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CONTRACTARIANISM AND INTERSPECIES WELFARE CONFLICTS*

By Andrew I. Cohen

I. Introduction

Moral theories permitting aggregation consider whether and how to compare the gains of some individuals to the losses of others.[1] Before settling the question of how to aggregate, a moral theory must determine what counts morally and how much. Recent discussions of aggregation then puzzle over subsequent moral dilemmas. How a moral theory addresses such hard cases may have implications for the theory's structure and for the cogency of ordinary moral intuitions.

I take it that some nonhuman animals count morally. There is much dispute over what it is that makes them count, how they count, and how much. A lot is at stake. Depending upon how and why animals have a moral status, more of them might count more than we had supposed, and some human beings might thereby count less than we had supposed.[2] The feature(s) of animals that ground their moral status might require that we abandon or reform many of our current practices of vivisection and factory farming.[3] Justice may even require a wholesale redistribution of resources to improve the welfare of animals.[4]

* For comments and conversation about earlier drafts of this essay, I am grateful to Talbot Brewer, Ray Frey, Russell Hardin, Iwao Hirose, Lawrence Jost, Frances Kamm, Chris Morris, Jan Narveson, Alastair Norcross, Jennifer Samp, Kit Wellman, the other contributors to this volume, and its editors. I am especially grateful to Harry Dolan, Brad Hooker, Ellen Frankel Paul, and Cindy Stark for their generously detailed comments and suggestions.

[1] This formulation is inspired by Iwao Hirose, "Aggregation and the Non-Utilitarian Moral Theories," *Journal of Moral Philosophy* 4, no. 2 (2007): 275–86, at 275.

[2] For excellent discussions of such points, see, e.g., Jeff McMahan, "Killing and Equality," *Utilitas* 7, no. 1 (1995): 1–29; McMahan, "Cognitive Disability, Misfortune, and Justice," *Philosophy and Public Affairs* 25, no. 1 (1996): 3–34; McMahan, *The Ethics of Killing* (Oxford: Oxford University Press, 2002), esp. chap. 3; Nils Holtug, "Equality for Animals," in Jesper Ryberg, Thomas S. Petersen, and Clark Wolf, eds., *New Waves in Applied Ethics* (New York: Palgrave Macmillan, 2008); and Peter Vallentyne, "Of Mice and Men: Equality and Animals," in Nils Holtug and Kasper Lippert-Rasmussen, eds., *Egalitarianism* (Oxford: Clarendon Press, 2007), 211–37.

[3] The familiar examples here are Tom Regan and Peter Singer. See, e.g., Tom Regan, *The Case for Animal Rights* (Berkeley: University of California Press, 1983); Regan, *Defending Animal Rights* (Urbana: University of Illinois Press, 2001); Regan, "Empty Cages: Animal Rights and Vivisection," in Andrew I. Cohen and Christopher Heath Wellman, eds., *Contemporary Debates in Applied Ethics* (Malden, MA: Blackwell, 2005), 77–90; Peter Singer, "All Animals Are Equal," *Philosophical Exchange* 1, no. 1 (1974): 103–16; and Singer, *Animal Liberation* (New York: Random House, 1975).

[4] See, e.g., Nils Holtug, "Equality for Animals"; and Vallentyne, "Of Mice and Men: Equality and Animals."

doi:10.1017/S0265052509090104
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This essay does not attempt to resolve these puzzles but rather begins to consider how one moral theory might approach them. My focus here is mainly on contractarianism as a normative theory, though later I draw on a contractarian metaethical account of the truth of moral claims.[5] Exploring what contractarianism says about how and whether animals count morally will illuminate some of the theory's commitments regarding moral status and how such status figures in interspecies welfare conflicts.[6] Sketching some of the contractarian landscape of moral status will clarify how the theory might aggregate the relevant gains and losses to resolve a conflict between the welfare of humans and that of nonhuman animals.

Of course, there are many normative contractarianisms. They differ on many levels, including, for instance, their accounts of the contractors (what motivates the contractors, what level of concern they might have for the interests of others, what decision strategies they adopt, how much they know about themselves or the world, and so forth), the initial situation in which contractors find themselves (such as what, if anything, constrains the agreement), and the scope of the agreement (what it is that is being decided and to whom it is applicable). These differences can be significant enough that different contractarian theories can generate incompatible conclusions.

Despite these significant differences, there seems to be a core common to contractarian moral theories. Rationally self-interested agents reach agreement from some position of rough equality. They correctly believe that they are mutually vulnerable but stand to gain from some form of mutual restraint. The validity of moral norms then rests on their agreement.

Such a bare sketch might seem to be insufficient to generate any determinate conclusions about whether animals count morally, let alone how they count. But I argue that it is enough to suggest how they might and do count. It is also enough to suggest how contractarianism might begin to approach problems regarding how to resolve cases where promoting the welfare of animals conflicts with promoting the welfare of persons.

[5] See Ronald Milo, "Contractarian Constructivism," *The Journal of Philosophy* 92, no. 4 (1995): 181–204, for a helpful discussion of metaethical contractarianism. Normative and metaethical contractarianism are logically independent; contractarianism in one sense does not presuppose contractarianism in the other. Metaethical contractarianism is basically an account of the truth-makers of moral claims. On Milo's view of contractarianism as a metaethical theory, for instance, contractarianism is in part "a theory about the ontological status of moral wrongness" (ibid., 190). The theory holds "that the moral wrongness of acts is constituted by their being prohibited by the norms chosen by the hypothetical contractors" (ibid., 202). A normative contractarianism, by contrast, will specify principles for determining the moral rightness or wrongness of acts (ibid., 189).

[6] Though my discussion focuses on contractarian accounts, much of it may apply as well to contractualist theories. For the contractualist/contractarian distinction, see Stephen Darwall, "Introduction," in Darwall, ed., *Contractarianism, Contractualism* (Malden, MA: Blackwell, 2003); and Ann Cudd, "Contractarianism," *Stanford Encyclopedia of Philosophy,* http://plato.stanford.edu/entries/contractarianism/.

https://doi.org/10.1017/S0265052509090104 Published online by Cambridge University Press

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In what follows, I do not defend contractarianism as a moral theory or as an account of the truth of moral claims. Instead, I sketch how contractarianism has room for acknowledging the moral status of animals, and I use this account to consider what contractarianism might begin to say about the moral logic appropriate to determining how to resolve interspecies welfare conflicts. I argue that contractarianism is likely to constrain any comparison of welfare between humans and animals and express some partiality to humans in a way that discounts the welfare of some or all animals. While the norms emerging from the contract might be silent or inconsistent in some tragic or catastrophic cases, in most ordinary conflicts of welfare, contractors will agree to norms that produce some determinate resolution. What the agreement says can evolve depending upon how the contractors or their circumstances change.

Sections II and III begin by considering how contractarianism might recognize animals' moral status. Sections IV and V explore what I describe as "moral standing" and how contractarianism might confer it on animals. In Sections VI and VII, I consider, in the light of indeterminacy problems, how contractarianism might begin to approach interspecies welfare conflicts. Sections VIII through X discuss various sorts of constraints contractors might endorse on interspecies welfare comparisons in conflict situations. Section XI offers some concluding remarks on contractarian indeterminacy and the context-sensitivity of contractarianism's account of the truth value of moral claims.

II. Contractarianism and Animals' Indirect Moral Status

Before considering what the theory might say about nonhuman animals, I should be clear on how I conceive contractarianism. Here I understand the theory, first, mainly as appealing to hypothetical consent to determine which moral principles are justified: they are the ones that agents would endorse when reasoning under certain conditions.[7] Second, the agreement among those who participate is understood as simultaneous and unanimous. Third, in contrast with constrained versions of the initial situation, the contractarian agreement validating moral norms arises in an unconstrained context. In other words, moral principles shape neither the context under which contractors agree nor the conclusions that are acceptable.[8] Moral principles are what emerge from the agreement.

[7] Hypothetical consent thus need not merely be a "heuristic"; principles can be justified because agents would agree to them in hypothetical choice situations. For a related discussion, see Cynthia A. Stark, "Hypothetical Consent and Justification," *The Journal of Philosophy* 97, no. 6 (2000): 313–34, at 326–29.

[8] This is a clear point of departure between contractarianism and contractualism. The Rawlsian agreement, for instance, models certain moral conceptions of what should constrain principles of justice. Contractarian agreements have no such commitments since moral notions are supposed to emerge out of the agreement. See John Rawls, *A Theory of*

The scope of moral norms emerging from a contractarian choice situation will obviously depend heavily on who the contractors are and how we describe them. Moral contractarianism rests the validity of moral norms in an agreement among rationally self-interested agents bargaining from some position of rough equality.[9] At once it may then seem that contractarianism has no room to extend moral regard to nonhuman animals, since none of them are rational agents.[10]

This sort of worry is not new. Contractarian moral theory has often been accused of not having the resources to acknowledge properly the moral status of animals. It would seem that animals are not represented at the bargaining table.[11] Combine animals' lack of representation with plausible assumptions that contractors have little (if any) concern with others. There is then a serious danger that contractarian moral norms will not protect animals at all. If the moral norms do address animals, they might only confer upon them a cheapened moral status.[12]

Justice (Cambridge, MA: Belknap Press of Harvard University Press, 1971). David Gauthier, by contrast, assigns no moral constraints to the bargaining situation. On his view, while fairness and impartiality characterize the bargaining situation and coercion is ruled out, these conditions are necessary for making any agreement possible. Otherwise agents would not come to the table. See, e.g., David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), chaps. 6–7. The Hobbesian agreement lacks even the modest constraints Gauthier proposes. See Thomas Hobbes, *Leviathan,* ed. C. B. Macpherson (New York: Penguin Books, 1968), chaps. 6, 14, 17, 21. For the distinction between "constrained" and "unconstrained" contract theories, see Christopher W. Morris, "Justice, Reasons, and Moral Standing," in Jules L. Coleman and Christopher W. Morris, eds., *Rational Commitment and Social Justice: Essays for Gregory Kavka* (New York: Cambridge University Press, 1998), 186–207, at 189.

[9] In this discussion, I use "agent," "human," and "person" more or less interchangeably, though there will likely be a significant difference between what qualifies as a "human being" and what qualifies as an "agent" or a "person." This would matter when considering how contractarianism might assess the moral status of children or the disabled. I pass over this issue here, though there will be connections among various contractarian accounts for each case. But for a discussion of children, see Andrew I. Cohen, "Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Nonhuman Animals," *Journal of Applied Philosophy* 24, no. 2 (2007): 188–201, esp. sections 3–4; and on the status of the disabled within contractualism, see Christie Hartley, "An Inclusive Contractualism: Obligations to the Mentally Disabled," in Kimberley Brownlee and Adam Cureton, eds., *Disability and Disadvantage: Re-examining Topics in Moral and Political Philosophy* (New York: Oxford University Press, forthcoming).

[10] Here I assume that no nonhuman animals are rational agents. Dolphins and some of the great apes might be rational agents to some extent, but I concentrate on exploring the moral status of animals that are not at all rational agents or persons. On the personhood of dolphins, see Thomas White, *In Defense of Dolphins* (Malden, MA: Blackwell, 2007). On the place of morality among primates other than humans, see, e.g., Frans de Waal, "Morally Evolved: Primate Social Instincts, Human Morality, and the Rise and Fall of 'Veneer Theory,'" in his *Primates and Philosophers* (Princeton, NJ: Princeton University Press, 2006), 1–82.

[11] Gauthier admits as much; see *Morals by Agreement,* 268, 285.

[12] For some instances of this worry, see Peter Carruthers, *The Animals Issue: Morality in Practice* (Cambridge: Cambridge University Press, 1992); David DeGrazia, *Taking Animals Seriously* (Cambridge: Cambridge University Press, 1996); Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford: Oxford University Press, 2003), 7–9, 66–70; and Martha Nussbaum, "Beyond the Social Contract: Toward Global Justice," *The Tanner Lectures on Human Values* 24 (2004): 413–507. A related version of this objection concerns the status of the disabled in contractarian theory. See, e.g., Eva Feder Kittay, *Love's*

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Part of what motivates this worry is a fear that contractarianism can only confer an *indirect* moral status on animals. Animals with only indirect moral status are not directly owed any moral consideration. Moral consideration might merely be owed *regarding* them but not *to* them. In such cases of indirect moral status, prohibitions on torturing animals for amusement's sake might simply be understood as duties owed either to other persons or to oneself. Kant's position, though not contractarian, is an example of this sort of account. On his view, animals cannot obligate us, but we should still not be cruel to them since such cruelty obstructs the qualities of character that promote moral behavior.[13]

Such indirect moral status need not be restricted to animals. It can be extended to anything, such as plants, a mountain, someone's property, or a work of art. In such cases, the indirect moral status is what something enjoys when some agent(s) ought to behave in a certain way regarding the item in question. The agents would not owe the treatment to the item.

Before considering potential shortcomings of restricting animals to an indirect moral status, we should indicate why the contractors might agree to moral norms that would confer such indirect moral protections. Contractors could agree to a norm forbidding the mistreatment of animals belonging to another contractor. If the animals were regarded as property, for instance, then they would be protected in the same way other property is protected.[14] Rationally self-interested contractors would agree to norms that secure property, animate or inanimate. Refraining from mistreatment of animals would then be an obligation owed to the owners of the animals.[15]

There may seem to be several shortcomings in such an approach if it is the only route to establishing the moral status of animals. If we take the property metaphor seriously, conferring only the moral protections of property on animals would strike some critics as cheap and thin. It might seem cheap because it would not recognize any meaningful difference between dogs and sofas. Reasons not to burn a dog or a sofa without the

Labor (New York: Routledge, 1999). Cynthia A. Stark recently considered a related worry about how to adapt Rawlsian contract theory to accommodate the disabled. See Stark, "How to Include the Severely Disabled in a Contractarian Theory of Justice," *Journal of Political Philosophy* 15, no. 2 (2007): 127–45.

[13] See, e.g., Immanuel Kant, *The Metaphysics of Morals,* ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 192–93; Kant "Duties Toward Animals and Spirits" (c. 1780), in Louis Infield, trans., *Lectures on Ethics* (New York: Harper and Row, 1963), 239–41. See also Christine Korsgaard's discussion of Kant's views in Korsgaard, "Fellow Creatures: Kantian Ethics and Our Duties to Animals," *The Tanner Lectures on Human Values,* presented at the University of Michigan, February 6, 2004, available at http://www.tannerlectures.utah.edu/ijklm.html.

[14] Working in a contractarian framework, Jan Narveson suggests that animals at most enjoy an indirect moral status, most notably as property. See, e.g., Narveson, *Moral Matters* (Orchard Park, NY: Broadview Press, 1999), chap. 6.

[15] Depending on the specific version of contractarianism, there might be no meaningful way to describe some behavior toward animals as *mis*treatment until norms forbidding some behavior emerge from an agreement.

owner's permission would seem to apply in both cases. It would seem that everyone—perhaps especially a dog's *owner*—has a reason not to seek amusement by burning the dog, but it may seem unclear how contractarianism has the resources to explain such a reason. More sharply, critics would complain that this approach ignores a special additional reason not to mistreat a dog that does not apply in the case of sofas: the dog is sentient, and such sentience exerts an independent claim on us.[16] The property metaphor may also strike some critics as too thin because it excludes all unowned animals from moral protection. It may then seem as though such a contractarian approach misses the idea that something about animals commands everyone's moral attention, regardless of what the contract might say.

Of course, other moral theories might protect animals merely as property and be vulnerable to similar criticisms. My focus here, however, is contractarianism, which has some responses available. First, enjoying moral protection as property is but one way animals can acquire moral status in a contractarian framework. The contractors might also endorse other moral norms that obligate persons more strongly *to* animals. (I discuss this further in the next section.) Second, self-interested contractors might want to ensure that persons in their moral community cultivate certain moral sensibilities. People who kick cats for fun might not be the sort of people you want living next door—and not merely because you do not care to listen to the sounds of cats being kicked. This raises the familiar issue of worrisome spillover effects from perverse or missing moral sentiments. Persons who kick cats for fun might strike contractors as individuals who are unlikely to treat contractors with the mutually beneficial moral restraint the contract requires.[17] It thus seems that contractarianism has room for extending moral protections to animals—at least by conferring an indirect moral status on some of them.

Critics might respond that any such indirect moral status is nevertheless inadequate. First, critics might point to psychological bracketing. Contractors might reasonably believe that agents can confine to nonhuman animals their moral indifference or mistreatment. Contractors might then be indifferent to torture so long as it only involves animals (or some types of animals). They might see little reason to agree to norms that protect animals as anything other than property.[18] Second, critics may worry that contractors could acknowledge the possibility of some spillover effects on persons but believe that reasons to agree to norms forbidding or requiring some behavior regarding animals are not as stringent as

[16] See, e.g., Hooker, *Ideal Code, Real World,* 67–68.

[17] Kant puts this well when he speaks of how cruelty toward animals blunts a "shared feeling of their suffering and so weakens and gradually uproots a natural disposition that is very serviceable to morality in one's relations with other people." Kant, *The Metaphysics of Morals,* 192–93.

[18] For a related discussion, see Hooker, *Ideal Code, Real World,* 68–70.

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reasons to allow people the liberty to behave as they wish with respect to animals.[19] In short, critics will worry that if contractarianism only lets animals have an indirect moral status, contractarian moral norms will deny to animals the right sort of moral status. Indeed, by not bringing them to the bargaining table at the start, contractarianism may seem to have few if any resources to provide meaningful moral protection to animals. The theory may seem unduly anthropocentric.

The proponent of contractarianism might then insist that much of the worry here seems animated by appeal to pretheoretic intuitions, but might argue that these are of little probative value.[20] Fortunately, we do not need to stop the conversation so abruptly. The task here is not to show that contractarianism necessarily extends animals a certain sort of moral regard. Some contractarian theories may very well have no such commitments. The task is, first, to show that a plausible contractarian theory has the resources to extend animals some robust moral protections, and, second, to consider the structure of contractarian moral logic in cases of conflict. Thus, we can stipulate that given certain descriptions of the contractors and their choice situation, there might be little if any moral protection conferred on animals.[21] But some contractarian accounts have plenty of room for protecting some or all animals in some way.

As I have noted, the contractors may have excellent reasons to agree to moral norms that forbid certain treatment of certain animals and thereby confer an indirect moral status on some or all of them. Admittedly, it might not yet be clear whether any such moral status generates reasons for action (or forbearance), and if it does, how the stringency of the reasons generated might vary among different types of animals (and perhaps even among particular animals of any given type) and from one person to another. Furthermore, it is still possible that some animals would not be protected at all because contractors would not agree to moral norms that confer any moral status on them. But some animals could be protected, and not just as property. The contractors might agree to binding norms that would require or forbid certain treatment of animals independently of property considerations. (I develop this idea fur-

[19] Much would also depend on how we describe the contractors; how much they know about people's psychologies; their beliefs about the power of education, inculcation, and example to inspire people to develop certain dispositions; and, perhaps most importantly, the specific theory of rationality built into the contractarian theory. If rationality were purely instrumental, then contractors' particular ends would govern their decision on the relevant candidate moral norm. If rationality has an end (or ends), then, depending upon what those ends were, people might be committed to treating animals in a certain way. For a related discussion of whether Hobbesian reason has an end of its own, see Andrew I. Cohen, "Warmongers, Martyrs, and Madmen Versus the Hobbesian Laws of Nature," *Canadian Journal of Philosophy* 32, no. 4 (2002): 561–86, esp. 576–81.

[20] See, e.g., Gauthier, *Morals by Agreement*, 269.

[21] For a related discussion, see Jan Narveson, "Gauthier on Distributive Justice and the Natural Baseline," in Peter Vallentyne, ed., *Contractarianism and Rational Choice* (Cambridge: Cambridge University Press, 1991), 127–48, at 141–42.

ther in the next section.) Contractors might even agree that some such treatment is owed to the animals, conferring a *direct* moral status on them. I turn now to a discussion of the nature of this direct moral status, how it might arise in a contractarian framework, and what it entails.

III. Contractarianism and Animals' Direct Moral Status

What is this *direct* moral status? It is the status an entity enjoys when moral consideration is owed not merely *regarding* it but also *to* it.[22] Consider the possibility of gratuitously torturing a dog. If the dog has direct moral status with respect to forbearance from torture, that means some agents owe *to* the dog forbearance from torture. Torturing the dog would not merely be wrong. It would also wrong the dog. The key here is that the dog would be owed certain treatment not merely as the beneficiary of the performance of some duty. The treatment would be owed to the dog.

Before considering why contractors might agree to treat animals as having direct moral status, we should acknowledge that contractarianism does not own the distinction between indirect and direct moral status. Other moral theories can appeal to the distinction as well and can confer either or both types of moral status. The distinction also implies nothing about whether moral status generates decisive (or indeed any) reasons, and it implies nothing about the relative strength of any reasons to treat animals in a certain way. It may be, for instance, that reasons not to inflict pain on a certain animal with indirect moral status are more stringent than reasons not to inflict similar pain on another animal with some direct moral status.

For any given moral theory, an animal could enjoy both types of status regarding different moral considerations. Perhaps you owe forbearance from torture *to* a neighbor's dog. This gives the dog a direct moral status with respect to you regarding forbearance from torture. But you might also have an obligation to feed the dog when you promise the neighbor some help while she is away on vacation. This would be an obligation *regarding* the dog, but owed *to* the neighbor. This gives the dog an indirect moral status with respect to you regarding sustenance. Thus, from a formal standpoint, an entity's moral status can vary with respect to different persons. Bessie the cow might have a direct moral status with respect to Pat and Chris, regarding the moral consideration of beneficence.[23] This would mean Pat and Chris would each owe beneficence to

[22] Chris Morris draws a similar distinction between direct and indirect moral objects in "Justice, Reasons, and Moral Standing," 191.

[23] I assume here that beneficence is the sort of moral consideration that can be owed. Whether the prospective beneficiary can also be a *claimant* of it is another matter. For a related discussion of disconnecting rights from demands, see Neera Badhwar, "The Circumstances of Justice: Pluralism, Community, and Friendship," *The Journal of Political Philosophy* 1, no. 3 (1993): 250–76, at 266–71. See also Christopher Morris's discussion of the

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Bessie. Meanwhile, two other agents, Sam and Terry, might owe beneficence (merely regarding Bessie) to Pat and Chris, giving Bessie an indirect moral status with respect to Sam and Terry. Perhaps all four persons (and many more) owe to Bessie forbearance from gratuitous torture, giving her a direct moral status with respect to all such persons regarding that moral consideration.[24]

This direct moral status is what an entity enjoys when another entity owes it moral consideration. It is thus not merely the beneficiary of the performance of someone's duties. When an entity has a direct moral status, it has what I call *moral standing.* In the next section, I discuss what moral standing is and how contractarianism might confer it on nonhuman animals.

IV. Generating Direct Moral Status for Animals: Two Types of Moral Standing

On a contractarian account, how might animals acquire a *direct* moral status? Recall that this is the status an animal enjoys when moral considerations are owed to the animal in question. There are two ways for an animal to acquire such moral status. First, an animal can have a *primary moral standing*[25] if it can be said to participate in the original agreement through which moral status is generated. This moral status is what an animal would enjoy if some person(s) were to agree with the animal to owe it direct moral regard. But since animals cannot agree to any mutual restraint,[26] and since establishing the primary moral standing of animals is not necessary to consider some features of contractarian moral logic regarding conflict cases, I shall proceed with a less controversial but more encompassing account of the possibility of moral standing for nonhuman animals. I shall suppose that *the animals are not party to the agreement by which they acquire direct moral status.*

place of beneficence in contract theory in "Moral Standing and Rational-Choice Contractarianism," in Vallentyne, ed., *Contractarianism and Rational Choice,* 76–96, at 93–94.

[24] Of course, particular substantive moral theories might insist that moral status cannot vary in this fashion. A theory may say, for instance, that if some entity has direct moral status, it has that with respect to all persons.

[25] This account of primary and secondary moral standing owes much to Christopher W. Morris. See Morris, "Moral Standing and Rational-Choice Contractarianism"; Morris, "A Contractarian Account of Moral Justification," in Walter Sinnott-Armstrong and Mark Timmons, eds., *Moral Knowledge* (Oxford: Oxford University Press, 1996), 215–42; and Morris, "Justice, Reasons, and Moral Standing."

[26] If animals can agree to mutual restraint with human beings, then they might acquire primary moral standing. I see little convincing evidence that animals can do so. In any case, the number of types of animals that are candidates for having such advanced rational abilities is narrower than the scope of animals we typically regard as being owed our direct moral consideration. I know of one argument that many animals can agree to restraint and are thus eligible to be contractors. See C. Tucker and C. MacDonald, "Beastly Contractarianism: A Contractarian Analysis of the Possibility of Animal Rights," *Essays in Philosophy* 5, no. 2 (2004), available at http://www.humboldt.edu/~essays/tucker.html.

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As I discuss elsewhere,[27] an entity has *secondary moral standing* with respect to some person(s) when a contractor(s) insists on such standing and another party agrees to extend it. So, for instance, imagine that A is not or cannot be at the bargaining table with B, C, and all other parties to the original agreement. Suppose also that B is not inclined to agree to restraints with respect to A. Perhaps B thinks it might be good to hunt for sport and eat A and entities like A. But A might still come to have moral standing with respect to B and many other agents. Recall that an entity has moral standing when some agent(s) owes it some direct moral consideration. Since B is not inclined to extend A any direct moral consideration, why would B agree not only to restraints with respect to A but to owe such restraints *to A*?

The answer comes from the demands of the contractors. C might agree to cooperate with B on the condition that B agrees to extend A direct moral regard. In the case of nonhuman animals, some advocates might insist as a condition of cooperation with other human beings that all other prospective confederates agree to regard some specific nonhuman animals as claimants on their conduct.[28] The demand might be: If you wish for my cooperation, you must agree not to harm this entity (or entities of this sort), perhaps to help it, and to owe some moral consideration directly to the entity.[29]

An entity with secondary moral standing is directly owed moral consideration even though its moral status is the result of third-party demand. Suppose C demands that B agree to owe justice to A. If B agrees, then A has moral standing with respect to B. In other words, B's agreement with C is among the truth-conditions for B's directly owing some moral consideration to A. If B agrees, A would then have secondary moral standing with respect to B. "Secondary" here does not mean "weaker." The moral status of an entity with secondary moral standing can be just as stringent as that enjoyed by the parties to the original agreement.

When A has secondary moral standing with respect to B, A's moral status would then be quite different from the indirect moral status that protects many valuable objects and animals. For instance, when an animal merely has the indirect moral status of property, agents owe to the animal's owner forbearance from treating the animal in ways that clash with the owner's wishes.[30] But if an animal has secondary moral standing

[27] Cohen, "Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Nonhuman Animals."

[28] Here I pass over several complicating scope issues, such as how many animals are the subject of the agreement, whether all animals of a given type are thus protected, and whether the relevant moral protections are all of the same stringency for all agents prospectively bound. On related themes, see Andrew I. Cohen, "Dependent Relationships and the Moral Standing of Nonhuman Animals," *Ethics and the Environment* 13, no. 2 (2008).

[29] See related discussion in Cohen, "Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Nonhuman Animals," secs. 3–4.

[30] I make the simplifying assumption that no other moral constraints bind agents regarding the animal.

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with respect to some agents, those agents owe certain treatment to the animal. The failure of the agents to extend such treatment is not merely wrong; it also wrongs the animal. The reason it came to be true that some treatment is directly owed to the animal can be traced to an agreement among other parties, but the moral protections covering the animal can be just as strong as those covering any agent who was a party to the original agreement.

Elsewhere I argue that this account resists objections that secondary moral standing is overbroad or insubstantial.[31] Here I note possible challenges about secondary moral standing from two sorts of critics. One critic is likely a contractarian who thinks the account goes too far. Another critic would not be a contractarian and would claim the account does not go far enough.

Consider the contractarian critic first. This critic may argue that secondary moral standing for animals is incompatible with the foundations of contractarian theory. It may seem that the motivational assumptions of contractarianism rule out secondary moral standing.

Contractarianism may seem to require that the contractors are egoists, so that all their preferences would need to be self-regarding. The egoist *might* have a self-regarding interest in the welfare of others, but she need not. If contractors' preferences did not refer to the preferences of others, animals could be left morally unprotected. If the contractors were egoists, it would not be true that any nonhuman animals would necessarily enjoy moral protection.

Perhaps a contractarian theory could posit contractors with less self-regarding preferences. For example, contractarianism might assume only that agents show "mutual disinterest" and thus take no interest in the interests of others.[32] Mutually unconcerned agents could, however, take an interest in nonhuman animals.[33] Indeed, a still weaker motivational assumption of "nontuism," where agents simply take no interest in the interests of those with whom they forge agreements,[34] would also leave room for agents to have an interest in the welfare of animals. There are other motivational assumptions we might attribute to contractors and distill from leading contractarian theories.[35] Some of these might allow contractors to take an interest in animals; others would preclude their

[31] See Cohen, "Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Nonhuman Animals," secs. 5–6.

[32] Rawls, *A Theory of Justice,* 13.

[33] Christopher W. Morris, "The Relation between Self-Interest and Justice in Contractarian Ethics," *Social Philosophy and Policy* 5, no. 2 (1988): 119–53, at 123.

[34] See Gauthier, *Morals by Agreement,* 87; and Morris, "The Relation between Self-Interest and Justice in Contractarian Ethics," 123.

[35] For discussion, see Morris, "The Relation between Self-Interest and Justice in Contractarian Ethics," 123–24; Morris, "Moral Standing and Rational-Choice Contractarianism," 90–92; and Peter Vallentyne, "Contractarianism and the Assumption of Mutual Unconcern," in Vallentyne, ed., *Contractarianism and Rational Choice,* 71–75.

doing so. But short of assuming from the start that agents take an interest in the interests of animals, it might seem that contractors would not necessarily agree to extend any moral protections to them.

We need not assume, however, that contractors have no other-regarding preferences—nor that they have no preferences concerning the welfare of animals. As Peter Vallentyne argues, contractarianism "should make *no assumption* concerning the nature of people's preferences."[36] The key is showing that agents have an interest in agreeing to mutual restraint. It is not necessary to show that they would have such an interest regardless of what their preferences are. Admittedly (here adding to Vallentyne), contractors' preferences must fall within a certain range. Their preferences must be compatible with a readiness to cooperate with others under mutually beneficial conditions. As Vallentyne notes, though, attributing disinterest to the contractors undermines the appeal of the moral norms emerging from the contract, since such norms are supposed to bind actual persons.[37]

Once contractarianism correctly abandons any rigid self-regarding motivational assumptions, the theory can appeal to people's preferences—especially including other-regarding preferences that encompass animals.[38] Human beings do care about the welfare of at least some animals, so contractors could and likely would endorse moral norms that extend some moral protection to them. Indeed, given that many persons prefer (for nonanthropocentric reasons) that animals matter morally, contractors might agree to norms that acknowledge the secondary moral standing of some animals under certain conditions.

The contractarian critic may insist, though, that contractors would not be concerned about how people treat chickens, cats, or cockroaches except insofar as such animals (and others) are people's property.[39] The representative contractor is unconcerned with sophisticated theoretical questions about animals' "moral standing." That contractor simply wants other people to stop stealing his chickens and setting his cats on fire.

In response, note that contractors are sophisticated enough to be able to bargain for reciprocal justice. They can agree to binding norms that define each human person as a *claimant,* and they can agree to norms of justice that are sophisticated enough to have scope limitations. For instance, they can agree that promises ought to be kept as part of justice but that promises are not infinitely stringent, and they can agree that, in certain situations, other obligations may take moral precedence over certain promises.

[36] Vallentyne, "Contractarianism and the Assumption of Mutual Unconcern," 73 (emphasis in the original).

[37] Ibid., 73–74.

[38] The preferences need not be "considered" preferences, despite Gauthier's suggestions. See Gauthier, *Morals by Agreement,* 29–38. For a critique of the appeal to such considered preferences, see Malcolm Murray, "Unconsidered Preferences," *South African Journal of Philosophy* 17, no. 4 (1998): 346–53.

[39] I am grateful to Brad Hooker and Ellen Frankel Paul for pressing versions of this worry.

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Of course, they might not put it that way in the bargain; they are, after all, just ordinary (representative) contractors. But if they are capable of creating such nuanced moral understandings, I think they are capable of understanding what it means to owe justice to those with whom they cannot (now) currently reciprocate. They could see a reason to extend moral treatment to such nonreciprocating entities (animals, infants, the disabled) because of the demands of other contractors.

The contractarian critic could press here and say that the contractors would not bother to press such demands. Why threaten the contract by insisting on direct moral regard for dogs? But note that contractors *might* prefer to do so. Much now depends on the weight of their preferences. Once we have *not* assumed that contractors are necessarily rigidly self-regarding, we can take stock of what contractors prefer.

Consider that infants cannot currently reciprocate, but many contractors would likely be willing to walk away from the contract unless infants were owed justice by *everyone.* Why would contractors bother to take a stand for infants? Infants matter immensely to many contractors. Whether contractors would bother to extend moral standing to nonhuman animals would then depend on what their preferences were, how much they knew about their preferences, and how much they knew about human moral psychology. Again, they may understandably insist not only that setting cats on fire for laughs is wrong but that it wrongs the cats. Agreeing to norms that endorse such a conclusion might be the best way for contractors to satisfy their preferences. It thus seems possible that the contract might allow that at least some persons would owe at least some animals some direct moral regard. This should be enough to say that contractarianism might endorse moral standing for animals and so would need to resolve possible cases of conflict between the welfare of humans and that of nonhuman animals.

I turn now to the critic who is not a contractarian and who worries that this account of how and why contractors would endorse moral norms protecting animals does not go far enough. To such a critic, this account may seem to be a recipe for only acknowledging the moral standing of "charismatic megafauna," that is, big and/or cute furry animals with broad popular appeal. If an insufficient number of contractors took interest in the welfare of some unappealing animal, that animal might be excluded from moral protection.[40] A critic might then say that contractors may be indifferent to the gratuitous torture of some unappealing animal, and it would seem the contractarian must say that such torture would not be wrong. Clearly, the critic might say, such conduct would still be wrong, and it would still wrong the animal.

[40] To be more precise, in such a case the weight at the bargaining table of demands by the animals' advocates would not be enough to give contractors reason to endorse norms protecting such animals.

There are two ways to respond to this worry. First, it is possible that the intuitions animating the worry are unfounded.[41] But, second, since such intuitions seem quite strong, we need only reiterate that contractarianism has much room for acknowledging the moral standing of nonhuman animals. Contractors' preferences might be for many animals to be morally considerable and for some (if not all) animals of certain types to be directly owed some moral consideration. This is a plausible description of the preferences of human agents. People care about many animals, and not just because we think animals' value is a function of human interests. While this does not determine the precise content of the moral norms protecting animals (which animals, at what stringency, binding on which agents, and under what circumstances), we can say that contractors could endorse some norms to protect some animals with secondary moral standing.[42] While this might not be enough to defend contractarianism as an account of animals' moral status, that is not the focus of this essay. Here we need only set the stage for considering the contractarian moral logic regarding conflict cases between persons and animals. In Sections VI and VII, I will explore how such conflicts may arise for contractarianism and how the theory might begin to address them. Before addressing such conflicts in detail, a few more words about moral standing are in order.

V. Some Formal Features of Moral Standing

In this section, I consider some features of moral standing. The account is neutral among moral theories. Our understanding of these formal features of moral standing will shape how contractarianism begins to resolve cases where there are welfare conflicts among morally considerable animals from different species.

To have moral standing is to be directly owed moral consideration. Moral standing is thus relational, unilateral, and scalar. These features are true of moral standing regardless of whether it is primary or secondary moral standing. Moral standing is relational in that it is simply the status one enjoys when another entity (or entities) owes one direct moral regard.[43] Formally, moral standing is also unilateral: A's directly owing some moral consideration to B says nothing about whether B has a similar responsibility to A.

[41] Perhaps, for instance, human beings simply do not owe any moral consideration directly to Gila monster lizards. If we can make sense of the notion of gratuitously torturing a Gila monster, and if such torture is wrong, at most it wrongs other human beings. But since Gila monster saliva produces compounds useful for treating diabetes (see, e.g., http://www.centerwatch.com/patient/drugs/dru879.html), one can imagine contractors insisting on moral norms that forbid the gratuitous destruction of any (and especially all) Gila monsters.

[42] For a discussion of the possibility that the contract may endorse defective norms, see Cohen, "Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Nonhuman Animals," sec. 6.

[43] For a discussion of some of the conditions of "owing to," see ibid., sec. 5.

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On certain substantive theories, however, moral standing will often be bilateral. On many readings of contractarianism, for instance, one agent owes justice to another if and only if that obligation is reciprocal. This substantive view must be weakened if we are to allow for secondary moral standing. Recall that the reciprocal moral restraint that grounds animals' secondary moral standing is channeled through their human advocates. Those advocates agree to mutual restraint with other agents on the condition that the other agents extend the animals direct moral regard. If, as I believe, no animals are full agents, none of them can agree to the mutual restraint required for participating in the reciprocal moral relations that ground contractarian moral regard.[44] Thus, even for contractarianism, moral standing need not be bilateral.[45]

Of note is the scalar feature of moral standing. Moral standing comes in degrees. The extent of an entity's moral standing is a function of three features: (1) *how many* other entities owe it some moral consideration; (2) *which* moral considerations are owed; and (3) the *stringency* of the considerations.

Here are some examples of how moral standing can vary in degree. First, if A, B, and C directly owe justice to D, then, other things equal, D has more moral standing than it would if only A and B owed it justice. D has more moral standing in the former case than in the latter since more agents owe it moral regard. Second, if A, B, and C all owe to D justice as well as some other moral consideration such as beneficence, then D has more moral standing than it would if it were not owed beneficence.[46] In such a case, moral standing varies according to how many moral considerations an entity is owed. Third, if moral considerations generate reasons, then the reason one has to extend one entity justice might be more stringent (or perhaps have a greater exclusionary scope) than the reason one has to extend another entity justice.[47] The stringency of the considerations an entity is owed affects the degree of that entity's moral standing. Thus, to sum up, the extent of an entity's moral standing varies according to three features: *how many* agents owe the entity *which* moral considerations at what level of *stringency.*[48]

[44] This seems to be much of the reason Jan Narveson rejects the moral considerability of animals. See Narveson, "Gauthier on Distributive Justice and the Natural Baseline," 141–42.

[45] By appealing to the apparatus of secondary moral standing, the contractarian can allow for owing direct moral consideration to infants. A similar sort of unilateral constraint might apply between human persons and nonhuman animals. See Cohen, "Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Nonhuman Animals," secs. 3–4.

[46] This example is purely illustrative and not meant to presuppose that beneficence is necessarily a contractarian moral virtue or that it can be owed. For related discussion, see Morris, "Moral Standing and Rational-Choice Contractarianism," 93–95.

[47] The "exclusionary scope" of a reason refers to how many first-order reasons it excludes from counting in the balance of reasons. For related discussions, see Joseph Raz, *Practical Reason and Norms* (London: Hutchinson and Co., 1975); Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986); and Raz, "Facing Up: A Reply," *Southern California Law Review* 62 (1980): 1153–1235.

[48] Here I suppose that these three parameters all influence the same metric: moral standing. It might be analytically more complete to speak of three different parameters of moral

On typical contractarian accounts, the contract would endorse norms of justice that purport to bind all relevant agents in the same way.[49] All agents would reciprocally owe one another justice. Each agent would then have, in at least one respect, an equal moral standing with respect to all other relevant agents. Justice would apply to all agents. This is to make the obvious point that justice for one person would not count for more than justice for another.[50] While it might then be true that all relevant agents have the same moral standing with respect to one another regarding justice, it might also be true (and likely is true) that some persons ought (for the sake of justice) to privilege other agents as beneficiaries of some of their actions.

Animals complicate matters since what the contract says about them will depend on the preferences of the contractors. There are at least three possibilities. The contract might deny that animals have any moral standing, or it might allow that some of them have moral standing on a par with persons, or it might acknowledge for animals a moral standing weaker or more modest in scope than that of persons. How then would the contract begin to address situations where the interests of animals clash with those of human parties to the contract? I next consider what considerations may shape the contractarian moral logic for resolving conflicts.

VI. Responsiveness and Contractarian (In)Determinacy

What does contractarianism say about the moral logic of situations where the welfares of two or more entities are at stake? From the start, it seems that contractors would agree to norms that express *responsiveness* to gains and losses to the welfare of any entity.[51] The norms emerging from the agreement would support benefiting one entity when it is possible to do so without harming another (this is *positive responsiveness*), and the norms would oppose options harming an individual while benefiting no other entity (this is *negative responsiveness*).[52]

standing that track the three varying factors (number of agents, which considerations, and stringency). This level of precision is not required for the analysis of welfare conflicts that I offer below.

[49] Here I need not take a stand on whether the contract necessarily includes and thus binds all persons. Having enough agents might be enough to secure the mutual restraint contractors seek. See related discussion by Gregory S. Kavka in "The Reconciliation Project," in David Copp and David Zimmerman, eds., *Morality, Reason, and Truth* (Totowa, NJ: Rowman and Allanheld, 1984), 297–319, at 306–7; Morris, "A Contractarian Account of Moral Justification," 226; and Cohen, "Warmongers, Martyrs, and Madmen Versus the Hobbesian Laws of Nature," sec. VIII.

[50] All this will be true even if the relevant moral norms do not necessarily generate decisive (or indeed any) reasons. For related discussion, see Morris, "A Contractarian Account of Moral Justification," esp. 226–33.

[51] My conception of responsiveness comes from Iwao Hirose, "Aggregation and the Separateness of Persons," paper delivered at Georgia State University, April 9, 2007, pp. 3–4.

[52] These formulations draw from Hirose, "Aggregation and the Separateness of Persons," 3–4. To be clear, the contract is not necessarily saying that all choice situations involving the

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Appeals to responsiveness do not indicate how contractarianism would resolve conflicts among the welfares of two or more entities.[53] In such cases, the gains and losses of different individuals are rivalrous. A gain to one entity is impossible without losses for another, or forbearing from inflicting a loss on one individual is impossible without imposing a loss on another.[54]

There are many occasions where two or more entities have rivalrous welfares. Insofar as one option is morally preferable in such conflict situations, this option would be endorsed by norms to which the contractors would agree. This is what the contract does: it generates and justifies binding moral norms.

Of course, it is one thing to assert that the contract would say something in such conflict cases. It is another matter to assert that the contract would say something determinate.

The contract can be indeterminate in such conflict cases in many ways. It might equally endorse two or more incompatible conclusions. Or it might be unclear what the contract would say because of uncertainties regarding how best to conceive the ideal bargaining situation. In many or all such cases, it might be difficult to discern a determinate conclusion since whatever it might be would be a function of many variables concerning the contracting situation and the contractors themselves.[55] These variables heavily influence what binding moral norms the contractors would endorse. What value we assigned such variables would determine

welfare of two or more entities express responsiveness in a way that generates *moral* reasons. But insofar as the contract would endorse some option(s) as morally preferable in such situations, it would thereby express (or at least be consistent with) responsiveness. Whether the contract would say that any possible resolution to conflict situations must also be a function of *moral* norms would depend on whether the theory (or a substantive doctrine to which it is married) has any commitments on the pervasiveness of morality. For related discussion, see Samuel Scheffler, "Morality's Demands and Their Limits," *The Journal of Philosophy* 83, no. 10 (1986): 531–37. The theory's commitments on this issue do not ultimately seem to matter much for the important cases involving conflict, for at least in some such cases the contract would resolve the conflict by endorsing one option as *morally* preferable.

[53] Responsiveness also says nothing about what a moral theory would say properly *counts* as a benefit or a harm (or, similarly, a gain or a loss). To simplify the discussion, I shall assume there is a criterion of gain/loss that is sufficiently robust so as to command a consensus that resolves the bulk of cases involving putative gain/loss. This is not to claim there would be no difficulties in determining what this criterion might be. If it is not available in some handy form prior to agreement, it would need to be a product of the contract.

[54] Obviously, there are various other possible combinations that would be instances of rivalrous welfares, such as: a gain to one entity requires forgoing a gain to another, or, a gain to one individual comes with an opportunity cost of forgoing an additional gain to another entity that otherwise stood to gain in any case, and so forth.

[55] The conclusions of the contract will significantly hang on the structure of the coalitions at the bargaining table. As Christopher Morris notes, however, coalition theory is underdeveloped—especially for the purposes of generating a determinate contractarian moral theory. See his discussion in "Justice, Reasons, and Moral Standing," 192, 202–3. See also Milo, "Contractarian Constructivism," esp. sec. III.

the shape of norms that would endorse one option as morally preferable in conflict cases.

I do not argue that contractors will agree to norms that generate a determinate resolution to all conflict cases. I doubt they would or could. I wish to consider what would condition the contractarian moral logic of resolving conflict situations insofar as the norms contractors endorsed generated any determinate finding about which option among various alternatives for resolving a conflict was morally permissible or preferable. My remarks below on particular cases are purely illustrative; I do not mean to imply that contractarianism always generates an accessibly determinate resolution, nor do I wish to say that the cases I discuss are those for which a contractarian theory would necessarily have a determinate resolution.

VII. Interspecies Contractarian Welfare Comparisons: Some Preliminary Considerations

To say the contract would endorse an option in a conflict situation as morally preferable is to say that the norms endorsing the option would be chosen by contractors bargaining in the "circumstances of justice." In the circumstances of justice, agents bargain from a position of rough equality of power amid moderate scarcity of important resources. Agents in the circumstances of justice show tendencies toward partiality, but they might benefit from some form of mutual restraint.[56] Agents also know all this. Typical contractarian theories show agents agreeing to moral norms, including norms of justice. These norms would help to resolve at least some conflicts among persons by indicating some options as morally preferable (or precluding some other options as morally ruled out). Earlier I sketched how contractors might endorse norms that extend to some animals a secondary moral standing. How then might contractors resolve cases where human welfare clashes with that of animals?

The contractors might endorse moral norms that begin to resolve the conflict by comparing the gains and losses of the individuals whose competing welfares are at stake.[57] But before any such norms might identify an option as morally preferable, there would first need to be standards governing the comparison itself and its inputs. The contractors would need to agree to norms regarding who counts morally, how much, and

[56] See, e.g., David Hume, *A Treatise of Human Nature* (1739; Oxford: Clarendon Press, 1951), III.2.2.; Hume, *An Enquiry Concerning the Principles of Morals* (1777; Oxford: Clarendon Press, 1975), III.1; Morris, "Moral Standing and Rational-Choice Contractarianism," 79–80, 86; Morris, "A Contractarian Account of Moral Justification," 220; Gauthier, *Morals by Agreement,* 113–16; and Rawls, *A Theory of Justice,* 126–30.

[57] Again, not all conflict situations necessarily have one or any *morally* preferable outcome, because not all situations of conflict are moral conflict; and not all moral conflicts necessarily have determinate or unique moral resolutions. For related discussion, see Philippa Foot, "Moral Realism and Moral Dilemma," *The Journal of Philosophy* 80, no. 7 (1983): 379–98.

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how to compare entities whose welfares conflict. The shape such norms take would determine how and whether aggregation or some other procedure could offer some morally preferable solution to conflicts between humans and animals.

Contractors would need to settle on a criterion of welfare.[58] The criterion of welfare that contractors endorse would provide some metric to indicate how much some setback or gain to welfare for any given entity counts. The metric may have various levels of precision. Contractors may be satisfied with a criterion that is reasonably precise for cases involving human beings and higher animals but less precise for lower animals. In this way, for instance, the norm emerging from the contract regarding how to measure welfare might give contractors the data to weigh rival welfares in a satisfactory fashion for most conflict cases. Assuming that in some case the contract's norms permit or require selecting an option that produces the greatest net welfare, then appeal to such norms might suggest, for instance, that the death of a cockroach counts as a setback to its welfare, but this setback does not count enough to outweigh the gain to a person's welfare that comes from squashing the cockroach.[59] This would be typical for cases of simple weighing: where morally considerable welfares are rivalrous, the option promising the greatest net welfare for all relevant parties is morally preferable. Contractors may endorse norms for simple weighing in some or all cases involving conflicts between human and animal welfare. If the gains to human welfare exceed the setbacks to animals in conflict cases, then, other things equal, advancing human welfare would be regarded as morally preferable.

In many cases, however, various *constraints* may govern or restrict the comparison of conflicting welfares. I next consider what sorts of constraints might emerge from the contract and how they might figure in the contractarian moral logic of resolving conflict cases involving persons and animals. I divide these constraints into two categories, the *conceptual* and the *substantive.* I consider conceptual constraints first in Section VIII and substantive constraints in Section IX.

VIII. Possible Conceptual Constraints on Interspecies Contractarian Welfare Comparisons

Conceptual constraints on the comparison of conflicting welfares determine which putative gains or losses qualify as actual gains or losses when comparing rival welfares. I discuss a few examples of such constraints.

[58] Again, the criterion of gain/loss would depend significantly on the findings of the rich literature on rational choice. I propose setting such controversies aside by supposing that whatever criterion contractors select would still present them with a possibility where human and animal welfares would potentially be in conflict.

[59] On whether and how an animal's death counts as a setback to its welfare, see Jeff McMahan, *The Ethics of Killing,* sec. 1.2.

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The discussion is intended to illustrate but not exhaust the possibilities facing the contractors.

For starters, one can ask whether contractors would endorse some *person-affecting* criterion or some *non-person-affecting* criterion. A non-person-affecting criterion of welfare would be indifferent as to which person enjoys any given unit of welfare. It would also be indifferent as to whether such a person is actual or drawn from alternative histories featuring partly or entirely different persons. By contrast, a person-affecting welfare criterion restricts its focus to the welfares of identifiable particular persons.[60] As I have conceived contractarianism, the contractors would only opt for some person-affecting criterion, since they would be making a social choice to govern themselves, not some alternative-history version of themselves (or to govern an alternative history in which they did not exist).[61] This is not to settle the issue of what the criterion would be, but merely to narrow the range of possibilities.

The contractors would select a person-affecting welfare criterion over a non-person-affecting criterion, but it may not be clear whether they would select an *animal-affecting* or a *non-animal-affecting* criterion. In other words, would contractors agree that gains to welfare count morally only insofar as they accrue to some identifiable particular animal, regardless of what *sort* of animal it is? Or would they allow that any putative welfare gain—including gains that accrue to actual or potential animals across various possible histories—can morally count as a genuine gain to welfare?[62]

Contractors would also need to determine whether the "animal" in "animal-affecting" refers indifferently to human beings and nonhuman animals. They might very well make a distinction here. This would open

[60] See, e.g., Jan Narveson, "Moral Problems of Population," *The Monist* 57, no. 1 (1973): 62–86; Narveson, "Utilitarianism and New Generations," *Mind* 76, no. 301 (1967): 62–72; Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), 370, 394; John Broome, *Weighing Lives* (Oxford: Oxford University Press, 2004), chaps. 8–9; and Peter Vallentyne, "Critical Notice of *Child Versus Childmaker: Future Persons and Present Duties in Ethics and the Law* by Melinda Roberts," *Noûs* 34, no. 4 (2000): 634–47.

[61] Of course, this might be an argument against structuring the contractarian choice situation in a way to rule out non-person-affecting criteria for morally considerable welfare, but my task here is not to defend contractarianism but to explore the moral logic it features for resolving conflicts between persons and animals. See related discussion about cross-generational ties in Gauthier, *Morals by Agreement,* chap. 9; but see also worries about Gauthier's approach in Gregory Kavka, "The Problem of Group Egoism," in Brad Hooker, ed., *Rationality, Rules, and Utility: New Essays on the Moral Philosophy of Richard B. Brandt* (Boulder, CO: Westview Press, 1993), 149–63. My thanks to Harry Dolan for correspondence on this issue.

[62] I assume here that only animals, and likely only sentient creatures, can have welfares. See Cohen, "Contractarianism, Other-Regarding Attitudes, and the Moral Standing of Non-human Animals," 192; Paul Taylor, "Frankena on Environmental Ethics," *Monist* 64, no. 3 (1981): 313–24; Joel Feinberg, "The Rights of Animals and Unborn Generations," in W. Blackstone, ed., *Philosophy and Environmental Crisis* (Athens, GA: University of Georgia Press, 1974), 43–68; and DeGrazia, *Taking Animals Seriously.* But nothing in my account hangs on this assumption. If, contrary to my belief, plants or rocks can have welfares, then, after setting out some ontology of *entity,* we could explore whether contractors would endorse an entity-affecting or a non-entity-affecting criterion of welfare.

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up a wide variability in possible blends among the contract's norms that constrain which welfares count in moral reasoning. Contractors would endorse a person-affecting criterion of welfare, and they might also agree to an animal-affecting criterion—for some particular animals, or only for animals of a given type, or for all animals. Or they might agree to a non-animal-affecting criterion for some animals but not others.[63]

Contractors might, for example, agree to a person-affecting criterion of welfare for all persons and an animal-affecting criterion for all domestic animals, but agree to a non-animal-affecting criterion for all other animals. For instance, any measure of red-cockaded woodpecker welfare, on a non-woodpecker-affecting criterion, would need to take stock of alternative possible histories featuring altogether different woodpeckers. The non-woodpecker-affecting criterion of welfare would be indifferent as to which woodpeckers experienced any particular unit of woodpecker welfare.[64] Contractors would thus consider which sorts of welfare can count when comparing the welfares of various entities. Such comparison might be required when determining which option is morally preferable in resolving conflict situations.

I have yet to say anything about how the welfares of such morally considerable entities might be weighted in any comparison when resolving a conflict. I address this issue in a moment. When determining which welfares count for a comparison in any putative conflict situation, perfectionist-minded critics (some of whom might be contractarians) may interrupt and suggest that some other conceptual constraints simply rule out the need for comparing the rival welfares among various individuals across various options. Such conceptual constraints would simply deny the possibility of rivalrous welfares altogether.

To see how such conceptual constraints may operate, consider that contractors could decide that what properly counts as a gain or a loss is a function of some criterion that somehow consistently and completely determines any entity's welfare (properly understood) given the circumstances and given the universe of all other morally relevant entities. This criterion would deny that welfares could be rivalrous. In order for it to rule out rivalrous welfares, this perfectionist criterion would need to be robust enough to generate a compossible conception of everyone's proper welfare. This way there would never be a conflict among the welfares of any individuals. Since there would never be any such conflict, there would never be any need to balance the gains and losses of various individuals. Aggregation—or any other method for comparing rival welfares—would be beside the point.

[63] Here I am happy to avoid the more accurate but clumsier "non-nonhuman-animal-affecting."

[64] Certain maximizing requirements for welfare may then threaten a "repugnant woodpecker conclusion," but I do not pursue that matter here.

I doubt that any constraints on aggregation emerging from contractarian agreement would be conceptual in such a perfectionist sense. I will not fully argue the point here, but I will sketch some of my misgivings. I believe it is unnecessary and unlikely for contractors to agree to norms that count welfare according to such a robust perfectionist criterion. It seems unnecessary because contractors can obtain the benefits of mutual restraint without it. It seems unlikely because many (if not all) contractors are unlikely to endorse norms that disqualify their interests in resolving conflicts in their favor.[65] Of course, we might just think of the social contract device as a heuristic for determining what that robust welfare criterion is and for lending decisive moral guidance in choice situations. I confess I cannot see what accessibly determinate shape that perfectionist criterion might have, but this may be due to my limited imagination. In any case, my discussion does not hang on denying such perfectionist conceptual constraints on aggregation, since I am simply concerned with contractarian accounts of how to resolve putative welfare conflict cases involving persons and animals—regardless of what the criterion of welfare might be.[66] If a contract could generate norms sufficiently robust to empty the set of cases of welfare conflict, so much the better for that contract.

IX. Possible Substantive Constraints on Interspecies Contractarian Welfare Comparisons

I have considered how some conceptual constraints might condition any contractarian comparison of welfares in situations of apparent conflict between entities of different species. These constraints might purport to rule out the comparison entirely, or they might allow that only some sorts of putative gains can figure in any comparison. Much of the discussion also applies easily to conflicts among humans. Species membership may begin to matter to contractors when determining various *substantive* constraints on the comparison of conflicting welfares. These norms would constrain the welfare comparison according to some value judgments. My discussion here is again meant to be illustrative and not

[65] There would be further complications in understanding how, if at all, such a perfectionist criterion applies to nonhuman animals. If it applies to animals, it might not be a loss to the gazelle when a lion hunts and kills it. This would seem to require an implausibly robust non-animal-affecting criterion of welfare.

[66] Here I have assumed there would no place for partial perfectionist criteria of gain/loss. Any such partial criterion would not rule out conflict entirely; it would merely restrict opportunities for conflict. The criterion would rule out only certain prospective changes to welfare as genuine gains or losses. Contractors would then have to have agreed to a norm that disqualifies only certain putative gains from being genuine. If only certain gains are ruled out, then either we can capture the effects of ruling out such putative gains by appealing to various substantive constraints (as I discuss at present in the text), or contractors could agree that some such gains simply are not really gains. Again, I confess I do not see why contractors would agree to this latter notion.

https://doi.org/10.1017/S0265052509090104 Published online by Cambridge University Press

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intended to show that contractarianism would necessarily be committed to some specific substantive constraint.

Contractors might agree to various *substantive discounting functions* (or, for lack of a better term, *substantive surcharging functions*) that count welfares differently according to the *identity* of the entity whose welfare it is. These functions could be linear, increasing, or decreasing, and they could apply in some contexts but not in others.

Such discounting/surcharging functions might express *partiality* toward some sorts of entities over others. When comparing gains and losses, impartiality across species would require that the identities of the animals to whom such gains and losses accrue are irrelevant.[67] Strict impartiality would amount to a rejection of any form of "speciesism" that would privilege members of some species (typically human beings) over others.[68]

Contractors can and likely would be partial to human persons, at least in some respects, and they would sometimes express that partiality through discounting/surcharging functions that privileged the welfare of human persons in at least some circumstances of human/animal conflict. These discounting/surcharging norms are likely to be context-sensitive. Contractors may agree to norms that hold, for instance, that a unit of chicken welfare counts for some fraction of a comparable unit of human welfare. They may agree to apply that discount rate to contexts involving the provision of food but not to contexts involving human amusement. When it comes to amusing people, contractors may instead agree to norms where chicken welfare discount rates diminish or disappear entirely. In this way, for instance, the substantive norms determining the weights and relevance of welfares in cases of human-chicken welfare conflict might *exclude* improvements to human welfare through amusement from counting against the suffering of cockfighting chickens—no matter how great those human welfare improvements might be.[69] This is one way of understanding how a contractarian ethic might allow the production of chickens for human food but forbid the production of chickens for cockfighting. Even if it is true that the welfare of a chicken at a factory farm is worse than that of one living the life of a cockfighter, and even if the aggregate setback to chickens' welfare is worse in factory farming than it is in

[67] See Hirose, "Aggregation and the Separateness of Persons," 3; and Broome, *Weighing Lives*, 135–36. See also Gauthier, *Morals by Agreement*, 235–36.

[68] For a splendid discussion of problems with speciesism, see Alastair Norcross, "Puppies, Pigs, and People: Eating Meat and Marginal Cases," *Philosophical Perspectives* 18, no. 1 (2004): 229–45.

[69] The contract can reach this conclusion regardless of its commitments on whether the relevant criterion for chicken welfare is chicken-affecting or non-chicken-affecting. It need only hold that the life of any such chicken is below some baseline for making the life worth living. For related discussion, see John Broome's account of the "neutral level" of human existence in *Weighing Lives*, chaps. 10, 13. If no human life is worth living, interspecies welfare comparisons might be further complicated but certainly not impossible. See David Benatar, *Better Never to Have Been: The Harm of Coming into Existence* (Oxford: Oxford University Press, 2006).

cockfighting, the contract's moral norms may discount the welfare losses of chickens raised for food production. Of course, this might be an argument against the partiality that contractarianism would allow,[70] but I am not defending contractarianism. I am exploring some of its commitments and how it might begin to handle the challenges of interspecies welfare conflicts.

The contract might hold, then, that the welfare gain of human amusement does not always count against rival animal welfares. Some *substantive exclusionary constraints* on welfare comparisons might thereby exclude welfare improvements (or setbacks) generated in certain ways from counting against some rivalrous welfare. These exclusionary constraints may privilege animals in some human/animal conflicts, but they may just as well do the opposite. It might be that welfare improvements to human health, for instance, exclude many considerations of welfare setbacks to animal well-being.[71]

Here, of course, I am not committing to what the contractarian resolution to any interspecies welfare conflict would be. I consider only how the contract's norms might give guidance on how to begin to resolve such conflicts. The moral norms emerging from the contract would determine whose welfare counts morally and how much.

A critic may worry that contractarian talk of interspecies welfare conflict is and must always be, for the contractarian, talk of conflict among humans. The critic may complain that the contract would not endorse norms that morally rank options in cases of interspecies welfare conflicts for any reason other than the preferences of human beings. Giving animals any moral precedence over human beings could only be the result of double-counting the preferences of the animals' human advocates, but contractors would not agree to this. Consequently, the critic may say, the contract has no room for moral norms that protect animals for anything other than instrumental reasons. Thus, the contract must fail to acknowledge that something about animals commands our moral attention.

To see why contractarianism need not render all cases of interspecies welfare conflicts as intraspecies preference conflicts (and thus need not be unduly anthropocentric), consider an example:

[70] Norcross might raise such an objection. See, e.g., his "Puppies, Pigs, and People: Eating Meat and Marginal Cases."

[71] Human health likely generates a wide but not absolute substantive exclusionary constraint. Contractors might agree to discount the suffering of animals confined for the purposes of experimentation to develop some pharmaceutical or consumer product to benefit humans, even if, on some measures of welfare, the setback to animals exceeds the benefit to human beings. This discount might not, however, exclude what contractors would deem inappropriate or gratuitous animal discomfort, such as pain that can be avoided without jeopardizing the integrity of a study. Examples of norms restricting such inappropriate treatment are found in the various animal use and care principles governing research universities in the United States.

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> *Frogs on the Road:* Lou wishes to drive down a road to return home after a trip to the beach. It is a rainy evening in May when frogs of different species are moving among breeding and feeding sites in a marshy area traversed by a low-traffic highway. Roads in such circumstances are sometimes covered with tens of thousands of frogs. Driving down the road (call this option D) would require killing or maiming thousands of frogs. The deaths and maimings of the frogs are welfare setbacks to them. Refraining from such setbacks to the frogs would impose a welfare setback on Lou, namely, some inconvenience. Lou can avoid D with some alternatives, among which is A, which entails the smallest welfare setback to Lou. (Option A might be: take an alternative route or simply wait until the road clears.) Should Lou choose D or A?

This is a case of a conflict between human welfare and the welfare of animals. This is not necessarily a case where the contract's norms justify which option is morally preferable purely as a function of human preference. The contract may, for instance, say that persons owe some moral consideration to the frogs, thus giving the frogs some secondary moral standing. In such cases, the welfare of the frogs would be directly morally considerable. Recall though that moral standing can vary in degree in several ways, and one way it can vary is a function of how many agents owe an entity some moral consideration. The contract may say that Lou and agents like Lou owe the frogs no moral consideration. The contract may still endorse certain moral norms that hold that A is morally preferable to D. In other words, the contract's norms might endorse the claim that Lou ought not to drive down the frog-covered road.[72] Lou may owe it to other contractors not to drive down the road.

While the genealogy for such norms would appeal to the preferences of the contractors in the bargaining situation, the norms justifying the claim that A is morally preferable to D need not privilege the welfare of any person(s). Option A might be morally preferable to D simply because the contractors endorse moral norms that forbid unnecessary welfare setbacks to morally considerable entities. The contractors' estimation of who is morally considerable need not be restricted to human beings, and thus human welfare need not be the sole determinant of how to resolve conflicts with other species.

In *Frogs on the Road,* other persons would likely suffer some welfare setbacks if Lou were to select D. The next day other travelers and nearby residents would have to endure a pungent mess. Some persons may also be troubled on behalf of the frogs. These factors may simply overdetermine

[72] I take no stand here on whether the contract would reach this conclusion by aggregating the frogs' welfare setbacks or by saying that the welfare gain to Lou from any given incremental roll forward in the car is not as weighty as the welfare setback to each frog hurt as the car proceeds along that increment.

the option that the contract's moral norms could endorse, namely: Lou ought morally to select option A.

How the conflict should be resolved changes if we suppose there is no (human) third-party loss, or if, indeed, third parties prefer D to A. Imagine that the frog deaths have no adverse impact on other human beings. Indeed, imagine that such deaths benefit many other human beings. Suppose the road is a frequent site of such frog migrations and the occasional aftermath. The area attracts the attention of various carrion-eating birds who feast on the thousands of frog carcasses. Nearby residents might be avid bird-watchers who take special delight in the activities of turkey vultures.

If contractors knew that many persons were avid bird-watchers or that not so many were moved by the welfare of frogs on roads, it would not be so clear that they would endorse norms that would morally select option A over option D. Contractors may agree to discount the loss to the frogs, perhaps by treating it as a recurring natural disaster. This possibility suggests that the contract would ultimately privilege human interests even if, on some calculations of the balance of welfare, the aggregate setback (however measured) to animal welfare in D, all things considered, exceeds any putative aggregate gain to human welfare. Of course, the privileging of human interests does not require discounting animal welfare. Human interests are privileged in that theirs are the ones determining which norms morally bind the contractors. Those interests may be to regard the welfare of some animals as considerable.

In this section, I have discussed some of the substantive constraints that contractors might endorse when tabulating the welfare of animals in any comparison with rivalrous human welfares. The discussion has offered a preliminary glance at some of the constraints contractors might adopt and what considerations might shape such constraints. I have yet to discuss one important likely substantive constraint on welfare comparisons: justice. It is to this task that I now turn.

X. Rights, Wrongs, and Interspecies Welfare Conflicts

Suppose contractors have agreed to norms that extend some animals secondary moral standing. This means that the contractors have agreed that at least some persons owe some moral consideration directly to the relevant animals. Animals with secondary moral standing may be immune to any welfare discounting, or they may be vulnerable to it in fewer contexts or at a lesser discount rate than animals without such standing. Their secondary moral standing may even make them bearers of rights. Those rights in certain circumstances could exclude consideration of rival human welfare.

Obviously, the set of rights-bearers would also include human beings, and their rights might exclude some rival animal welfares from counting

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against their own in cases of conflict. Contractors might agree to norms defining and protecting these individual rights. The contract need not be the *foundation* of all such rights. On David Gauthier's version of contractarianism, for instance, some rights precede the agreement.[73] Regardless of whether the contract is the foundation of all such rights (as it might be on typical readings of Hobbes) or whether it merely acknowledges some of them, the contract in either case would endorse moral norms that protect the claims contained in such rights.

One function of some individual rights is to constrain some sorts of welfare comparisons. Such rights limit the extent to which the gains or losses of one individual may count against those of others. "Inhospitable hospital" examples are cases in point: no matter how extensive the promised gains to others, appeals to rights show that it would be impermissible to kill an otherwise healthy patient in the hospital for a minor procedure in order to harvest her organs to distribute to others. The rights that contractors are likely to endorse would rule this out.

What sorts of rights the contractors might endorse is much discussed.[74] I do not wish to pursue this matter except to note an important possibility: contractors may place a high value on individual human liberty. They may value liberty so highly that they might agree to rights that protect human choices in a wide domain—even when such choices could come at the expense of other humans or (perhaps especially) the welfare of animals. These rights could then, in certain contexts, exclude rival welfares (human or animal) from counting against a person's protected opportunity to perform some action. There is a strong possibility, for instance, that contractors would endorse a person's right to eat animals, since many contractors prefer omnivorous diets. But even if contractors endorsed such rights (or endorsed a contract whose norms were consistent with such rights), they need not agree to norms that morally endorse the exercise of such rights in all circumstances.

Thus, contractors might endorse at least two sorts of moral norms. One sort of norm might be a (if not the) resource for judgments about moral value, which would help to determine judgments of what agents morally ought to do. This way the contract's norms might justify the judgment that Lou morally ought not to drive along the road in the *Frogs on the Road* example without good reason, and might hold that mere convenience is insufficient reason. The contractors might also endorse a second sort of norm that defines spheres of protected liberty. Such norms might protect opportunities to make choices exactly like the one between options A and D in *Frogs on the Road.* The contract might, in other words, endorse norms

[73] See, e.g., Gauthier, *Morals by Agreement,* 208–11, 221–23.

[74] See, e.g., Jan Narveson, *The Libertarian Idea* (Philadelphia, PA: Temple University Press, 1988); Gauthier, *Morals by Agreement,* chap. 7; and the essays in Vallentyne, ed., *Contractarianism and Rational Choice,* esp. those in part II.

that protect a person's right to perform some wrong actions.[75] This protection would mean that other agents must forbear actual or threatened harm of a person when she chooses between A and D.[76] The relevant moral norms might very well be subtle here: they might condemn the choice of A but treat it as a low-level moral breach unworthy of much, if any, moral response.

This is suggestive of a much more extensive argument about contractarianism and rights, which I will not pursue here. But note that even if contractors endorsed norms that protected a limited right to perform some morally wrong actions, they would not endorse norms licensing a moral right to perform unjust actions. Much of the point of norms of justice is to realize some mutual restraint. A right to act unjustly would be inconsistent with that aim. This is not to say that the contract's norms would necessarily offer complete and consistent prescriptions for any moral dilemma. Some tragic or catastrophic cases may escape determinate contractarian resolution, but the contractors might be untroubled by such indeterminacy. They might believe that some moral problems have no determinate resolution, or they might believe that the contract need not address itself to all conceivable moral dilemmas in order to offer moral norms that can secure the basic mutual restraint that contractors seek. Whatever the moral norms that emerged from the contract, they nevertheless would not uphold a right to act unjustly.

In *Frogs on the Road,* the contract's norms may endorse the judgment that Lou has the right to choose option D even if, according to the contract, D is the wrong thing to do. But the contract's norms might be silent (or yield incompatible conclusions) in cases, such as those Tom Regan imagines, where one must choose between saving one human life or all the Siberian tigers on the planet.[77] Again, the contractors might not be bothered by this prospect. The contract can do the job it needs to do without decisively resolving all possible moral dilemmas. Indeed, in some catastrophic cases, mutually beneficial restraint among the contractors might not be possible. Agents in such cases might no longer be in the circumstances of justice, so moral norms would no longer apply to them.[78]

The determinacy issue returns here sharply on two levels: first in how to specify the contractors and their situation, and second in what level of

[75] I discuss this right to do wrong in "Virtues, Opportunities, and the Right to Do Wrong," *Journal of Social Philosophy* 28, no. 2 (1997): 43–55.

[76] Presumably, the contract would also indicate what counts as a "harm." Here I set aside the issues of the mechanics of the contractors' settling on a notion of harm and what the content of the notion is likely to be.

[77] See, e.g., Regan, *The Case for Animal Rights,* 308. See also Tom Regan, "Animal Rights, Human Wrongs," in Michael E. Zimmerman et al., eds., *Environmental Philosophy,* 4th ed. (Upper Saddle River, NJ: Prentice Hall, 2005), 41–55.

[78] To be clear, in the case of Regan's example, the circumstances of justice might no longer obtain between the person in question (along with her advocates), and those persons who advocate for the Siberian tigers.

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determinacy they would expect of the contract. The two issues are related. The contractors may allow silence or indeterminacy in what the contract's moral norms say about runaway trolley cases (for example) because contractors would know that trolleys rarely run away. In a world where trolleys were often or always running away, the contractors would need to settle on some norms to resolve such cases. Likewise, in the real world, contractors would agree to norms that offered some determinate resolution to more quotidian interspecies welfare conflicts such as those involving factory farming or vivisection. How much determinacy they would expect of the norms is a function of the level of determinacy in how we specify the contractors and their contracting situation.

What is important for the contractors is agreeing to norms that can reliably secure beneficial mutual restraint. It might then be unnecessary to secure universal compliance or even universally applicable binding reasons to be just.[79] Having enough people who take the contract's moral norms as giving reasons might be enough to secure what Christopher Morris calls the "practical aim" of the contract.[80] But norms only bind if all contractors agree to them. If justice applies to our dealings with animals, then the manner in which it applies and what it demands of us must be matters to which the contractors would agree.

As before, we can easily say that the contractors would refuse to endorse norms that licensed a right to act unjustly. But what can we say about their conception of the proper scope of justice? Formally, nothing stops the contractors from endorsing norms that confer some secondary moral standing on some or all animals of a given type. Contractors may then agree that at least some persons owe justice to some animals. But it may sometimes be unclear (even to the contractors) which animals have moral standing with respect to justice and who owes it to them. More sharply, it might be unclear whether the justice agents might owe to animals would be inconsistent with human use of animals for food or experimentation.

Norms of justice might not extend so far as to prohibit, say, raising animals for human consumption (even on factory farms) or confining animals in zoos or using them in circuses. Contractors may endorse norms that protect their opportunities to engage in such conduct. Or they might endorse norms that condemn such conduct but deny that the conduct amounts to an injustice. A key issue here is how contractors will agree to restrain themselves against one another. They might agree to norms that require restraint on the part of third parties when contractors use or profit from factory farmed animals. The protected choice opportunities that such restraint allows are likely to be important to contractors, partly because some of them have a preference for access to inexpensive meat,

[79] See related discussion by Morris in "Justice, Reasons, and Moral Standing," 200–203.
[80] Ibid., 201.

and partly because many of them may believe that protecting opportunities for choice is important when there is substantial and reasonable disagreement on the merits of certain practices. The contract's norms may then say that agents have a right to engage in such conduct even though the conduct is morally wrong. Alternatively, contractors could endorse norms that uphold persons' rights to engage in such activities but leave undecided the moral status of performing them. The moral status of the activities might be left open given reasonable disagreement in the contracting situation. Despite this disagreement, contractors can achieve sufficient consensus on the norms of justice to realize mutually beneficial restraint.

According to metaethical contractarianism, moral claims are true if they are endorsed by norms to which contractors would agree in the circumstances of justice.[81] On the contractarian view, there is a constancy to the truth-value of moral claims about what we owe each other, since who we are and what we want is usually held constant. But if people change, or if their circumstances change, it might turn out that contractarianism would allow that the truth-value of certain moral claims may change.[82]

This generates some intriguing possibilities and challenges for contractarianism, only a few of which I will sketch here. If, say, all or most contractors were vegetarians, and they knew that, or if it were possible to satisfy people's appetites for meat without factory farming and without increasing the cost of meat (and contractors knew that), the practice of factory farming could become more than obsolete. It could become regarded as gratuitous torture according to norms to which contractors would agree. Whether it would then be forbidden would depend on the contractors' aims. If securing the practical aim of the contract is inconsistent with ruling out such conduct, the contractors may stop short of endorsing norms that forbid it. But if they believe the contract's success depends on ruling out such behavior, the claim that people have a right to engage in or benefit from factory farming, which may have once been true, may become false.[83] Much still depends on the complexities and indeterminacies of coalition theorizing, but this is beyond the scope of this discussion. Doubtless some critics will object to such context-sensitivity in contractarian accounts of the truth-value of moral claims, but that would be the start of an objection to contractarian constructivism and not an objection to the possibility that contractarianism can underwrite the moral status of nonhuman animals and explain how to adjudicate interspecies welfare conflicts.

[81] For related discussion, see Milo, "Contractarian Constructivism."

[82] See also Morris, "Justice, Reasons, and Moral Standing," 207 n. 46.

[83] But see related discussions of slavery in Gauthier, *Morals by Agreement,* chap. 7; Morris, "Moral Standing and Rational-Choice Contractarianism," 87–89, 93–95; and Morris, "Justice, Reasons, and Moral Standing," 192–94.

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XI. Conclusion

Contractarianism justifies moral claims by appealing to the norms contractors would endorse. Contractarianism has the resources to justify the moral status of nonhuman animals. Contractors may decide that persons are obligated to treat animals in certain ways. The contract might also underwrite a sort of moral standing in which animals are directly owed some moral consideration by some persons.

The welfare of animals will often clash with that of some human beings. If the contract selects an available option as morally preferable, the norms that would do so would call for comparing the relevant welfares in light of various conceptual and substantive constraints the contractors would endorse. Such constraints are likely to express partiality to human beings and reflect the contractors' preferences for areas of protected choice. Such constraints would also determine how, if at all, to aggregate the relevant welfares when determining how to resolve a conflict situation. The contractarian norms relevant to interspecies welfare comparisons need not thereby discount the moral considerability of animal welfare. The contractors may hold that animals count morally, for reasons other than those having to do with human ends.

What moral norms the contractors would endorse is a function of how we specify the contractors and their bargaining situation. In many contractarian accounts, it would seem that contractors would endorse norms that stop short of ruling out behavior that, in effect, discounts welfare losses to animals. Protecting areas of human choice by restraining other persons may be more important to contractors than securing animal welfare. But contractors' views on the importance of animal welfare might very well evolve. Since the results of the contract hinge importantly on how we describe contractors' preferences, what behaviors are morally permissible, required, or forbidden regarding animals might evolve. Much now depends on the findings of coalition theory and social psychology. Critics might be troubled by this seemingly contingent status of some contractarian moral claims. This might be the start of an objection to contractarianism, or it might be the start of an argument for exhorting people to a permanent shift in their sensibilities regarding animals.

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