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ARTICLE

Justice, Non-Human Animals, and the Methodology of Political Philosophy

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One important trend in political philosophy is to hold that non-human animals don't directly place demands of justice on us. Another important trend is to give considerations of justice normative priority in our general normative theorising about social/political institutions. This situation is problematic, given the actual ethical standing of non-human animals. Either we need a theory of justice that gives facts about non-human animals a non-derivative explanatory role in the determination of facts about what justice involves, or else we should be wary of the default normative priority that considerations of justice have in much of contemporary political philosophy. This discussion brings out important

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general methodological points tied to the role of concept and word choice in normative theorising about our social/political institutions. These methodological points, I argue, matter for a range of discussions in contemporary political philosophy, including those about global justice.

Keywords: justice; political philosophy; animal ethics; philosophical methodology; conceptual ethics

INTRODUCTION

Consider the following scenario. Kerry has just adopted a new puppy named 'Bo'. At first, Kerry is really excited about Bo and spends a lot of time with him. But, after a few months, Kerry gets more and more frustrated with how much time Bo takes up in her life, as well as how many household items Bo chews and destroys when Kerry is gone at work. At first, Kerry's frustration mostly manifests itself in terms of negligence: she takes Bo on fewer walks, spends less time with him in general, and feeds him on a more and more erratic schedule. But then Kerry's frustration turns to anger, and she starts taking out her anger by hitting Bo. Over time, she starts to hit Bo harder and harder, eventually breaking one of Bo's legs, as well as causing him to permanently lose vision in one of his eyes. In turn, Kerry's increasingly bitter and violent relationship with Bo also affects her personal relationships with other people, making her more impatient, critical and violent with them as well.

Kerry's treatment of Bo is bad. One reason it is bad is because her relationship with Bo causes problems for Kerry, and also leads Kerry to become worse in her personal relations with other people. But the more straightforward reason has *nothing at all* to do with the impact of Kerry's actions on herself or other humans. Rather, it just has to do with *Bo*. Kerry's increasingly violent actions hurt Bo, and negatively affect his life. Somewhat more precisely, her actions *harm* Bo, and he has done nothing to merit such harm. Regardless of what downstream effects Kerry's actions do or do not have on herself or other humans, this is enough to mean that there is something wrong with Kerry's treatment of Bo. In short: Bo matters *on his own*. This means that he matters not just because of how he (or facts about what is happening to him) matter to Kerry or other humans.

Here is another thought experiment that supports this conclusion.[1] Imagine that, after becoming frustrated with Bo, Kerry has the following choice. She can take out her anger either by hitting Bo, or by playing an engrossing, and quite violent, video game called *Beat the Dogs!* Suppose, by stipulation, that the effects of Kerry playing the video game will be exactly the same as her hitting Bo *except* for the following difference: how it affects Bo. That is: suppose that Kerry's playing the video game will also lead to the same problems in Kerry's own life, her relations with other humans, etc., but that it will not have the same negative effects on Bo as Kerry's actually hitting him would. Faced with the choice

1 The following thought experiment is adapted from one introduced by Tristram McPherson in Tristram McPherson, 'A Case for Ethical Veganism' (2014) 11(6) *The Journal of Moral Philosophy* 677.

between these two options, Kerry should play the video game, rather than actually hit Bo. The reason does not have to do with Kerry or other humans. Rather, it has to do with *Bo*. Thus, this case reinforces the claim about Bo that I made above: Bo matters *on his own*, and not just because of how he might or might not matter to Kerry or other humans.

This fact about Bo is reflective of a more general fact about many non-human animals. The fact is this: *many* non-human animals matter in this non-derivative way. This includes, I take it, many of the domesticated non-human animals that humans routinely eat, such as pigs, cows and chickens, as well as many wild animals, such as deer, kangaroos, gorillas, elephants, iguanas, dolphins, bears, foxes, penguins, wombats, otters and pigeons. In short, (at least many) non-human animals have lives that can go *better or worse*, and, moreover, it ethically matters how their lives go *regardless* of any impact this might have on human lives, and, more generally, regardless of anything about us as humans. Put another way: certain facts about (at least many) non-human animals have *non-derivative* ethical significance or standing. (Henceforth, I will refer to this as these animals as having *ethical status*.) This reflects something important about the particular *kind* of ethical standing these entities have. In short, their lives matter, and they do so *not* just because of reasons that stem from the fact that human lives matter.[2]

The ethical standing of many non-human animals is something that we need to take into account when we set up our social/political institutions—or, relatedly, when we run those institutions, once they have been set up. This is because the normative facts about how, *all-things-considered*, we should set up (or, relatedly, run) our social/political institutions are sensitive to the normative facts about *all* of those entities with ethical status. Our theories of these all-things-considered facts should therefore reflect this. This might not matter that much in practice for our social/political theorising about our actual world if (a) there weren't many of the relevant non-human animals in our world or (b) (at least many) non-human animals have ethical status, but still they don't matter that much in the final determination of what we should do. But both (a) and (b) are false (or at least so I will argue in this paper). And so our theories of how, all-things-considered, we should set up (or run) our social/political institutions need to take into account the lives of non-human animals, and do so in a way that accurately reflects their ethical significance.

This point matters for how we think about what *justice* involves, and what role theories of justice should play in our more general political theorising. Many of the most philosophically influential theories of justice are ones that either (a) totally exclude non-human animals from their accounts or (b) don't explicitly give facts about non-human animals a non-derivative explanatory role in determining the facts about what justice demands. This is true for a wide range of theories of justice, including those developed by Robert Nozick, G.A. Cohen, Philip Pettit and Amartya

2 I will further clarify my use of the term 'ethical status' in §1.

Sen.[3] John Rawls's landmark theory of justice in *A Theory of Justice*—arguably the most philosophically influential account of justice in the twentieth century—is an illustrative example here. Non-human animals barely show up in Rawls's discussion in *A Theory of Justice*. And, when they do, it is partly so that Rawls can explain why, although we have certain ethical duties to animals, we very well might not have duties of justice to them—and, thus, that facts about their lives and interests might not have a non-derivative role to play in a worked-out theory of justice.[4] It should be underscored that there are of course important exceptions to this way of thinking about the role of non-human animals and justice: including, for example, Martha Nussbaum's recent work in *Frontiers of Justice*, Sue Donaldson and Will Kymlicka's recent work in *Zoopolis: A Political Theory of Animal Rights* and Robert Garner's work in *A Theory of Justice For Animals: Animal Rights in a Nonideal World*.[5] As these examples underscore, there are a variety of theoretical perspectives in ethics and social/political philosophy—including consequentialist, deontological, and virtue theoretic approaches—that can make room for the idea that non-human animals have ethical status, and the idea that this has a direct impact on what justice involves. But the dominant trend in philosophy—both historically, as well as more recently—is to develop theories of justice that don't explicitly give non-human animals this role.

At the same time, in current practice, theories of justice are often given a certain pride of place in our theorising about how we should set up (or run) our social/political institutions. This is partly due to the tremendous influence of Rawls. Rawls argues in *A Theory of Justice* that justice has a certain kind of dominant role to play in our all-things-considered political theorising. A first-pass account of his view is reflected, in broad outline, by a famous quote from the start of *A Theory of Justice*. He writes: 'Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.'[6] This kind of thinking informs the default practices of large parts of contemporary political philosophy (though certainly not all of it—as I will emphasise more below). In most of political philosophy, justice is understood to be a *particular* kind of virtue that social/political institutions can have—just as they might have the virtue of promoting freedom, equality or well-being. Tied to this fact, most political philosophers (including Rawls himself) deny (as they should) that facts about justice are co-extensive with the facts about how, all-things-considered, we should set up (or run) our social/political institutions. This is because, in short, a number of different virtues (or values) matter here for settling

3 See Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974); G.A. Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2012); Amartya Sen, *The Idea of Justice* (Belknap Press of Harvard University Press 2009).

4 See John Rawls, *A Theory of Justice (revised edition)* (Harvard University Press 1999 [1971]), 448.

5 See Martha Nussbaum, *Frontiers of Justice* (Harvard University Press 2006); Sue Donaldson and Will Kymlicka, *Zoopolis: A Political Theory of Animal Rights* (Oxford University Press 2011); Robert Garner, *A Theory of Justice for Animals* (Oxford University Press 2013).

6 Rawls, *A Theory of Justice* (n 4) 3.

these kind of all-things-considered facts. Nonetheless, many philosophers often (at least in practice) treat the first set of facts to be a generally reliable guide to the latter; for example, in the process of evaluating current societies, or in making concrete recommendations for how to reform our existing social/political institutions. And why shouldn't they do this, if facts of justice really have something along the lines of dominant explanatory role that Rawls suggests that they do?

Thus, we find ourselves in the following situation. One important trend in political philosophy is to hold that non-human animals (of the kind that we have in our actual world) don't directly place demands of justice on us, and thus that facts about them have no non-derivative explanatory role to play in a theory of justice. Simultaneously, another important trend is to think that justice is something akin to the 'first virtue of social institutions', and, thus, that it is often epistemically okay to approach theories of justice as generally good guides to the all-things-considered normative facts about we should set up (or run) our social/political institutions. This is part of a more general trend in post-Rawlsian political philosophy: discussion of *justice* and its demands dominates much of the discussion in political philosophy, such that political philosophers put a wide range of normative concerns in terms of the language of 'justice'.

This situation, I argue, is problematic. Either we need a theory of justice that gives facts about non-human animals (both domesticated and wild) a non-derivative explanatory role in the determination of facts about what justice involves, or else we should not treat facts about justice as a generally good guide to the all-things-considered normative facts about how we should set up (or run) our social/political institutions.

Which of these conclusions we end up with—or whether we end up with some version of each of them—depends on how we understand what exactly it is that we are talking about when we talk about 'justice', as well as, in a connected vein, what we *should* be talking about when we use that term, given its rich connotations in our social-historical context. Either way, careful consideration of the case of non-human animals poses an important challenge to existing philosophical practices surrounding our theorising about justice. My goal in this paper is to explore what this challenge looks like, and to explore some of the key options for moving forward. In so doing, my aim is *not* to work out exactly what role non-human animals should be given in a theory of justice. Nor is it to work out the more general normative question of how we should set up (or run) our social/political institutions in light of the ethical status of non-human animals.[7] Rather, my aim is to put pressure on our existing practices surrounding philosophical discussion about justice, and, in so doing, help us get clearer on some foundational methodological questions in political philosophy.

Before moving on, I want to briefly flag something important about the role that my claims about the ethical status of non-human animals will play in my

7 There is a substantial (and rapidly growing) literature on this normative question (as well as the more narrow question of what role non-human animals should be given in a theory of justice). For example, see Peter Singer, *Animal Liberation* (updated edn, HarperCollins 2009 [1975]); Donaldson and Kymlicka (n 5); Nussbaum (n 5); Ruth Abbey, 'Rawlsian Resources for Animal Ethics' (2007) 12(1) *Ethics and the Environment* 1; Alasdair Cochrane, *An Introduction to Animals and Political Theory* (Palgrave Macmillan 2010); Garner (n 5); Kimberly K. Smith, *Governing Animals: Animal Welfare and the Liberal State* (Oxford University Press 2012); Mark Rowlands, Rowlands, Animals Like Us (Verso 2002).

overall argument. As I will explain in the final section, my discussion of the case of non-human animals brings out an important *argument-type*. It does so in a particularly stark and hard-hitting way, on the assumption that non-human animals have the sort of ethical standing I claim that they do. This is because of the combination of two facts: (a) the fact that non-human animals are radically marginalised in much theorising in political philosophy and (b) the fact that many non-human animals in our world are having a lot of bad things happen to them (eg, consider the tens of billions of animals in factory farms). But the argument-type is general and can be detached from any claims about the ethical status of non-human animals. Indeed, as I will show at the end of this paper, this argument-type has important consequences for how we think about a range of other issues in political philosophy that have nothing directly to do with non-human animals. This includes, I will argue, how we should think of some important issues about global justice.

1. THE ETHICAL STATUS OF NON-HUMAN ANIMALS

In this first section, I clarify and further support the claim that non-human animals have ethical status. I also make the further claim that facts about these animals are ethically important (or, more precisely, at least ethically important enough to cause trouble for our theorising about justice). I will then turn to discussion of justice in the following section (§2).

As I am using the term 'ethical significance', this means the following: facts about X have ethical significance insofar as these facts matter for settling the ethical facts, ie, normative facts about what we should do or how we should live. On this definition, having *some* ethical significance therefore comes relatively cheap. Thus, on my way of talking, not much is settled by just figuring out that certain facts about an entity (or group of entities) have ethical significance—or, put another way, that the entity (or group of entities) has *ethical standing* of *some kind*. Instead, for most serious normative questions, we need to figure out more about the particular ethical significance that these facts have. Here, by talk of 'non-derivative' ethical significance, I mean to mark out one (though certainly not the only) important divide in what kind of ethical significance facts have. The divide has to do with the following question: do facts about what happens to X ethically matter *independently* of how these effects on X impact or are connected to other things with ethical significance? For facts that have 'non-derivative' ethical significance, the answer is yes. I then use a stipulative definition of 'ethical status' to mean the following: something has ethical status when facts about it have non-derivative ethical significance. There are different further ways of modelling this idea. But for my purposes in this paper, what I have said so far will be sufficient, so I will leave it there.[8]

8 Two things to note here. The first is that, for those familiar with Christine Korsgaard's influential discussion of value in 'Two Distinctions in Goodness' (1983) 92(2) *Philosophical Review* 169, my claim that certain things have ethical status (and thus that certain facts about them have non-derivative ethical significance) is connected to what Korsgaard calls 'intrinsic value', rather than to what she calls 'non-

The claim on the table is that many non-human animals (in our world) have ethical status.[9]

Of course, some people—philosophers and non-philosophers alike—deny this: they think that non-human animals ethically matter, but only insofar as their lives affect human lives. This is a mistaken view. One way to see it is mistaken is to carefully consider the cases I started with about Kerry and Bo. Another way to see that it is mistaken is to consider fictional creatures that aren't human, but that have many of the same capacities that we do. For example, suppose that highly intelligent, highly friendly and highly peaceful aliens from a distant planet showed up on earth next week seeking to exchange scientific knowledge with us and trade with us. Suppose that, as we learn more about them, we discover that, remarkably, they have almost identical psychological and emotional capacities to us. However, these aliens are from an entirely different evolutionary background, have a totally different genetic makeup, and can't be counted as members of the human species. Consider the view that the only way these aliens ethically matter is in a derivative way, based on how their lives matter to or are otherwise connected to human lives. To think that is to engage in objectionably *speciesist* thinking: it is to propose that species-membership has a kind of deep explanatory role in determining the ethical facts that it simply does not have. Facts about species-membership of course might ethically matter in certain more limited ways. But these facts do not matter in this kind of foundational way to the explanation of ethical status, any more than facts about racial identity or gender identity do. These aliens ethically matter regardless of how they affect humans. In short, these aliens have ethical status.

With the case of the aliens in mind, let me put forward one final argument for the claim that some (perhaps many) non-human animals have ethical status. Consider some entities that we are confident have ethical status. For example, to take a canonical starting point, suppose we start with healthy adult human beings with normal cognitive functioning. Then consider the question of what sorts of properties explain *why* they have such status. In thinking about this, it is important to keep in mind cases involving human beings that *aren't* healthy adult human beings with

instrumental' value. Second, I intend for my claim here that certain things have ethical status to be a way of locating where certain things stand ethically, in a way that draws on a fairly intuitive contrast in ethical structure. I do not intend it to also involve foundational claims about the ultimate foundations of ethical properties or facts. I thus take my way of talking to be one that is ultimately compatible with a range of response-dependent or judgment-dependent accounts of value, or of other ethical properties.

9 Many philosophers (working from a range of different theoretical perspectives in ethics) endorse a version of the claim that I am making here about the ethical status of (at least many) non-human animals. For example, see James Rachels, 'The Moral Argument for Vegetarianism' in *Can Ethics Provide Answers? And Other Essays in Moral Philosophy* (Rowman & Littlefield 1997); Alastair Norcross, 'Puppies, Pigs, and People: Eating Meat and Marginal Cases' (2004) 18(1) *Philosophical Perspectives* 229; Tom Regan, *The Case for Animal Rights* (University of California Press 2004); Jeff McMahan, 'Eating Animals the Nice Way' (2008) 137(1) *Daedalus* 68; David DeGrazia, 'Moral Vegetarianism from a Very Broad Basis' (2009) 6(2) *Journal of Moral Philosophy* 143; Singer (n 7); Elizabeth Harman, 'The Moral Significance of Animal Pain and Animal Death' in TL Beauchamp and RL Frey (eds) *The Oxford Handbook of Animal Ethics* (Oxford University Press 2011); Rosalind Hursthouse, 'Virtue Ethics and the Treatment of Animals' in Beauchamp and Frey (ibid); Christine M Korsgaard, 'Interacting with Animals: A Kantian Account' in Beauchamp and Frey (ibid); McPherson (n 1).

normal cognitive functioning—eg, babies or adults with significant mental handicaps. Such humans also have ethical status, and so it is a constraint on a viable explanation of the ethical status of healthy adult humans with normal cognitive functioning that it yields this result.

If one proposes that it is the solely the fact that these human beings are *human beings* that explains their ethical status—in the sense that it is a fact that these creatures belong to a certain biological species—this answer is wrong. As we saw from the above aliens case, facts about species-membership do not play that kind of foundational explanatorily role in determining the ethical facts. So what then does explain their ethical status? I am not going to try to come up with a full theory of this here. Rather, for now, I simply want to put forward the following claim: whatever the correct answer is to this question, it is going to have the result that many non-human animals also have such a status, given the properties that many non-human animals share with healthy adult humans.[10] For example, in combination with empirical facts about what non-human animals are like, this conclusion follows from the thesis that what explains why healthy adult human beings with normal cognitive functioning have ethical status is their capacity for pleasure and pain, or from many versions of the thesis that it has to do with the psychological capacity for certain kinds of qualitative experiences.

Of course, not every philosophically serious answer to this question—the question about what explains the ethical status of human beings—is going to have this result that many non-human animals also have ethical status. For example: there are certain kinds of Kantian answers (ones that focus exclusively on a specific kind of capacity for rational self-determination, understood in a restrictive way) that won't yield this result. But such views are wrong. I don't have the space in this paper to give any extended arguments for why that is so. But one core argument against such views is this: they get the wrong results in the cases involving non-human animals that I have been discussing so far.

The above remarks are obviously only the sketch of a full argument for the claim that (at least many) non-human animals have ethical status. But it will nonetheless be the extent of my argument in this paper for that claim. For the rest of the paper, I am just going to take this claim as given. My goal is to explore some issues in social/political philosophy that arise once certain claims (including, crucially, this one) are in place about the ethical status of non-human animals.

However, before moving on, I need to make a further claim about the ethical status of non-human animals. One might be tempted to think as follows: 'sure, non-human animals have ethical status, but that doesn't mean that they have *substantial* or *very important* ethically significance.' In short, perhaps the lives of non-human animals matter *very little*, even though they matter in a non-derivative way. If that is right, then much of my argument in what follows won't have much bite.

10 To be clear: that doesn't mean that they have exactly the *same* ethical standing as human beings. All I have said so far is that non-human animals have ethical status. Human beings can have that too, but still, for all I have said so far, ethically matter in ways that are very different (in any number of respects) from non-human animals.

The response to this line of thought is simple: animals *do* matter in significant ways. This conclusion is supported by the same kind of argument-type I sketched above for why (at least many) non-human animals have ethical status. First, consider some entities that we are confident have ethical status, and who we also think matter in a way that is ethically *significant* (where what that amounts to is whatever it would take to defeat the above worry). For example, we can consider here healthy adult human beings with normal cognitive functioning, or non-adult human beings, or human beings with significant cognitive defects. Then consider the question of what kind of ethical significance *these* creatures have, and what properties explain *why* they have such status. The answers to these question are, I think, going to have the result that many non-human animals not only have ethical status, but that they have an ethical standing that matters in important ways. This outline of an argument, of course, won't be convincing to those who doubt the ethical status of non-human animals. But it is enough for my purposes in this paper.

2. WHY NON-HUMAN ANIMALS MATTER FOR OUR THEORISING ABOUT JUSTICE

Not everyone working in contemporary political philosophy buys the idea that justice is the most important virtue or value to consider in organising social/political institutions. Many explicitly limit the scope of what *justice* as such involves, and emphasise that it shouldn't be given default import in normative theorising without significant normative argument. (For example, this is a key theme in G.A. Cohen's influential work on justice.)[11] More generally, much work in contemporary political philosophy proceeds by investigating a *particular* value or virtue—eg, equality, freedom or democracy—without taking it for granted that this value or virtue will trump other ones.[12] Nonetheless, an important trend of contemporary political philosophy post-Rawls—indeed, perhaps the prevailing trend—is to take facts about justice to play some sort of *dominant* explanatory role in settling the all-things-considered normative facts. This is the trend that I am interested in.

This trend shows up in a wide range of work in political philosophy. Consider, for example, Thomas Pogge's work in *Realizing Rawls*.[13] In rough terms, in *Realizing Rawls*, Pogge defends a normative vision for how the world should be that is based on Rawls's theory of justice, and which is (in many respects) more concrete in its policy recommendations than Rawls himself is. As part of this, Pogge makes

11 See Cohen (n 3). See also Goodin, 'Why Social Justice is Not All That Matters: Justice as the First Virtue' (2007) 117(3) *Ethics* 413; John Gardner, 'Amartya Sen's The Idea of Justice' (2012) 6(1) *Journal of Law, Philosophy and Culture* 241–250.

12 Consider, eg, Larry Temkin's work on equality, as in 'Egalitarianism Defended' (2003) 113(4) *Ethics* 764; Philip Pettit's work on freedom in *Republicanism: A Theory of Freedom and Government* (Oxford University Press 1999); Niko Koldony's work on democracy in 'Rule Over None I: What Justifies Democracy?' (2014) 42(3) *Philosophy and Public Affairs* 195; 'Rule Over None II: Social Equality and the Justification of Democracy' (2014) 42(4) *Philosophy and Public Affairs* 287.

13 Thomas Pogge, *Realizing Rawls* (Cornell University Press 1989).

far-reaching normative claims *on the basis of* claims about what *justice* is and what it demands. Or consider Sen's work in his recent *The Idea of Justice*.[14] In short, Sen's is a major and comprehensive book advancing a grand unified vision in social/political philosophy; and he frames it primarily as a theory of *justice*. In the book, Sen advances normative views about a wide range of topics, views that are tied to concrete policy recommendations that Sen has famously advocated in previous work. If we take Sen's presentation at face value, these claims are being made largely on the basis of a theory of *justice* as such. For both Pogge and Sen, *justice* might well be only one virtue or value among many that matters for settling the all-things-considered normative facts. But it is taken to be quite an important one indeed, and as a good basis for general normative claims in social/political philosophy. (It is thus not surprising that, as John Gardner notes in his review of Sen, Sen follows Rawls in casting a range of important normative issues as ones about 'justice', including ones that many would not pre-theoretically see as obviously ones about justice per se, but which they would take to be of serious normative import).[15]

More radically, we can note that some contemporary political philosophers go so far as to use 'justice' to simply *refer* to something quite close to the all-things-considered normative standards that should govern how our main social/political institutions are set up or run. This includes philosophers who take themselves to be working within a broadly Rawlsian tradition. For example, consider the following quote from Leif Wenar (in the entry on John Rawls in *The Stanford Encyclopedia of Philosophy*): 'Justice is the maximal moral standard: the full description of how a society's main institutions should be ordered.'[16] Or, to take another example, consider the way that the topic of distributive justice is *introduced* in the *Stanford Encyclopedia of Philosophy* by Julian Lamont and Christi Favor:

> The economic framework that each society has—its laws, institutions, policies, etc—results in different distributions of economic benefits and burdens across members of the society. These economic frameworks are the result of human political processes and they constantly change both across societies and within societies over time. The structure of these frameworks is important because the economic distributions resulting from them fundamentally affect people's lives. *Arguments about which frameworks and/or resulting distributions are morally preferable constitute the topic of distributive justice.* Principles of distributive justice are therefore best thought of as providing moral guidance for the political processes and structures that affect the distribution of economic benefits and burdens in societies.[17]

For our purposes here, what is crucial about this quote is this. The topic of distributive justice is here understood—in the entry on distributive justice in one of the most widely used and cited encyclopaedias in contemporary philosophy—to *just be*

14 Sen (n 3).

15 Gardner (n 11).

16 Leif Wenar, 'John Rawls' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy (Winter 2013 Edition)*, http://plato.stanford.edu/archives/win2013/entries/rawls/%3E accessed 24 November 2015.

17 Julian Lamont and Christi Favor, 'Distributive Justice' in Zalta (n 16) (emphasis added).

the topic of 'which frameworks and/or resulting distributions are morally preferable'.

The core point here is this: theories of justice are often (either by the proponents of those theories, or those who appeal to those theories) taken to have *very large* import for our overall normative positions about social/political institutions. Often, they are taken to have some kind of *dominant* role here. This is both philosophically and politically problematic, given that non-human animals play only a marginal role in most of our leading theories of justice.

To see why it is problematic, let's start with the following question: do facts about non-human animals play a non-derivative role in explaining facts about justice? Suppose that facts about non-human animals *do* play a non-derivative role in explaining facts about justice. There is good reason to think this might be so, at least for a range of the meanings of 'justice' at play in contemporary political philosophy. Consider, for example, Wenar's above definition of justice, according to which 'justice is the maximal moral standard: the full description of how a society's main institutions should be ordered'.[18] Non-human animals certainly matter (in a non-derivative way) for justice, when justice is understood in that broad way. And, so, if a theory of justice has nothing to say about animals, it then is missing something important. Moreover, consider even more restrictive uses of the term 'justice', on which justice is one political value among many. The sorts of things that are arguably central to what justice involves (on a range of more restrictive sense of 'justice')—including, perhaps, such things as taking into consideration issues of fairness, respecting rights and promoting the flourishing of those effected by social/political institutions—can be extended to apply to non-human animals too, including, crucially, many of the non-human animals that exist in the actual world. This is the basis for a good argument—one that, of course, would take some care to fully develop—that the concept that many in political philosophy are expressing by the term 'justice' is something that picks out a virtue (or value, or some other evaluative or normative kind) that involves *both* humans and non-human animals. If that is right, then theories of the thing that the concept picks out—that is, theories of *justice itself*—that don't take seriously the situation of non-human animals are making a mistake.

If this line of thinking is right, it shows that many theories of justice are making a mistake as *theories of justice*. There is a further question of *how big* a mistake they are making, or how easy it would be to fix this mistake. The answer will of course be different here for different theories of justice. Moreover, it won't be something we can answer in the abstract, without further inquiry into the ethical status of non-human animals, as well as (obviously) into what kind of thing justice ultimately is. My goal in this paper is *not* to pursue this kind of important question.

However, it is important to note that there might be deep problems here for certain theories of justice. For example: suppose that one is working with a theory along the lines of what Rawls is working with in *A Theory of Justice*. One thing that you might think is that, in order to fix this (purported) mistake all Rawls needed

[18] Wenar (n 16).

to do was to add some further chapters to *A Theory of Justice* which would detail what sorts of demands of justice we have to non-human animals, but that this won't change anything of substance in the rest of his theory. Perhaps. But perhaps not. Consider that issues about the distribution of habitat between humans and non-human animals will interact in complicated ways with issues about how to set up (or run) many social/political institutions—including, for example, economic institutions—that are part of what Rawls calls the 'basic structure' of society, and which is what he claims justice is about. Rawls characterises the 'basic structure' of society as follows: 'the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation.'[19] Once issues about non-human animals enter the scene in a deep way, there are real and significant trade-offs here: what might be best for lots of non-human animals will likely not be best for lots of humans. Indeed, it is arguable that many non-human animals would be better off if human populations confined themselves to a relatively limited part of the planet, or perhaps if humans worked toward their own eventual extinction altogether. These kinds of thoughts suggest the following: perhaps Rawls's theory of a number of other important points about the basic structure are significantly off, given the way that institutions interlock with each other and collectively have an impact on the lives of non-human animals.

Or perhaps the very focus on the basic structure as he defines it—one about distributing goods that arise through social cooperation—is already to stack the deck against large numbers of non-human animals (eg, wild animals). In short, perhaps it marginalises the normative idea that issues about their well-being should be central to how we set up (or run) our central social/political institutions (eg, the economy). The problems could go even deeper still here. Perhaps, for example, as Martha Nussbaum has suggested, it is impossible to give non-human animals the place they deserve in a theory of justice if one is working in a contractualist framework.[20]

There are interesting questions here about how ethical concern with non-human animals is best incorporated into a Rawlsian account in political philosophy. For example: should animals (or representatives of them) somehow be put behind the veil of ignorance? Or should it be that species-membership is screened off behind the veil of ignorance, in a way that parallels one's ethnic or socioeconomic status? How should Rawlsian concern with the fate of the *worst off* in a distributive scheme be developed once non-human animals are taken into account? Should we keep Rawls's proposed two principles of justice as given and work from there, or are those perhaps already inadequate in some way? The answers to such questions will depend on *which parts* of Rawls's views in political philosophy one wants to keep, and why. My goal here is not to work out how all of this will go. Rather, it is to point

19 John Rawls, *Political Liberalism* (expanded edn, Columbia University Press 1996) 258.

20 See Nussbaum (n 5). For more sympathetic discussion of the relationship between contractualism and animal ethics, see Matthew Talbert, 'Contractualism and Our Duties to Nonhuman Animals' (2006) 28(2) *Environmental Ethics* 201; Rowlands (n 7).

out that there are real and serious issues here, and that a theory of justice might well not just be incomplete, but perhaps radically incomplete, or perhaps seriously mistaken in what it says, if it doesn't give facts about non-human animals a non-derivative explanatory role in settling the facts about justice.

But perhaps this above point, and the reasoning that supports it, rests on a deep mistake. Perhaps *justice* just isn't the kind of thing that takes into account the well-being, rights and interests of non-human animals, or at least not so in a non-derivative way. In other words, when faced with my starting question above—the question 'do facts about non-human animals play a non-derivative role in explaining facts about justice?'—suppose the answer is 'no'. There are different ways that one might try to defend this answer. Some of them will involve denying that (at least many) non-human animals have ethical status. Since I am taking that claim as a given in my argument in this part of the paper, those ways of defending this claim are irrelevant here. The relevant options here are just those that develop this claim *while also* granting the non-derivative ethical significance of facts about (at least many) non-human animals.

The most important way to pursue this line of thought is as follows. Start by noting the following: the fact that (at least many) non-human animals have ethical status does not entail that they have exactly the *same* ethical standing as human beings. Human beings can ethically matter in ways that are very different (in any number of respects) from non-human animals, even if non-human animals and humans alike both have ethical status. Based on this, one might appeal to (a) certain (purported) features of the particular ethical standing that humans have that are not shared by other animals and (b) certain (purported) basic truths about the topic of justice, in order to support the conclusion that, even though (at least many) non-human animals have ethical status, facts about them do *not* play a non-derivative role in explaining facts about *justice* in particular.

There are a number of salient options here. For example, one might claim that it is a conceptual truth that justice is the kind of thing that only applies to creatures that are capable of making *second-personal claims* on each other, in the right kind of way. Or perhaps it is because non-human animals aren't properly thought of as part of a *society*, and since *being just* is a potential property of a society, the entities that justice needs to be directly responsive to are only those that are members of the relevant society. Or perhaps it is because non-human animals aren't properly thought of as part of a *cooperative scheme* undertaken by agents, and since *being just* is a potential property of such a scheme, the entities that justice needs to be responsive to are those compose it. Or perhaps it is because duties of justice are fundamentally *associative duties* that arise through certain specific kinds of interaction between agents, and we simply don't have those kinds of interaction with non-human animals. Or perhaps it is because even though non-human animals matter, we don't have *obligations* toward them, and justice (one might hold) is necessarily tied to obligation. Or perhaps it is because even though we have obligations toward animals, the state is not justified in using *coercive force* to help get us to conform to those obligations, and justice (one might hold) is necessarily tied to those obligations that the state can use coercive force to help get us to conform

to. Or perhaps it is because justice as such concerns relations between entities that are fundamentally *moral equals*, and non-human animals (despite having ethical status) do not have the same ethical standing as (at least) adult human beings, such that they are not moral equals with them (in the relevant sense of 'moral equals').

These above ideas give the outlines of how one might try to develop the idea that non-human animals are not properly considered as part of the topic of justice (at least not in a non-derivative way). In order for such a move to not be *ad hoc*, it would of course need significant further argument. But it is worth taking seriously the idea that the topic of justice involves such a restriction to exclude non-human animals (or at the least the ones that we know about in *our* world, even if not members of possible or actual alien species), based on one of the above lines of reasoning.

So suppose that is right. The first thing to then say is this: thinking about non-human animals still poses a problem for our *practices* of theorising about justice, given the ambitions that many political philosophers have for *what to do* with theories of justice. To see why this is so, first consider the following straightforward argument. Start with two claims. First, a general normative principle: the norms that determine how, all-things-considered, we should set up (or run) our social/political institutions are ones that take into account all beings with ethical standing, including, crucially, all beings with ethical status. This is hard to deny, at least when stated at this level of abstraction. Second, non-human animals (or at least many of them) have ethical status. This is a working premise of this paper. These two claims, when combined, support the idea that any good theory of how, all-things-considered, social/political institutions should be set up (or run) needs to take into account non-human animals, and do so in a way that respects their ethical status.

If this above argument is correct, then now suppose that facts about justice don't take into account non-human animals in this way. And also suppose that my earlier argument is right that (at least many) non-human animals not only have ethical status, but also that their ethical significance is normatively important. This then counts against any theory on which facts about justice are given *too large* of an explanatory role in determining the all-things-considered normative facts about how we should set up (or run) our social/political institutions. Many political philosophers assume that facts about justice have a very large explanatory role to play here—indeed, perhaps some kind of *dominant* role. This is the kind of role that is arguably reflected in Rawls's idea that 'justice is the first virtue of social institutions', and which is certainly reflected in Wenar's claim that 'justice is the maximal moral standard: the full description of how a society's main institutions should be ordered'.[21] But if facts about justice aren't dependent on facts about the ethical standing of non-human animals *at all*—let alone in the right way (namely, one that respects their actual ethical standing)—then this gives us reason to be sceptical that considerations of justice are really as important as many have thought for determining how, all-things-considered, we should set up (or run) our social/political

21 Wenar (n 16).

institutions. In short, facts about justice might have a much more limited explanatory/justificatory role to play here than is often thought. And, in turn, we should then be sceptical of Rawls's claim that 'justice is the first virtue of social institutions', as well as similar claims or attitudes in the vicinity that often form the backdrop to theorising about justice in contemporary political philosophy.

To bring out this point, imagine the following scenario. First, suppose we grant for the sake of argument that facts about justice are *not* sensitive to facts about the rights, well-being and interests of non-human animals, or at least not in a way that respects the ethical standing of these animals. Now imagine we live in a world where all humans are treated fairly and live flourishing lives, such that *all* humans in this world live in fully just societies (according to such an above theory of justice). The non-human animals in that world might be doing *very* badly. The current plight of many non-human animals in our world (eg, consider cows or chickens in factory farms in North America) gives some sense of how badly things can go for non-human animals. But things could also obviously get *much* worse for many non-human animals. So suppose that the lives of these animals are going as badly as possible, up to whatever point is compatible with it not having a bad impact on humans, of the kind that our imagined exclusively human-focused theory of justice would be sensitive to. And suppose that there are only a very small number of human beings in this world, but a very large number of non-human animals with ethical status. For example: imagine that a scientist is able to produce large amounts of well-being for human beings, but only via a secret method that involves torturing and killing lots of the non-human animals that are bred especially for this purpose, and kept in captivity their whole lives before their eventual torture and execution. Because that method of torturing and execution is a secret one that only the scientist knows about, it has limited negative impact on the lives of humans. All the humans are getting are the positive results.[22]

The fate of non-human animals in such a scenario seems to me to count *significantly* against the idea that this is a good way of setting up (and running) social/political institutions. Suppose, for now, that I then grant that justice isn't something that incorporates concerns for animals such that the following is true: the society in such a scenario above counts as a fully *just* society. My core line of response here can then be glossed as follows. I care more about how, all-things-considered, we should set up (or run) our social/political institutions than I care about justice. If your theory of justice excludes non-human animals, or doesn't take into account the idea that they have ethical status and that facts about them are ethically weighty, or doesn't yield the result that their ethical standing has an impact on your final theory of justice, then the question becomes how important facts about *justice* really are for determining the facts about how, all-things-considered, we should set up (or run) our social/political institutions. In short: the less your theory of justice is being responsive to the non-derivative (and significant) ethical standing of non-human animals, the more limited an explanatory role the property that your theory picks out has in the explanation of the all-things-considered normative facts. Of course, facts of

22 Thanks to Sam Shpall for helpful discussion about this example.

justice might still be *very* important, even if considerations about non-human animals are excluded from such theories entirely. But we should be very careful to make sure they aren't given *too important* a role—something that, for example, is encouraged if we hold fixed the Rawlsian idea that justice is the 'first virtue' of social institutions.

The line of argument that I have advanced thus leads to the following point: either (a) we need a theory of justice that aptly incorporates (non-derivative) ethical concern for non-human animals, or (b) we need to put pressure on the idea that justice really is the 'first virtue' of social/political institutions, and, at the same time, become much more sceptical of the practice of treating facts about justice as a generally good guide to the all-things-considered normative facts how we should set up (or run) our social/political institutions. Which of these conclusions we end up with—or whether we end up with some version of each of them—depends on whether or not facts about non-human animals play a non-derivative role in explaining facts about justice.

So, we might ask: well, do they? That is: do facts about non-human animals *actually* play a non-derivative role in explaining facts about justice, or not? To answer this question, we need to have a grip on *which thing* political philosophers are investigating when they talk about 'justice'. On this front, it is not at all clear that political philosophers that engage in debates about justice really do mean the same thing by 'justice'; or, equivalently, if we take the meanings of words to be the concepts that they express, that these philosophers express the same concept by the term 'justice'. The basic reason is this: different philosophers seem to have significantly different patterns of usage for the term 'justice', and such patterns of usage (in non-defective conditions) are one good source of evidence (even if not the only source of evidence) about what concept someone is deploying. Based on this, I think there is good reason to think that they do *not* mean the same thing by the term 'justice'.[23] If that is right, then the following is likely to be the case: some philosophers use the term 'justice' in such a way that it picks out something different than other philosophers.

If this is right, there might very well then not be one thing—*justice*—referred to by everyone in political philosophy with the term 'justice', but rather a range of things. For some of these things, it might very well be that facts about non-human animals play a non-derivative role in explaining facts about that thing. For other things in the range of things that philosophers pick out with the term 'justice', however, it might very well be that this is not the case. Therefore, it will likely depend on which of a range of concepts we are expressing by the term 'justice' to know which of these conclusions we end up with: that is, whether we should

23 Some philosophers will want to immediately object that this line of thought will vitiate our ability to explain the coherence of *disagreement* between political philosophers. But this need not be a consequence of such a view at all. In fact, views that attribute a wide divergence in the meanings of words between speakers have significant resources to draw on in explaining how disagreements are expressed. See David Plunkett and Timothy Sundell, 'Disagreement and the Semantics of Normative and Evaluative Terms' (2013) 13(23) *Philosophers' Imprint* 1; 'Dworkin's Interpretivism and the Pragmatics of Legal Disputes' (2013) 19(3) *Legal Theory* 242.

conclude (a) that we need a theory of justice that aptly incorporates (non-derivative) ethical concern for non-human animals, or (b) that we need to put pressure on the idea that justice really is the 'first virtue' of social/political institutions, and, at the same time, become much more sceptical of our practice of treating facts about justice as a generally good guide to the all-things-considered normative facts about how we should set up (or run) our social/political institutions.

Based on that, we might then ask: 'okay, so which concept is the one that we *should* be expressing here, the one that picks out the thing that we can then, moving forward, think of as *real* or *true* justice?' This is an issue in what we can call *conceptual ethics*—an issue, in short, not about what concepts we *are* using, but about which ones we *should* be using (and, in a connected vein, expressing with certain terms).[24] Given how important the term 'justice' is in much of political thought and practice, I think that question is an important question for political theory, and, indeed, for political practice.[25] But it is beyond the scope of this paper to take a stand on that issue.

Some readers will be frustrated here; they will want an *answer* to the question as to whether or not theories of justice that don't give non-human animals a non-derivative explanatory role are really deficient as theories of justice, or not. In response, we should then ask the question: why care so much? The main argument in this paper concerns how we should set up (and run) our social/political institutions, all-things-considered. More specifically, the main argument is a methodological one about how to approach these all-things-considered normative questions. One doesn't need to take a stand on what *true justice* really involves to make all-things-considered normative claims. And, indeed, the fact that one does not need to do that (and, moreover, that there in fact might be strong reason to not do so) is one of the methodological upshots of my argument.

Before moving on, I want to note two important things about the argument that I have given thus far. First, notice that the issues involved here aren't restricted to theories of justice. The line of argument above also puts pressure on *any* theory in political philosophy about how we should set up (or run) our social/political institutions that doesn't give a non-derivative role to facts about non-human animals. Even if such a theory isn't one about *justice* per se, it doesn't matter. As long as it is a theory that makes claims about how, all-things-considered, we should set up (or run) our social/political institutions—or, relatedly, is often *used* as the basis for a quick inference for making such claims—there is a problem insofar as the theory doesn't take seriously the ethical standing of non-human animals.

Second, notice that my argument isn't restricted to discussion of domestic non-human animals. It involves *all* non-human animals that have ethical status. It might very well be that we have special duties to domestic non-human animals—and,

24 This terminology of 'conceptual ethics' is drawn from Alexis Burgess and David Plunkett, 'Conceptual Ethics I' (2013) 8(12) *Philosophy Compass* 1091; 'Conceptual Ethics II' (2013) 8(12) *Philosophy Compass* 1102.

25 For discussion of why I think that this sort of terminological choice can be important here, see Plunkett and Sundell, 'Disagreement' (n 23) and David Plunkett, 'Which Concepts Should We Use? Metalinguistic Negotiations and The Methodology of Philosophy' (2015) 58 (7–8) *Inquiry* 828–874.

indeed, perhaps we have special duties of justice to them (if, as some have thought, we need to be interacting with others in a cooperative scheme for demands of justice to arise). But, even if that is true (which I am sympathetic to thinking it might be), notice that this point doesn't matter to me here, given the argument of this paper. For, on this proposed picture, notice that a significant class of non-human animals with ethical status—namely, wild ones—would still be excluded from playing a non-derivative explanatory role in the determination of the facts of justice. We are here imagining that to be a correct exclusion, given the nature of justice. If so, a version of this second conclusion still remains: given that (many) wild non-human animals have ethical status, we should then put pressure on the idea that justice really is the 'first virtue' of social/political institutions, and, at the same time, become much more sceptical of our practice of treating facts about justice as a generally good guide to the all-things-considered normative facts how we should set up (or run) our social/political institutions.

3. OBJECTIONS AND REPLIES

There are a number of important worries that one may want to raise about my argument so far. Here are three of them, along with some initial responses.

3.1 What Does it Mean to be the 'First Virtue' of Social Institutions?

Consider the following passage from *A Theory of Justice*, the passage in which Rawls introduces the idea that justice is the 'first virtue of social institutions':

> Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the larger sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests. The only thing that permits us to acquiesce in an erroneous theory is the lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid an even greater injustice. Being first virtues of human activities, truth and justice are uncompromising.[26]

Immediately after introducing these claims, Rawls cautions that 'no doubt they are expressed too strongly'.[27] Nonetheless, Rawls takes them to express the core of a broadly intuitive account of justice, as well as its primacy for settling questions in social/political philosophy, that he thinks is worth trying to develop into a more

26 Rawls, *A Theory of Justice* (n 4) 3–4.
27 ibid 4.

general theory. As he puts it: 'These propositions seem to express our intuitive conviction of the primacy of justice … In any event I wish to inquire whether these contentions or others similar to them are sound, and if so how they can be accounted for.'[28] In turn, this then launches him into the development of his theory of justice that forms the core of *A Theory of Justice*.

One might worry that I am not being nuanced enough in my reading of what it is to think that justice is the 'first virtue of social institutions'. Perhaps when we push on what this means, it will become clear that justice really is the first virtue, even if facts about justice don't depend on facts about non-human animals (in a non-derivative way), and that this is totally compatible with a theory about how we should set up (or run) our social/political institutions fully taking into account the ethical status of non-human animals in an appropriate way.

In thinking about this worry, it is important to separate out two different questions. One question is an exegetical question of what Rawls means when he uses the idea of 'first virtue' in the quote from *A Theory of Justice* that I have been working with. Another question is what the reasonable things are that one might use this phrase to express, in this sort of philosophical context. For our purposes here, the second question is the more pressing one.

On this front, we can start with the idea that for something to be a *first virtue* of something is for that virtue to be a particularly important virtue—indeed, for it to be, *in some sense*, the *most* important virtue. There are different senses in which it might be the most important. One sense is this: it has a certain sort of *veto power* with respect to other virtues. On this sort of *lexical priority* model, other virtues might matter a lot, but if there are problems with respect to the first virtue, then this fully undercuts whatever result would be otherwise suggested by these other virtues. This model is one potentially promising way of reading Rawls's claim that '[a] theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.'[29]

Another sense of something be the first virtue is this: some virtues count more than others in determining how an institution should be, and the first virtue is the one that delivers the most positive weight in that determination, not necessarily in the sense of having any sort of veto power, but just in the straightforward sense that facts about the instantiation of this virtue count more in favour of a result then facts about any other virtue.[30]

28 ibid.

29 ibid 3.

30 Note that there is another position that one might attribute to Rawls here: it is a necessary condition that social institutions be just in order for them to be ones that all-things-considered should exist, or that are normatively acceptable. On this suggestion, all that we have here is a necessary condition for a kind of ideal social/political order (or normatively acceptable social/political order etc.). Note that, if this is the only position that Rawls is after here, it in no way supports thinking that justice is the *first virtue* in any interesting sense of the term 'first virtue'. Compare: logical omniscience is arguably a necessary condition on fully ideal belief. But, even if true, that does *not* mean that logical omniscience is in any interesting sense the *first virtue* of ideal belief, or of belief in general. (Thanks to Tristram McPherson for suggesting this particular example, and for helpful discussion.)

There is a lot more one could say here, and it touches on a range of philosophical questions that are well worth exploring. But it is not clear to me that it matters much in our context. Recall the dialectic here. A particular virtue—justice—is claimed to be in, in some sense, the *most important* virtue of social institutions. Either that virtue is sensitive (in a non-derivative way) to the lives of non-human animals (in a way that respects their significant ethical standing) or it is not. If it is, then many of our current theories of justice (including Rawls's own) are missing something important. If it is not, and if animals have the sort of ethical status that I am claiming they do, then we have reason to hold that it should not be given *too important* a role in our theories of how, all-things-considered, we should set up (or run) our social/political institutions. And, thus, we should then be modest about what all-things-considered claims we make largely on the basis of claims about what justice demands. If we go this route, the question then becomes the following: *how* important a role should facts about justice be given in our theories of what, all-things-considered, we should set up (or run) our social/political institutions?

Apart from thinking seriously about what the ethical status of non-human animals amounts to—and what we thereby owe to them because of it, or what we should do in light of it—we cannot settle that question. Thus, apart from more extended engagement with these questions about non-human animals, it is hard to see why we should be confident that this virtue really is *the* dominant one, in whatever sense of 'dominant' is at issue here. The upshot of this is as follows: even if we don't know exactly what it is for something to be the 'first virtue' of social institutions, we know *enough* to be worried about the idea that anything is such a virtue if facts about non-human animals don't play a non-derivative role in the explanation of that virtue (in a way that respects the ethical status of those animals). So if justice does not take into account non-human animals in this way, then, to repeat, we have reason to be sceptical of the idea that justice really is 'the first virtue' of social institutions.

3.2 You Need to Start Somewhere

Figuring out all-things-considered normative facts is tough work. This is so for many kinds of all-things-considered normative facts, including facts in social/political philosophy about how we should set up (or run) social/political institutions, in ethics about how one should live a life and in epistemology about how one should form one's beliefs. What methodology should one use to grain traction on all-things-considered normative facts? One reasonable idea is that we should start by focusing on some particular circumscribed subset of normative facts that we take to be explanatorily important for the all-things-considered facts. This will be especially attractive if we already think we have relatively good theories of this subset of normative facts.

In light of this kind of methodological idea, perhaps one can reason as follows. First, one could hold that justice does *not* take into account the lives of non-human animals in the non-derivative way that I have been considering it might. Second, one could then claim that this, however, is totally fine, since a theory of justice is *not*

meant to give us the answer to how we should set up (or run) our social/political institutions, all-things-considered. Rather, it is only meant to give us a theory of one set of explanatorily important facts. So what is the problem?

In a sense, this response is fine as far it goes. But there is a problem here, given the broader issues on the table. The problem is that, if this response is on the right track, we should be very careful not to slide into thinking that a theory of justice gives us the *basically right answer* to the all-things-considered questions about how to set up (or run) social/political institutions, with just some tinkering to do on the edges. That a theory of justice does so is encouraged, for example, by thinking of justice along the lines exemplified in the quote from Rawls, as well as exemplified by how much pride of place facts of justice are often given in contemporary political philosophy (eg, consider again here the earlier quote from Wenar).

There is a choice here between two options.

One option is this: you go with this above response (on which, recall, a theory of justice should not give non-human animals a non-derivative explanatory role). If so, you then need to leave open that facts about justice might play a more limited role than is often thought in determining the all-things-considered normative facts about how to set up (or run) social/political institutions. What role they actually play can only be determined by looking more carefully at the ethical standing of non-human animals. But, given our reflections earlier on the ethical standing of non-human animals, we are in a good position to hold the following: there are enough non-human animals with an important enough ethical standing that we should be very hesitant to make inferences from facts about justice to the kinds of all-things-considered normative facts we are talking about here (namely, facts about how social/political institutions should be set up, or, relatedly, facts about how they should be run).

The second option is this: you do *not* go in for the response I am considering here, and, instead, you hold onto the idea that justice is really the most important virtue, and continue to think that a theory of justice gives us the *basically right answer* to the all-things-considered questions about how to set up (or run) social/political institutions. But that is only really going to be viable if non-human animals are part of the topic of justice, and are part of that topic in a non-derivative way. You can't have it both ways and still be giving non-human animals the sort of ethical consideration that they deserve.

This above line of thought raises a worry for Rawls's own limited discussion of non-human animals in *A Theory of Justice*, where he adopts a view along the lines of the above response to my argument that I have just been considering (namely, what I just called the 'first option' above). Looking at Rawls here is, again, instructive for the broader discussion. Consider the following two quotes from Rawls, the first one from the start of *A Theory of Justice*, and the second one from towards the end:

> Obviously if justice as fairness [Rawls's own theory of justice] succeeds reasonably well, a next step would be to study the more general view suggested by the name rightness as fairness.' But even this wider theory fails to embrace all moral relationships, since it would seem to include only our relations with other persons and to leave out of

> account how we are to conduct ourselves toward animals and the rest of nature. I do not contend that the contract notion offers a way to approach these questions which are certainly of the first importance; and I shall have to put them aside. We must recognize the limited scope of justice as fairness and of the general type of view that it exemplifies. How far its conclusions must be revised once these other matters are understood cannot be decided in advance.[31]

> [W]e should recall here the limits of a theory of justice. Not only are many aspects of morality left aside, but no account is given of right conduct in regard to animals and the rest of nature. A conception of justice is but one part of a moral view. While I have not maintained that the capacity for a sense of justice is necessary in order to be owed the duties of justice, it does seem that we are not required to give strict justice anyway to creatures lacking this capacity. But it does not follow that there are no requirements at all in regard to them, nor in our relations with the natural order. Certainly it is wrong to be cruel to animals and the destruction of a whole species can be a great evil. The capacity for feelings of pleasure and pain and for the forms of life of which animals are capable clearly imposes duties of compassion and humanity in their case. I shall not attempt to explain these considered beliefs. They are outside the scope of the theory of justice, and it does not seem possible to extend the contract doctrine so as to include them in a natural way. A correct conception of our relations to animals and to nature would seem to depend upon a theory of the natural order and our place in it. One of the tasks of metaphysics is to work out a view of the world which is suited for this purpose; it should identify and systematize the truths decisive for these questions. How far justice as fairness will have to be revised to fit into this larger theory it is impossible to say. But it seems reasonable to hope that if it is sound as an account of justice among persons, it cannot be too far wrong when these broader relationships are taken into consideration.[32]

Much of what Rawls says in these quotes resonates with what I have been urging in this paper. But consider the end of this statement form Rawls here. Rawls claims that 'How far justice as fairness will have to be revised to fit into this larger theory it is impossible to say. But it seems reasonable to hope that if it is sound as an account of justice among persons, it cannot be too far wrong when these broader relationships are taken into consideration.'[33]

First, note that if is really 'impossible to say' how the theory would need to be revised here, then we lack good reason to think that justice is *the first virtue* of social institutions (at least on many plausible glosses of what being the 'first virtue' here amounts to).

Second, it is totally unclear why we are epistemically justified in having the optimism that Rawls expresses in the last sentence—namely, that it is 'reasonable to hope that if it is sound as an account of justice among persons, it cannot be too far wrong when these broader relationships are taken into consideration'.[34] Prior to making this claim, Rawls has given basically no space in *A Theory of Justice* to a serious discussion of the ethical status of non-human animals, or what ethical demands their lives place on us. Without such a discussion, why have this optimism?

31 Rawls, *A Theory of Justice* (n 4) 15.
32 ibid. 448–49.
33 ibid. 449.
34 ibid.

Perhaps it is politically advantageous to have such hope. But it seems that we might very well lack epistemic justification for doing so.

Moreover, we actually have some good reasons for thinking that Rawls's theory of justice might need to be seriously revised, or at the very least, that it might need to be given a potentially much smaller role in our overall theory of how we should set up (or run) social/political institutions than is suggested by the idea that 'justice is the first virtue of social institutions'. I have given some of those reasons earlier in this paper. And here are some other reasons as well.

First, it is far from obvious that either the broadly Kantian ethical ideas that Rawls draws on, or the contractualist apparatus that he appeals to, are things that be smoothly extended to adequately cover our ethical relations with non-human animals.[35]

Second, consider that humans benefit in a lot of ways (even if they are hurt in other ways) by treating non-human animals as instruments for the promotion of human well-being. Among other things, keep in mind that we kill *a lot* of them for food each year, and we regularly destroy their habitats in order to get things we want. In that sort of situation, we should suspect that there will be significant amounts of *ideological infiltration* in our theorising about non-human animals. That is: we will often gravitate (for non-epistemic reasons) towards theories that legitimise our relationships with non-human animals. That doesn't mean that such theories that legitimise these relationships are wrong. But it does give us some *pro tanto* reason to be sceptical of such theories that do so.

3.3 Applied Ethics vs Political Philosophy

Some political philosophers (including Rawls, and many of those working in the Rawlsian tradition) have been drawn to the following idea: there is something importantly different about *political philosophy* from simply applying our best ethical theories (or, similarly, moral theories) to the social/political domain. There are different ways of fleshing out what this idea might amount to. One potentially fruitful way of doing so is as follows: arguments in political philosophy (at least in a democratic society consisting of free and equal citizens) must be ones that engage 'public reason' in the right way, perhaps because of the nature of political justification as such. Among other things, this might mean that (a) normative arguments in political philosophy must appeal to a more limited range of normative/evaluative considerations than those in applied ethics (for example, excluding appeals to certain substantive ethical views, views that not all members of a pluralistic democratic society will agree on) and/or (b) normative positions in political philosophy must be capable of being *justified-to* citizens (or at least those that count as

35 For an argument to this effect with respect to contractualism, see Nussbaum (n 5). (In that work, she then develops her own alternative view, based on a capabilities approach.) I am not taking a stand on this issue about contractualism in this paper, and, thus, I am not to saying that one cannot come up with a good ethics of how to interact with non-human animals based on these broad approaches. For some of the best work on the ethics of non-human animals from a Kantian perspective, see Christine Korsgaard's recent work on this topic, including, eg, 'Interacting with Animals' (n 9).

'reasonable' or 'qualified'), in terms they themselves (or suitably idealised versions of them) can accept, in a way that is different than positions in applied ethics.[36] One might therefore worry: my argument in this paper, an argument about *all-things-considered* normative facts about how to set up (or run) social/political institutions, isn't responsive to this distinction between applied ethics and political philosophy, and thus fails as a project within *political philosophy*, properly understood.

The first thing to say in response to this objection is this: my main concern in this paper is not with how one uses the terms 'political philosophy' and 'applied ethics'. I take it as obvious that one important task for what we call 'political philosophy' (or, more broadly, 'social/political philosophy') is the task of trying to make progress on all-things-considered normative (and evaluative) questions about social/political institutions. Those are intelligible questions, and ones that are well worth asking—just as all-things-considered normative (and evaluative) questions are worth asking in ethics about how individuals should live. But if you do not think that this is obvious, and you think that the task I have identified is instead the task of a certain subset of ethics or moral philosophy, then that's fine. I am not interested in here defending the label 'political philosophy' for broader usage (though I do also think that can be important, in certain contexts). In the context of this paper, the question just is this: are my arguments good ones about the all-things-considered normative questions that interest me, or not?[37]

The underlying point here is this. We can ask a range of normative (and evaluative) questions about our social/political institutions. For example, we can ask questions about when states are justified in using coercive force to get people to live up their ethical duties. Or we can ask questions about what states are ethically *required* to do to help out the world's poor, as opposed to what it would be *best* if they did. Here is one question that you might be interested in (as many political philosophers are): how (if at all) can we justify the distribution of resources in a cooperative scheme in a way that everyone involved in that scheme will consent to, and which can be justified to them on terms they themselves can accept? Here is another related question that you might be interested in (again, as many political philosophers in fact are): how can we best get along with each other in a pluralistic society, given that we often have very different ethical views about a range of core ethical topics (eg, the nature of the good life), and given that we want to treat everyone in a democratic society with respect? These are questions you might take yourself to be trying to answer with a theory of *justice*, or, more broadly, questions you take to be the core questions of *political philosophy* as such. But we can ask a *wide range* of other normative questions as well. And, I submit, we need to be able to do so, if political philosophy is to be relevant to the full range of pressing normative and evaluative issues we face in the contemporary world. In particular, I claim, we need to be

36 For a good overview of the public reason tradition in political philosophy, see Jonathan Quong, 'Public Reason' in Zalta (n 16).

37 For a similar response to this kind of proposed narrow definition of 'political philosophy', see David Enoch, 'Against Public Reason' in Oxford Studies in D Sobel, P Vallentyne and S Wall (eds) *Oxford Studies in Political Philosophy, Volume 1* (Oxford University Press 2015).

able to ask all-things-considered normative questions about how we should set up social/political institutions, or, relatedly, how they should be run.

One way to push this thought is to start by focusing on problems we face in the contemporary world that we should be trying to make progress on actually solving, or at least that we might want to ask normative questions about how we *should* solve them. For example: we face the practical problem of how to interact with the non-human animals that share our planet with us, and which we share important resources with. We should want to find a solution to that problem, especially as issues of global warming and mass extinctions increasingly loom large. Moreover, we face another kind of practical problem as well—what to do in light of *all* the practical problems we face. If one likes, one can think of that as one way of making sense of the kind of all-things-considered question I am interested in here. That's a question we need to be able to ask, regardless of whether we call it a question in 'political philosophy' or not.[38]

One might still worry, however, that nothing I have said so far responds to the core underlying problem here: namely, that my arguments simply don't respect or engage so-called 'public reason' in the right way, and they need to do so, given the relevant *all-things-considered* normative truths that matter here (including, eg, truths about what political justification as such involves).

I have three main things to say here. The first is that, once we get clear about what this constraint about public reason involves (keeping in mind that it involves different things, according to different philosophers working in the public reason tradition), I am not at all convinced that my arguments here won't be able to be formulated in a way that respects public reason. It is going to depend on the details of the public reason view one puts forward.

A second, deeper point is this. In the context of all-things-considered normative questions, values or goods tied to the idea of public reason, such as finding a solution that all citizens (or, more accurately, suitably idealised versions of a subset of them) can endorse—or which can be justified to them on terms they (or idealised versions of them) can accept—might well be *important* goods or values. And they might in fact be deeply tied to other more foundational values or goods, such as ones about fairness, freedom, equality and autonomy. But we should not assume from the start that any of these goods or values are *more* important than other goods or values (including, critically, the ones I am discussing here, associated with the ethical status of non-human animals), or that these goods or values place

38 This brings out the following further point that is worth emphasising. Perhaps a given political philosopher (eg, Rawls) just isn't interested in my all-things-considered question. That's fine, but it is no objection to my argument. Suppose that Rawls's theory succeeds at providing a solution to a particular practical problem that concerned him, and, moreover, suppose he is right to call the thing 'justice' that provides that solution. In such a case, there is still the *practice* of political philosophers of using facts about justice as generally good guides to the all-things-considered normative facts—a practice, I think, encouraged by Rawls's talk of justice being the 'first virtue' of social institutions. Recall that what I am here objecting to is an epistemic practice, when it is occurring in parallel with a theory of justice that doesn't give non-human animals a non-derivative explanatory role. So even if Rawls himself as a good theory of the specific thing he was trying to give a theory of, a thing that he was calling 'justice', that is not an objection to my main argument in this paper.

a fundamental constraint on which other goods or values we can appeal to in justifying our normative positions.[39] That doesn't mean that there aren't important arguments to be considered on behalf of public reason here, or the underlying values that (purportedly) support the idea of public reason. Of course there are.[40] But those are arguments that will need to be *assessed* in the context of doing all-things-considered normative theorising, and done so *alongside* the kind of arguments I am giving in this paper. If it turns out, for example, that the need to respect public reason yields normative positions that are problematic about non-human animals, then that is a worry about the constraint of needing to respect public reason. There are, moreover, a number of other important (and well-known) philosophical worries about public reason that also deserve to be part of the all-things-considered normative conversation. These worries include the following: whether or not the relevant kinds of idealisation used in public reason accounts can be defended, whether the restrictions on whom justifications are owed to in pubic reason accounts (eg, 'the reasonable' or 'the qualified') can be defended, whether the ideal of public reason is self-defeating, whether the epistemological ideas invoked by public reason accounts can be defended and whether or not the relevant values or norms that motivate public reason accounts are really *as important* or *as weighty* as their proponents claim, or presuppose.[41] Given this, in our current epistemic context, it would be a mistake to straightjacket ourselves when doing all-things-considered normative theorising about the social/political world and only consider normative arguments that are compatible with the idea of respecting public reason. Maybe such arguments that run afoul of the dictates of public reason will ultimately need to be rejected. But it is not as if they are failing to address the relevant all-things-considered normative questions that matter here, or that we should be so confident about the importance of public reason that we can quickly reject such arguments without engaging them in any detail.

Finally, we can add the following point as well. Even if the idea of public reason can be defended, such that it constrains which normative positions we should seriously consider when doing political philosophy, it is a further assumption that this will lead to a view on which exclusively *humans* in a society are owed justifications. It might turn out that many non-human animals are also properly understood as members of a given society.[42] In turn, it might then be that, given the best underlying rationale for public reason in the first place, this entails that these non-human animals are (in some sense) owed justifications for the way in which that society is set up and run. From a related angle, suppose that the idea of using pubic reason as such can't be fully defended, but that it *is* tied to important values that matter

39 This line of argument here resonates with the conclusion of Enoch's (n 37) argument.

40 For a good overview of relevant arguments here, see Quong (n 36).

41 See Enoch (n 37) for a good starting point for some of the major recent criticisms of the idea of public reason (including versions of the criticisms that I have glossed above). See also the discussion of criticisms of public reason in Quong (n 37).

42 For more on this broad kind of idea of thinking of many non-human animals as members of society, see Donaldson and Kymlicka (n 5).

when asking normative questions about how we should set up and run social/political institutions. Some of the underlying values that are associated with the public reason tradition—such as values of respect for autonomy or fairness—might require taking non-human animals into account in a direct way.

We can tie these above thoughts about public reason together as follows. My main argument in this paper will be in trouble if (a) the normative deliverances of public reason are extremely weighty in determining the all-things-considered normative facts about how we should set up (or run) our social/political institutions *and* (b) the structure of public reason precludes giving direct attention to the interests or rights of non-human animals (and, in particular, the non-human animals in the actual world). Maybe it will turn out to be that both (a) and (b) are true. But we should hardly take it is a starting point for doing normative theorising about our social/political institutions that both of them are true. And, moreover, we in fact have good reasons to doubt that it is correct. These include the reasons I have sketched above. And they include other reasons as well. For example, if one accepts both (a) and (b) above, it is going to make it hard to give adequate normative weight to the interests of cognitively disabled human beings, including those who are permanently disabled.

4. CONCLUSION

The argument I have given in this paper has focused on non-human animals. In this section, I now want to explain how this argument exemplifies a more general *argument-type* for thinking about justice, and, more generally, for thinking about how we should set up (or run) our social/political institutions. The case of non-human animals brings out this argument-type in a particularly stark and hard-hitting way, given the ethical status of non-human animals, their fate in the contemporary world, and their general marginalisation in social/political philosophy. But there is a general argument-type here that doesn't mention non-human animals at all.

The general argument-type can be put as follows. First, there is the following background normative principle: the norms that determine how, all-things-considered, we should set up (or run) our social/political institutions are ones that take into account all beings with ethical standing, including, at the very least, all beings with ethical status. I take this to imply the following: the normative facts about how, all-things-considered, we should set up (or run) our social/political institutions take into account the lives of *all* entities with ethical status, wherever they are located in the world, and whatever they are like.

Second, consider some entities that have ethical status. In particular, pick some that you suspect are unfairly marginalised in discussion about how, all-things-considered, we should set up (or run) our social/political institutions but that you think are actually ethically significant. I have picked non-human animals. But there are other candidates here that you might be interested in, depending on your ethical views about what entities have such ethical standing. Some of the other options will be ones that many agree have ethical status: for example,

human children and stateless people. Others are more contentious: for example, future generations of humans, works of art, redwood trees and ecosystems.

We can then ask: should a theory of a given particular substantive virtue about social/political institutions (or, similarly, a particular *value*) take into account these entities in a non-derivative way, given the nature of that virtue (or value)? *Justice* is the particular virtue/value I have been concerned with, but one could also pick other virtues or values—eg, ones having to do with *political legitimacy* or *democracy*. If the answer is 'yes' to the above question, and our best theories of the virtue in question (eg, justice) fail to do so, then that is a problem for those theories. If the answer is 'no', then that gives us strong reason to make sure we keep considerations of the virtue (eg, justice) in their place, and not let our theories of the virtue in question (eg, justice) serve as proxy theories for all-things-considered theories in social/political philosophy, or as the basis for quick inferences from one to the other. (This is something we should avoid doing anyway, but it is something that becomes particularly important to avoid when the concept expressed by the normative term in question excludes consideration of the entities in question). In short: we should then make sure we do not let theories of justice become too dominant in our theorising about how, all-things-considered, we should set up (or run) our social/political institutions. (In turn, what will count as 'too dominant' will, obviously, depend on what ethical standing the things in question actually have.)

This is an important kind of argument that can have bite across a range of discussions in contemporary political philosophy. Consider, for example, that most discussions of justice focus on a particular society or polity, and treat justice as mostly a matter of that society is internally organised. Insofar as such a polity is one that doesn't include *everyone*, there will be some *outsiders* to this polity. These will include human beings in other societies. Let's assume (as it seems safe to do) that these humans have ethical status, and that their ethical status is also normatively important. Then, if the above argument-type is on the right track, any theory of how, all-things-considered, we should set up (or run) our social/political institutions needs to take them into account. If it turns out that that the concept some philosophers expressed by the term 'justice' picks out a property that excludes them (or, similarly, does not give facts about them a non-derivative explanatory role, or is insufficiently responsive to crucial facts about their ethical standing), then that is evidence that the property picked out by the concept have a less central explanatory role than if it included them.

Something similar applies to the concept expressed by the term 'global justice'. One of the reasons people might (and I think sometimes do) become interested in using the language of 'global justice' is because they are concerned about the following: how societies should be set up (or run) *given* the full range of connections with other societies, and their effects on those societies and the people within them. Those are good normative questions to ask, and ones we *need* to ask in thinking about all-things-considered questions in political philosophy. Suppose it turns out that, given the constraints built into the application-conditions of the concept we express by the term 'justice', that there is no such thing as global justice, but only domestic justice. Perhaps, for example, this is because *justice* concerns a specific kind of *associative* duty, and we don't have the *right kinds* of associations with

people outside of the domestic sphere that would give rise to such duties.[43] If that is right, then this just shows we need something better in our conceptual toolkit for expressing our legitimate concerns that, I claimed, might lead us to talk about 'global justice' in the first place—roughly, about how societies should be set up (or run) *given* the *full range of* connections between people in that society with other people around the world, located in different societies, or perhaps not located in any society whatsoever. Those are legitimate concerns. (And, it should be noted: they are not concerns that clearly focus solely on certain kinds of associative duties that might arise between people). If the concept that we currently express by the term 'global justice' isn't the right concept for addressing these concerns, then so much the worse for that concept: we can then just be aware that the property picked out by this concept is less important to our normative theorising than we might have otherwise thought.

We can put one of the underlying points here in more abstract terms: questions about what kinds of specifically *associative duties* we have to people around the world *are* important and interesting normative questions, as are questions that focus on *specific* kinds of associative duties (including those that are often the focus in discussions of global justice). But we should make sure that we do not take it for granted that answers to such questions will lead to basically the right answers about the broader normative questions that we might well be interested in; including, most importantly, all-things-considered normative questions. Given the resonance of the term 'justice' in our social/historical context—including its tie to the idea of being the 'first virtue' of social institutions—it can be easy to lose track of this core methodological point.

These points about global justice are parallel to my discussion about the terminology of 'justice' and non-human animals. We should be concerned about what effects our social/political institutions have on the lives of non-human animals. If the concept some philosophers express by the term 'justice' doesn't incorporate that concern in the right way, then this gives us reason to think that the property picked out by this concept is less important to our all-things-considered normative theorising than many have thought.

43 For a sympathetic recent discussion of this claim, see Thomas Nagel, 'The Problem of Global Justice' (2005) 33(2) *Philosophy and Public Affairs* 113–47. For some of the important criticism here, see AJ Julius, 'Nagel's Atlas' (2006) 34(2) *Philosophy and Public Affairs* 176; Joshua Cohen and Charles Sabel, 'Extra rempublicam nulla justitia?' (2006) 34(2) *Philosophy and Public Affairs* 147. See also Charles R Beitz, 'Cosmopolitanism and Global Justice' (2005) 9(1-2) *Journal of Ethics* 11.