself would upset a great many institutions in society, particularly in the case of nonhuman animals considered as political nonpersons. Nonhuman animals are used in various context as assistance to the physically disabled and additionally, in farming. The parties in the original position would be unable to accept such a provision if they consider farmers to be a point of entry. Additionally, this type of revision has no basis of justification in the principles of justice and thus cannot be justified from the standpoint of the parties in the original position.

Additionally, the subjugated political nonpersons are not reasonable themselves insofar as they are not rational, given the fact that they would be unable to propose or to acknowledge the principles of the fair terms of social cooperation. The framework describes objects that are incapable of doing this as unreasonable.

In short, the idea of the reasonable only makes a thin moral claim; it does indeed compel us to recognize our own interests as subordinate to the political conception of justice. But if an object does not fit the conception of the political

\[\text{104} \text{ This is the case insofar as the reasonable presupposes the rational, which is a stipulation Rawls makes. I discussed this above.}\]
person, then there can be no obligation to that object within the framework. Given this, the reasonable only applies as a moral claim to sentient objects that recognize the public conception of justice.

§31 The Social Bases of Self-Respect Objection

Another potential Rawlsian objection operates on the social bases of self-respect. Rawls recurrently stipulates that the social bases of self-respect are “perhaps the most important primary good”\textsuperscript{105} throughout \textit{Theory}. The Rawlsian objection is essentially that the inferior class is not receiving the social bases of self-respect to which they are entitled.

Before treating this objection, consider the definition that Rawls gives for the social bases of self-respect in \textit{Theory}:

\begin{quote}
We may define self-respect... as having two aspects. First of all... it includes a person's sense of his own value, his conviction that his conception of his good, his plan of life, is worth carrying out. And second, self-respect implies a confidence in one’s ability, so far as it is within one’s power, to fulfill one’s intentions.\textsuperscript{106}
\end{quote}

There is a problem with this definition pointed out by contemporary critics: the social bases of self-respect can be satisfied in a number of societies that would be considered unjust. Stephen J. Massey describes a clearly illiberal society of masters and slaves. In this hypothetical society, the slaves remain convinced that their status is unavoidable and fulfilling. He exemplifies this idea with an Uncle Tom character:

\begin{footnotes}
\footnote{105} \textit{A Theory of Justice} 386
\footnote{106} \textit{A Theory of Justice} 385
\end{footnotes}
Suppose he is an honest and trustworthy man, deeply concerned for the welfare and happiness of his family, friends, and others in his community. He may not regard his values and the fulfillment of his desires as having an importance equal to his master’s, but he thinks they have some importance and respects himself for meeting what he regards as his obligations. Since he meets the criteria of the subjective account, we can say that he respects himself.\textsuperscript{107}

Put another way, the primary good of the social bases of self-respect, as Rawls defined it in \textit{Theory}, allows for individuals who should not be viewed as self-respecting to be considered as such.\textsuperscript{108}

As a consequence of this type of critique, Catriona McKinnon offers the addendum to the social bases of self-respect that a person with self-respect is one who would:

Judge as legitimate any expectation of hers that others give her justifying reasons why she should perform actions which she is expected by them to perform, were she to have these expectations. A person is non-subservient when she conceives of herself as a member of the community of reason-giving and reason-demanding creatures.\textsuperscript{109}

McKinnon refers to this clause as the non-subservience requirement. Considering it in addition to the social bases of self-respect defeats Massey’s happy slaves dilemma.

Insofar as a particular individual is entitled to a fair distribution of primary goods, including the social bases of self-respect, that individual’s social position must be considered as a point of entry. If this is not the case, then those individuals are not entitled to the social bases of self-respect. Moreover, they do not seem to be capable of self-respect in this sense, insofar as it involves the

\textsuperscript{107} \textit{Is Self-Respect a Moral or a Psychological Concept?} 252
\textsuperscript{108} It should be noted that it is entirely irrelevant for the purposes of this thought experiment whether the hypothetical subjugated group is happy or not.
\textsuperscript{109} \textit{Basic Income, Self-Respect, and Reciprocity} 146
ability to take one’s commitments as legitimate grievances to be raised in public reason should they be infringed upon. McKinnon’s addendum to the happy slave dilemma raised by Massey seems to defeat the issue, but only insofar as the parties in the original position consider the slave position to be a possible point of entry. As has been said, nonpersons cannot be considered as points of entry. Thus, they are not entitled to the social bases of self-respect. Consequently, any Rawlsian objection to the hypothetical subjugator based upon the social bases of self-respect would fail.

§32 The Social Coordination Objection

Rawls makes an important distinction between schemes of social cooperation versus those of social coordination:

Social cooperation is distinct from merely socially coordinated activity—for example, activity coordinated by orders issued by an absolute central authority. Rather, social cooperation is guided by publicly recognized rules and procedures which those cooperating accept as appropriate to regulate their conduct.\(^{110}\)

The latter accounts for those political systems that compel persons to perform in a certain role while the former describes a scheme of persons living together on terms to which they can all assent. Such an account inherently depends on what it is to be a free and equal person. It might be objected that the scheme described in the thought experiment is one of social coordination rather than social

\(^{110}\) Justice as Fairness 6
cooperation. If this is indeed the case, then the society presented in the thought experiment cannot be thought of as well-ordered.

There are two points that are relevant in response. First, the idea of a scheme of social coordination implies that persons (in the political sense) are the ones being coordinated. The idea is that persons who are rational agents have their ability to participate in society limited by a dominant group. Insofar as this is the case, the objection fails, as the subjugated nonpersons do not fall within the extension of the concept of political person.

But this objection relies on an implicit idea in Rawls, specifically that social coordination is only the state of persons being coordinated. While Rawls would undoubtedly agree with this characterization, additional grounds for defeating the objection can be produced. With this in mind, consider Rawls's idea of paternalism:

Thus, the principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society. Others are authorized and sometimes required to act on our behalf and to do what we would do for ourselves if we were rational, this authorization coming into effect only when we cannot look after our own good. Paternalistic decisions are to be guided by the individual's own settled preferences and interests insofar as they are not irrational, or failing a knowledge of these, by the theory of primary goods.\footnote{A Theory of Justice 219}

Before proceeding, the rather obvious objection that the principle of paternalism would apply to the subjugated in the society of the thought experiment should be defeated. Put simply: it wouldn’t. This is because the parties in the original position do not consider the subjugated as points of entry. Thus, the subjugated
are not entitled to distributions of primary goods and are not subject to the decisions that the parties make about what they would want behind the veil of ignorance (i.e. what is rational to want).

Moving past this, the principle of paternalism necessarily implies certain spaces of social coordination within a well-ordered society. Paternalism indicates spaces for those who are not rational or who are rational but not reasonable to be held and coordinated. Prison systems and asylums seem like prominent examples of spaces of social coordination that are needed in any well-ordered society, even if strict compliance is assumed. Though the proper organization of these institutions belongs to non-ideal theory, Rawls is clear that these institutions would be necessary from the perspective of the original position in ideal theory. This is a consequence of the priority of liberty. As Rawls himself states:

For although men know that they share a common sense of justice and that each wants to adhere to the existing arrangements, they may nevertheless lack full confidence in one another. They may suspect that some are not doing their part, and so they may be tempted not to do theirs. The general awareness of these temptations may eventually cause the scheme to break down. The suspicion that others are not honoring their duties and obligations is increased by the fact that, in the absence of the authoritative interpretation and enforcement of the rules, it is particularly easy to find excuses for breaking them...By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules. For this reason alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed. Rather, the existence of effective penal machinery serves as men’s security to one another. (Emphases mine)\footnote{A Theory of Justice 211}
Spaces of social coordination within larger schemes of social cooperation are justified by the priority of liberty. Rawls even goes as far as to say that the priority of liberty itself to some degree “carries over to partial compliance theory.”

These spaces of social coordination order political persons who are rational but not reasonable in the case of prisons, and neither rational nor reasonable in the case of those who are institutionalized. To consider nonhuman animals again, farms are another example of a space of social coordination for sentient nonpersons. Social coordination is then allowed for in certain spaces within a larger space of social cooperation. This leads back to the first point, that social coordination is only not tolerated when it subjects political persons to coordination. The objection as a whole seems to run aground on these considerations.

§ 33 Other Conceptions of the Good in Justice as Fairness

Suppose instead that the subjugator’s claim that her society was just within the Rawlsian framework were to be challenged by stating that her conception of the person as a component of her comprehensive doctrine was incorrect. The claim that the subjugator’s conception of the person is unjust seems to turn on an intuitionist notion of the self: there is simply something that piques our moral indignation about the rather obvious fact that the subjugator is subjugating

113 A Theory of Justice 213
beings that can feel pain. But this objection must be carefully framed; if the claim is made that the subjugator has an obligation to care for those who cannot care for themselves, she might point out that she was doing so, and only requiring unending servitude by way of compensation. If the objection is to avoid this simple reply it must be carefully phrased so as to say that it is specifically the conception of the person that is incorrect and that given her obligation to her fellow persons, the subjugator is mistreating the nonpersons she subjugates.

In his later work, Rawls explicitly states that his theory is by no means complete and that it relies, at least to some degree upon other moral considerations. While this reliance on substantive conceptions of the good in certain cases is not in and of itself problematic, it remains an open question to what extent this response coheres with the framework as a whole. Its integration in some form seems to be the theory’s current response to the type of problem raised here. Justice as fairness relies upon a principle of charity from within substantive conceptions of the good in considering the treatment of political nonpersons.

The type of substantive conception of the good to which I refer is a form of charity after the organization of the political conception of justice is completed. The problem with this type of reliance is the extent to which it actually makes sense with the principles of justice. The idea is that the moral intuition made by a free and equal person from within their conception of the good that justice as fairness relies would not function if it could be shown that that intuition is in direct opposition to what the principles of justice recommend.
in these cases.\textsuperscript{114} If this could be accomplished, it would imply the need for incorporating an account of what just treatment for nonpersons would be within the conception of political justice.

\section*{§34 Moving Forward}

In this chapter, I have merely attempted to set up the argument that the political conception of justice needs an account of nonpersons and the obligation to those beings. This is the case insofar as the Rawlsian objections to the thought experiment all inimitably hinge upon a particular account of the political person and thus cannot distribute primary goods to political nonpersons. I have not yet fully developed these claims into criticism of the framework, however. I have merely attempted to demonstrate that this society could not be said to be unjust from within justice as fairness, considered as a political conception of justice. The truth of these claims is contingent on what I suggested at the end of the previous section, that justice as fairness’s current method of dealing with the problem implies contradiction in certain cases.

If this argument can be made successfully then it would become necessary to in some way revise the framework for the sake of consistency. One method for doing so would be to provide a systematic account within the political conception of justice of the obligations of persons to political nonpersons. Political nonpersons are those who are unable, for whatever reason,

\begin{footnote}
\textsuperscript{114} I attempt to make this point in §39 (Difference Principles and Nonpersons)
\end{footnote}
to understand and act from the public conception of justice; put another way, they are those that are incapable of practical application. I recognize that Rawls attempts to push these concerns outside of the scope of the political conception of justice, but as I attempt to establish in the next chapter this can create undesirable arrangements. The limits to the political conception of justice would not be acceptable if they push claims that should relate to justice outside the scope of the framework itself.

Plainly, Rawls does not intend the political conception of justice to be comprehensive. He is clear about this at various points, insofar as the framework still needs specific moral commitments independent of the political conception to account for certain unacceptable situations. The hypothetical society I suggest might be constitutive of this type of example. But one can only rely on this type of objection from within a substantive conception of the good if it does not run counter to what is recommended by the principles of justice in these types of cases. For it is clear that the principles of justice must supersede specific conceptions of the good in cases where those conflict.

Insofar as this critique is placed in ideal theory, it is not my intention to deal specifically with either the severely handicapped or nonhuman animals, although both are used as examples at various points.\textsuperscript{115} The parties cannot consider a position outside the scheme of social cooperation as a point of entry, which would be the source of argumentation for a political duty to those nonpersons.

\textsuperscript{115} This criticism plainly has implications for both groups, but it is not my intention to map these out as they relate specifically to either group.
Justice as fairness specifically makes no claims about obligation to nonpersons. It is the absence of this type of account that is problematic for the theory as a whole. I will argue in the next chapter that the principle of charity that Rawls attempts to use as a stopgap for this type of concern is ultimately unsatisfactory insofar as it is against what the principles of justice suggest in these types of circumstances. I attempt to demonstrate this in the next chapter.
Chapter 4

The Difference Principle and Nonpersons
With regard to the problems on which justice as fairness may fail, there are several possibilities. One is that the idea of political justice does not cover everything, nor should we expect it to. Or the problem may indeed be one of political justice but justice as fairness is not correct in this case, however well it may do for other cases. How deep a fault this is must wait until the case itself can be examined.\textsuperscript{116}

§35 Justice as Fairness and Conceptions of the Good

In his later work, Rawls is clear that justice as fairness is only a political conception of justice; this necessarily implies that it is limited. It makes a claim only to the structure of justice for those who can understand the implications of the procedure it uses.\textsuperscript{117} Rawls recognizes at various points throughout his work—notably in the passage reproduced above—that the theory is limited in certain respects. This is a result of the framework being considered as a political conception of justice, which applies only to the basic structure of society. A political conception of justice cannot be expected to be correct in every case. In cases that are outside its scope, it must rely on elements outside itself in order to give a satisfactory answer. Justice as fairness is only a political conception and thus does not provide answers outside of the political.

On these types of issues, Rawls suggests that other conceptions of the good are necessary, that a political conception of justice cannot help but to rely on these in questions outside the scope of the political. This works perfectly well in certain cases in which the issue is beyond the scope of the political conception

\textsuperscript{116} Political Liberalism 21
\textsuperscript{117} Those who are capable of practical application, to use my own terminology
of justice. But this is only to the extent that the issue is truly outside of the scope of the political. If the political conception of justice suggests something that runs counter to an objection on the basis of a conception of the good, then the political conception of justice has priority. This is potentially problematic because a characteristic of considering a person to be reasonable is that she accepts that her interests and moral conceptions are for political purposes subordinate to the political conception of justice when those conflict. Ideal theory assumes strict compliance from reasonable persons. If the political conception of justice does suggest something in this type of case, then reasonable persons can object on the basis of a conception of the good only by not complying with the principles of justice. To do so would be to partially comply in strict compliance theory, which seems contradictory.\footnote{I return to this in §40 (Practical Application in Ideal Contexts)}

The method for demonstrating the failure of justice as fairness in one of these limited cases is rather intuitive. The idea is to derive a contradiction between the principle of charity and justice as fairness. If, in this type of case, the political conception of justice recommends specifically against the principle of charity (based on moral grounds), this would demonstrate that the two are in conflict. This, in turn, would imply that the response of the framework as a whole to these types of cases is flawed.

In cases in which justice as fairness is limited, the response of the framework is to rely on moral concerns from outside of the framework. Intuitively, this seems to be the best objection to the type of case suggested in
the previous chapter. Justice as fairness might not rule out the society as just, but insofar as the political conception of justice does not support forced labor for nonpersons, an objection on other moral grounds seems to function against it. The basic idea of the objection is to suggest that the political conception of justice is indifferent to the hypothetical society. In order for the objection to be valid, the principles of justice cannot be in support of the setup of the basic institutions in the hypothetical society. However, if the political conception of justice does support a structural forced labor relationship for nonpersons, then the objection must fail.

This type of objection effectively relies on a principle of charity proposed by free and equal persons from within their conceptions of the good. It is my intention in this chapter to demonstrate that the idea of charity that Rawls relies on in relation to nonpersons conflicts with justice as fairness in certain cases. It is my contention that any objection on substantive moral grounds is contrary to what the principles of justice recommend with certain conditions in these types of cases. If this is indeed the case, then justice as fairness’s response as a whole is insufficient, and the framework would have to be revised in some way in order to accommodate these types of concerns.

Even when it is recognized that other moral conceptions apply outside of the scope of the political conception of justice, their exclusion from public reason limits their applicability and excludes their consideration in questions of justice. Sentient nonpersons have moral but not political standing in society. Whether or not justice as a term applies to sentient nonpersons is beside the point. The idea
is that the political conception of justice excludes the moral standing that sentient nonpersons do have when considering political questions, because nonpersons do not have political standing. I use the hypothetical society I presented in the previous chapter as a means of demonstrating this. My focus is on the difference principle and the ways in which it recommends against the removal of a policy of forced labor for sentient nonpersons in the hypothetical society.

§36 Beyond *Theory*

The moral framework of *Theory* might have been able to provide an answer to this type of issue, but the comprehensive moral theory it suggests is not a component of the political conception of justice. A full theory of the good is difficult to defend in a political conception of justice because it compromises the practicality of the conception. Further, this type of moral theory is often thought to be framed ideologically. It should not be said that the comprehensive doctrine represented in *Theory* is superior when compared to the political conception of justice advanced in Rawls’s later work. *Theory* is a staggering accomplishment, the likes of which political philosophy will not see again for the foreseeable future, but its flaws are well known. Justice as fairness—considered as a political conception of justice—only relies on a thin theory of the good (the idea of the reasonable).

Consider Rawls’s early discussion of nonhuman animals:
It does not follow from a person’s not being owed the duty of justice that he may be treated in any way that one pleases. We do not normally think of ourselves as owing the duty of justice to animals, but it is certainly wrong to be cruel to them. Their capacity for feeling pleasure and pain, for some form of happiness, is enough to establish this. To deny that this capacity is sufficient is not, then, to license everything.\textsuperscript{119}

This selection is from an early paper entitled *The Sense of Justice* from 1963. The sense of justice here refers to a more comprehensive moral idea in comparison with the term Rawls uses in his later work. The idea of the sense of justice that the title of this paper refers to is similar to the idea found in Chapter VIII of *A Theory of Justice*. In this chapter, Rawls provides an account of moral development, which is the basis for the idea of the sense of justice as a thick moral idea. This thick idea of the sense of justice retains its validity, but only as a component of a comprehensive doctrine of liberalism, it cannot be introduced into public reason on the exclusive view.\textsuperscript{120}

Rawls is explicit post-Theory that nonhuman animals are not components of the political conception of justice. Thus, he disregards their case in formulating a conception of justice that is *specifically political*. Plainly, the sense of justice in this sense refers to something distinct from the term as it was used in Rawls’s later work:

One such power is the capacity for a sense of justice: it is the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation.\textsuperscript{121}

\textsuperscript{119} *Collected Papers* 114

\textsuperscript{120} The exclusive view of public reason excludes reasoning based in comprehensive doctrines.

\textsuperscript{121} *Justice as Fairness* 18-19
This idea of the sense of justice is far thinner than that of *The Sense of Justice*. All the sense of justice describes in this context is the ability to understand, to recognize and to apply the political conception of justice. The idea of the reasonable is the thin moral theory that replaces the full moral theory present in *Theory*. The reason not to be cruel to animals does not come from a duty of justice, but from a substantive conception of the good.

In *The Sense of Justice*, Rawls plainly uses the term in reference to a more developed moral theory. In redefining the sense of justice and separating the comprehensive moral theory from the political conception of justice this type of consideration is no longer considered as a component of justice as fairness. The political conception of justice expects other moral conceptions to cover these types of cases. This seems to be the only response, insofar as the cases of sentient nonpersons are outside of justice as fairness. Indeed, in making the conception political, Rawls openly acknowledges that nonhuman animals and the severely mentally disabled are now problematic.¹²²

It is this shift to a conception of justice that is solely political that causes problems in the case of sentient nonpersons. The sense of justice, understood in the context of a comprehensive moral theory, might have been able to account for these types of issues, but it is not included as a component of the *solely political* conception of justice. Instead, in these areas justice as fairness now relies upon substantive conceptions of the good.

¹²² See *Political Liberalism* 20-21. Part of this discussion is reproduced as the opening quotation for this chapter. See §24 (Framing the Political Person)
For example, in a well-ordered society, one would assume that there would be laws against cruelty to nonhuman animals. Yet the principles of justice, insofar as they are directed only to the organization of persons within the basic structure, do not recommend a law against cruelty to nonhuman animals. At the same time, however, the principles of justice do not recommend against that law. Insofar as this is the case, arguments for that law (against cruelty to nonhuman animals) on moral grounds are acceptable because they are not in opposition to the principles of justice. In this example, then, moral grounds function to ensure appropriate treatment of nonhuman animals. But crucially, this only applies in cases where what is proposed on moral grounds is not in opposition to the principles of justice. Justice as fairness relies on substantive moral conceptions of the good in accounting for these types of obligations that fall outside of the political conception of justice. This type of reliance on substantive conceptions of the good only functions in the context of the assumption that this type of suggestion is not against what the principles of justice recommend in that case. For as has been stated, the principles of justice have precedence over moral considerations in cases where those conflict.
§37 The Difference Principle and The Least-Advantaged

In *Justice as Fairness*, Rawls defines the least-advantaged in the following way:

We have referred to the least advantaged, but who are they and how are they singled out? To answer these questions we introduce the idea of primary goods. These are various social conditions and all-purpose means that are generally necessary to enable citizens adequately to develop and fully exercise their two moral powers, and to pursue their determinate conceptions of the good.\(^{123}\)

The idea of the least-advantaged is not constituted by any particular racial or gender characteristic. Under different schemes of social cooperation, the least-advantaged could be vastly distinct. The least-advantaged are simply those who have the lowest expectation of primary goods in the given scheme of social cooperation.

Rawls characterizes primary goods in the following way:

Primary goods are things needed and required by persons seen in the light of the political conception of persons, as citizens who are fully cooperating members of society, and *not merely as human beings apart from any normative conception*. (Emphases mine)\(^{124}\)

Primary goods are “not things it is simply rational to want or desire” but those things constitutive of having rational wants and desires. Thus, it does not seem that the idea of primary goods functions for beings that do not possess rationality. Rawls is explicit that primary goods are not necessarily distributed to all human beings, but to *citizens*. Additionally, the idea of primary goods is not based on contextual knowledge:

\(^{123}\) *Justice as Fairness* 57  
\(^{124}\) *Justice as Fairness* 58
The account of primary goods does not rest solely on psychological, social, or historical facts. While the list of primary goods rests in part on the general facts and requirements of social life, it does so only together with a political conception of the person as free and equal, endowed with the moral powers, and capable of being a fully cooperating member of society. This normative conception is necessary to identify the appropriate list of primary goods. (Emphases mine)¹²⁵

The idea of primary goods is fundamentally conceived as connected with the normative conception of the political conception of the person as free and equal, as a concept applied for political purposes. To keep the idea of primary goods applicable more or less ahistorically, this is necessary.¹²⁶ The least-advantaged is the group of free and equal persons with the lowest expectations of an index of primary goods. It seems clear that nonpersons cannot be considered as members of the least-advantaged group, insofar they are not rational and thus cannot have any expectation of primary goods. The concept of primary goods seems to be an inapplicable concept in the context of sentient nonpersons.

Rawls states the following of the difference principle and its relationship to the least-advantaged:

As we have said, the inequalities to which the difference principle applies are differences in citizens’ (reasonable) expectations of primary goods over a complete life. These expectations are their life prospects. In a well-ordered society where all citizens’ equal basic rights and liberties and fair opportunities are secure, the least advantaged are those belonging to the income class with the lowest expectations. To say that inequalities in income and wealth are to be arranged for the greatest benefit of the least advantaged simply means that we are to compare schemes of cooperation by seeing how well off the least advantaged are under each scheme, and

¹²⁵ Justice as Fairness 58
¹²⁶ Rawls is clear that there is at least some reliance on facts about social life, but that the account of primary goods rests heavily on the political conception of the person is rather clear.
then to select the scheme under which the least advantaged are better off than they are under any other scheme.\textsuperscript{127}

The difference principle distributes specifically to the least-advantaged. In any case in which both the first principle and the principle of fair equality of opportunity are satisfied, the difference principle prefers the society in which the least-advantaged are better off. This, in turn, is to be judged on the basis of expectations of primary goods.

Further, in considering the difference principle, one must also consider its lexical ordering below the first principle and the principle of fair equality of opportunity:

We now turn to the difference principle as a principle of distributive justice in the narrow sense. Recall that it is subordinate to both the first principle of justice (guaranteeing the equal basic liberties) and the principle of fair equality of opportunity. It works in tandem with these two prior principles and it is always to be applied within background institutions in which those principles are satisfied.\textsuperscript{128} (Emphases mine)

The difference principle—in being a principle of justice—fundamentally structures the scheme of social cooperation. Its lexical ordering below the first principle and the first component of the second principle signifies that “it is always to be applied within background institutions in which those principles are satisfied.” This is to say that insofar as the first two principles are satisfied, the difference principle prefers any distribution in which the expectation of the least-advantaged group is maximized. The lexical ordering of the principles of justice guarantees that the difference principle cannot be prioritized over the securing of basic liberties or of fair equality of opportunity.

\textsuperscript{127} Justice as Fairness 59-60
\textsuperscript{128} Justice as Fairness 61
§38 The Difference Principle and Nonpersons

Justice as fairness, as a political conception of justice, organizes and makes claims about justice only for persons. In justice as fairness, nonpersons have only moral and not political standing in society. This would intuitively seem to suggest that the status of nonpersons could be reduced in order to increase the status of persons (specifically the least-advantaged) within the political conception of justice. The focus of this line of critique is largely on the difference principle. The central question is whether the difference principle justifies the lowering of the status of nonpersons in order to increase the status of the least-advantaged group. Because nonpersons cannot have expectations of any index of primary goods, the difference principle does not consider them as the least-advantaged group in comparing different arrangements of basic institutions and their distribution of goods for a scheme of social cooperation.

Suppose that in the hypothetical society\textsuperscript{129} the least-advantaged hold political nonpersons as forced laborers. This type of distribution seems justifiable in the original position. In the third (legislative) stage of the original position, the parties could agree to enact legislation that stipulates that the least-advantaged are entitled to the highest share of forced labor from nonpersons. To do so would be in accordance with the difference principle. In this well-ordered society, removing the forced labor directly harms the least-advantaged; thus, repealing the law is not justified by the difference principle. But this is only to

\textsuperscript{129} See section §25 (Subjugation in a Well-Ordered Society)
the extent that the repeal of the law—if this were recommended on moral grounds—would cause negative consequences for the least-advantaged (and thus would run counter to the difference principle). What the difference principle would require in this type of situation is compensation on political grounds in return for implementing a moral concern about nonpersons.130

The principles of justice seem to be clearly in favor of this type of distribution (or of some compensatory response) in the case in which the forced labor of nonpersons goes directly to improving the status of the least-advantaged. If we were to abstractly compare the society when nonpersons are in a relationship of forced labor to the society when that relationship does not obtain, then the distribution in which forced labor obtains is preferable. This is the case insofar as the status of the least-advantaged is greater than it is in when the law of forced labor is repealed. To remove the relationship of forced labor without compensation is to lower the status of the least-advantaged and to prefer a distribution in which the least-advantaged are worse off.

It seems that a law proposing uncompensated abolition of the institution of forced labor for political nonpersons would be in opposition to the principles of justice (specifically the difference principle). Given this, there seems to be a clear method of argumentation against the law in public reason: it runs counter to the difference principle. Assuming that the first principle and the first component of the second principle are satisfied (which we assume them to be, given that this is a constructed thought experiment), the difference principle

130 I deal with the issue of compensation below in §41 (Distribution Preferences)
always applies and always selects the arrangement of basic institutions in which
the least-advantaged are the best off. It follows from this that any objection to
the case of nonpersons in the hypothetical society on the basis of moral grounds
does not function because it is in opposition to the difference principle.

§39 The Priority of Right and Conceptions of the Good

The difference principle has priority over substantive conceptions of the good
when these stand in opposition. This is in accordance with what Rawls refers to
as the priority of right. Justice as fairness identifies the right (the principles of
justice) as superior to conceptions of the good in cases in which those conflict:

A conception of political justice must contain within itself sufficient space,
as it were, for ways of life that can gain devoted support. In a phrase:
justice draws the limit, the good shows the point. Thus, the right and the
good are complementary, and the priority of right does not deny this. Its
general meaning is that although to be acceptable a political conception of
justice must leave adequate room for forms of life citizens can affirm, the
ideas of the good it draws upon must fit within the limits drawn—the
space allowed—by that political conception itself.\footnote{Collected Papers 449-450}

Conceptions of the good are limited by the political conception of right. In order
to be considered reasonable within the political conception, a conception of the
good must be able to recognize the political conception as a limitation of their
interests. In cases in which the political conception of justice and conceptions of
the good conflict, the political conception has priority. This is what Rawls means
by the priority of right.
This necessarily extends to the difference principle as a component of the political conception of the justice. For example, consider the situation of a stonemason in a remote area, whose business is the only source of employment for those in the area. In determining the pay scale of her workers, it makes sense for the stonemason to offer the lowest amount of money possible ($1 per day, perhaps), particularly if she knows that her potential employees have no other potential source of income. If we were to consider the example of the stonemason as a micro society in the context of justice as fairness, then we can say that the difference principle is in opposition to the stonemason’s action. This conception of the good is clearly in violation of the difference principle and is thus not allowable according to the priority of right. It is in this way that the right has priority over the good.

The priority of right gives precedence to the principles of justice over conceptions of the good in these types of cases. It seems, then, as if this case is distinct from the type of case suggested above in which laws against cruelty to nonhuman animals were acceptable because they were not in conflict with the principles of justice. By contrast, any measure that would repeal the law of forced labor for nonpersons without compensation violates the difference principle (insofar as the least-advantaged are owners). The right has priority over these types of objections in the case of conflict because they are proposed from within a substantive conception of the good. In this case, the difference principle opposes the objection made on the basis of substantive moral grounds. Consequently, the objection must fail.
§40 Practical Application in Ideal Contexts

It seems clear that the difference principle recommends that nonpersons be subjugated insofar as their labor is to the advantage of the least-advantaged. The basic idea of the objection is that free and equal persons would oppose this type of law from within their conceptions of the good.

Consider again the idea of practical application:

*Practical application* is the use of the principles of justice in answering a *single* question of justice by free and equal persons in the second perspective. To be capable of practical application is what separates political persons from nonpersons.

Insofar as free and equal persons practically apply, they use the principles of justice as the basis for their response to a single question of justice. Consistent practical application by a free and equal person is what is constitutive of considering that person to be reasonable. In ideal theory, all free and equal persons fully comply with the public conception of justice.

Given the fact that ideal theory assumes strict compliance with the political conception of justice, it assumes practical application by free and equal persons in response to *every* question of justice. Insofar as the political conception of justice recommends a law enacting a structural relationship of forced labor for nonpersons, any objection to this on the basis of moral grounds would suggest that the individual who objects does not practically apply in this case. But ideal theory implies practical application in response to every question
of justice. Thus, there is a contradiction in the idea of any individual objecting on the basis of a moral conception in a case governed by the priority of right, insofar as doing so implies partial compliance in ideal theory. From this it seems that the idea of a free and equal person objecting to this type of law is not possible in ideal contexts.

This implies that the current response of justice as fairness does not work in this case in ideal theory, insofar as objecting on moral grounds to what the political conception of justice recommends is not possible in cases in which those conflict. This type of debate for objections raised on moral grounds could not be raised in public reason in ideal contexts.

§41 Distribution Preferences

The difference principle only recommends distributions on the basis of the status of the least-advantaged in the distribution. It does not operate on a principle of efficiency. Consider Figure 1 below:

<table>
<thead>
<tr>
<th>Figure 1</th>
<th>Least-Advantaged Group</th>
<th>Most-Advantaged Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>30</td>
<td>90</td>
</tr>
<tr>
<td>(2)</td>
<td>30</td>
<td>70</td>
</tr>
</tbody>
</table>

Before beginning this section, I should like to note that I assume that both the first principle and the principle of fair equality of opportunity are satisfied in all the scenarios I consider.
The difference principle has no preference between (1) and (2), insofar as in each case the least-advantaged are in the same position. The difference principle does not operate on the basis of a principle of efficiency and thus is indifferent between the two scenarios.

A possible objection to what has been argued above is that the situation in which nonpersons are held in a relationship of forced labor is only one possible distribution in which the least-advantaged are as well off as possible. If we were to remove the structural relationship of forced labor for nonpersons (in which the least-advantaged are owners), the difference principle has no opinion so long as the decrease in the status of the least-advantaged is compensated for by an increase of the same size. Thus, the choice for a society between a structural relationship of forced labor for nonpersons versus removing that structural relationship is roughly equivalent to the choice offered in Figure 1. If the removal of the structural relationship is accompanied by compensation from the most-advantaged to the least-advantaged, then the difference principle has no preference between (1) and (2). Thus, a law can remove the structural forced labor relationship for nonpersons because the difference principle no longer recommends against the objection on the basis of a moral conception.

But insofar as this objection bases itself upon the table given in Figure 1, it is flawed. The option of giving the least-advantaged ownership of nonperson forced laborers remains and can be considered \textit{in addition to} the compensation
that they would receive accompanying the removal of their ownership of nonperson forced laborers. The resulting distribution resembles Figure 2:

<table>
<thead>
<tr>
<th>Figure 2</th>
<th>Least-Advantaged Group</th>
<th>Most-Advantaged Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>30</td>
<td>90</td>
</tr>
<tr>
<td>(2)</td>
<td>30</td>
<td>70</td>
</tr>
<tr>
<td>(3)</td>
<td>50</td>
<td>70</td>
</tr>
</tbody>
</table>

In (1) the least advantaged are owners of nonpersons. In (2), the law is revoked and that same amount is taken from the most-advantaged in order to compensate for the resulting decrease in the status of the least-advantaged. In (3), the law remains in place and the least-advantaged receive the increase they would have received in compensation for the removal of the law. The difference principle evidently selects (3) in this case. The issue is still the increase of 20 from the forced labor of nonpersons that the least-advantaged can receive at no cost to the most-advantaged group.

Offering compensation merely makes the compensation *in addition to* the forced labor a potential option in the distribution. The idea here is that the society passes the law repealing the law of forced labor and giving the least-advantaged the requisite compensation. After this has been done, the option to institute the system of forced labor remains, and is, in fact, recommended by the
difference principle. The only reason for selecting (2) in Figure 2 would be on the basis of moral grounds. But, as has been said, the priority of right indicates that the principles of justice have precedence over moral conceptions when those conflict.

From this it follows that in a society in which nonpersons exist but are not forced to labor, if a law is proposed that gives ownership of nonpersons to the least-advantaged, this law is justified by the difference principle. Consider Figure 3:

<table>
<thead>
<tr>
<th>Figure 3</th>
<th>Least-Advantaged Group</th>
<th>Most-Advantaged Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1)</td>
<td>10</td>
<td>90</td>
</tr>
<tr>
<td>(2)</td>
<td>30</td>
<td>90</td>
</tr>
</tbody>
</table>

Let (1) represent the society without any law giving ownership of nonpersons to the least-advantaged, while (2) considers the society with this arrangement. It is clear that the difference principle prefers (2) in this case. The only grounds for opposing a distribution similar to (2) are on moral grounds. These are, in turn, ruled out by the priority of right. In ideal contexts, objections on these grounds are not possible given the assumption of strict compliance.

It should be noted that this claim only functions in ideal theory when nonpersons do exist. Because the non-ideal might require a different set of
principles of justice, this claim might not apply in non-ideal theory. But in ideal theory, when nonpersons do exist, the difference principle recommends their subjugation insofar as this helps the least-advantaged. This seems problematic, to say the least.

§42 Fundamental Concerns

If the argument above is accepted, then justice as fairness as a whole runs into a rather serious problem. The difference principle recommends the subjugation of nonpersons in any case in which that it is to the benefit of the least-advantaged group. This cannot be objected to on moral grounds in ideal theory, insofar as the priority of right is a necessary component of the framework.

The moral theory of *A Theory of Justice* and the idea of the sense of justice present in the 1963 paper of the same name seem better positioned to deal with this type of case. Yet the idea of the sense of justice that Rawls makes use of in his early work is far thicker than that of his later philosophy, in which it is only relates to the political conception of justice.

Concern for sentient nonpersons is a question that Rawls admits to pushing to the side in formulating a political conception of justice. Obligation for those nonpersons is to come from conceptions of the good outside the framework. But this principle of charity can only function in cases in which the political conception of justice does not recommend against the conception of the
good. For in these types of cases, the priority of right dictates that the political conception of justice (as the right) has priority.

In the transition from early to later Rawls, it seems clear that concern for sentient nonpersons simply fell through the cracks. Insofar as nonpersons are not subject to the first principle or the principle of fair equality of opportunity, the difference principle recommends distributions in which their relationship to the least-advantaged group is beneficial, in whatever form that takes.

§43 By Way of Conclusion

At the conclusion of Theory, Rawls says the following:

The perspective of eternity is not a perspective from a certain place beyond the world, nor the point of view of a transcendent being; rather it is a certain form of thought and feeling that rational persons can adopt within the world. And having done so, they can, whatever their generation, bring together into one scheme all individual perspectives and arrive together at regulative principles that can be affirmed by everyone as he lives by them, each from his own standpoint. Purity of heart, if one could attain it, would be to see clearly and to act with grace and self-command from this point of view.133

The goal, irrespective of the method by which one could attain it, is admirable by any measure. Regardless of one’s political or philosophical commitments, one must respect Rawls’s project. The political conception of justice and indeed political philosophy as a whole strives for this ideal. Insofar as the goal is admirable, the superior political conception of justice would be that which best

133 A Theory of Justice 514
accomplishes it. In light of this, revisions in order to meet the ideal are necessary if it can be shown that the political conception of justice is insufficient in certain cases.

I have attempted to problematize the account (or lack thereof) of sentient nonpersons in justice as fairness primarily as an attempt to identify a component of justice as fairness that is in need of revision. Although I have not developed a solution, my aim would be achieved if the identification of the issue and why it was a problem were made clear.

Ludwig Wittgenstein once said that, “The riddle does not exist. If a question can be put at all, then it can also be answered.” 134 Although the context of the statement is quite different, I should like to think that this is true in political philosophy. If a system could be achieved that would provide an adequate solution to any question of justice, philosophy as a whole would have achieved something quite staggering. This project would be a success if it were to be understood as a step, however small, in the direction of this admirable ideal.

134 Tractatus Logico-Philosophicus 6.5
Works Cited


