

# Contractarianism and Moral Standing Inegalitarianism

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*ABSTRACT:* Contractarianism is more inclusive than critics (and, indeed, David Gauthier) sometimes suggest. Contractarianism can justify equal moral standing for human persons (in some respects) and provide sufficient moral standing for many non-human animals to require what we commonly call 'decent treatment.' Moreover, contractarianism may allow that some entities have more moral standing than do others. This does not necessarily license the oppression that liberal egalitarians rightly fear. Instead, it shows that contractarianism may support a nuanced account of moral status.

*RÉSUMÉ :* Le contractarisme est plus inclusif que les critiques, incluant David Gauthier, le suggèrent parfois. Le contractarisme permet de justifier que les personnes humaines aient un statut moral égal (à certains égards), et de reconnaître à plusieurs animaux non humains un statut moral suffisant pour que ce que nous appelons communément un «traitement décent» leur soit dû. En outre, le contractarisme peut admettre que certaines entités aient un statut moral supérieur à d'autres. Cela n'autorise pas nécessairement l'oppression que les égalitaristes libéraux craignent à juste titre. Cela montre plutôt que le contractarisme peut rendre compte du statut moral de façon nuancée.

**Keywords:** David Gauthier, contractarianism, moral standing, moral status, political philosophy

## 1. Introduction

Among the signal achievements of David Gauthier's *Morals by Agreement* is its account of how roughly equal, rationally self-interested agents could

*Dialogue* 55 (2016), 639–658.

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doi:10.1017/S0012217316000585



agree to and abide by principles of mutual constraint. Who owes whom what would then be a function of norms these agents would accept. Parties to the agreement would be all and only those rational agents who are readily disposed to constrain themselves regarding similarly disposed others. However, there is no moral requirement to include anyone in these formative agreements since, by hypothesis, morality is what emerges from the agreements.

Among the criticisms of this normative contractarianism<sup>1</sup> is that it fails to afford appropriate moral protections to women, children, historically disadvantaged groups, the disabled, and nonhuman animals. Gauthier suggests that some of these groups are excluded from a morality of mutual restraint.<sup>2</sup> Even though his contractarianism is constrained by a version of the ‘Lockean proviso,’ critics worry that many groups will be wrongly omitted or discounted in the substantive moral norms that emerge from the agreement.<sup>3</sup> Critics may insist that, if the theory allows (let alone requires) morally discounting or ignoring such persons or animals, then the theory is mistaken.

Contractarianism is more inclusive than critics sometimes suppose. The moral norms emerging from the agreement would (or, at least, could) treat all persons as free and equal, and such norms would (or, at least, could) extend many nonhuman animals sufficient moral protections. I focus particularly on the notion of ‘moral standing’ and on what sorts of moral standing contractarianism might underwrite. The theory can justify equal moral standing in some respects for human persons. The theory can also provide sufficient moral standing for many nonhuman animals to require what we commonly call ‘decent treatment.’ Furthermore, as I discuss below, the theory may allow that some entities have *more* moral standing than do others. This does not necessarily license the oppression that liberal egalitarians rightly fear. Instead, it shows that contractarianism may support a nuanced account of moral status.

In what follows I defend the idea that contractarianism underwrites a moral standing inegalitarianism. I start by outlining a formal notion of moral standing. I discuss how contractarianism might support the moral standing of entities that do not have all the same properties as standard contractors (or who do not have them to the same extent). I then consider how contractarianism would allow for variations in the extent of moral standing among human persons and nonhuman animals.

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<sup>1</sup> I borrow from Milo, 1995, in distinguishing normative from metaethical contractarianism.

<sup>2</sup> Gauthier 1987, 268.

<sup>3</sup> See, e.g., DeGrazia 1996; Nussbaum 2004; Kittay 1999; Hooker 2003; Carruthers 1992.

## 2. Moral Standing

In this section, I discuss the formal notion of moral standing. I consider a distinction between moral status and moral standing. I indicate how moral standing is a special sort of moral status.

We have reasons to behave in certain ways. Some of these reasons are *moral* reasons: they can constrain our behaviour independently of our interests or preferences. In paradigmatic cases, we can have moral reasons to behave in certain ways regarding other persons. Perhaps too we have similar reasons, even if less stringent, to behave in certain ways regarding nonhuman animals, ecosystems, or some artifacts. Sometimes we have additional reasons for *owing* some treatment to a beneficiary of our action (or inaction). What grounds such reasons depends, of course, on what sort of theory of rationality we have and what account we offer of moral value.

Speaking generally for now, call 'moral status' the quality something has such that it counts in moral reasoning.<sup>4</sup> Anything can then have moral status since anything can be the subject of moral reasoning concerning what one may do with or to it. One thing can have *more* moral status than another if, for instance, it counts in moral reasoning more frequently than the other, or (assuming its status generates reasons) if it somehow generates more moral reasons regarding how one ought to behave, or if the reasons it does generate are more stringent, or if the reasons it generates apply to more persons, and so forth.

There are many considerations that might generate moral status, e.g., sentience, personhood, aesthetic value, agency, being the object of someone's preferences, and other intrinsic or relational properties. Perhaps some of these are not neatly (if at all) commensurable. A fuller account of moral status would, therefore, need to attend to whether there is a single metric of moral *status* and how such status connects to moral reasons. Such an account is not needed here. I only suppose that moral status is, quite broadly, what a thing has when it somehow figures in moral reasoning. Here, I focus on one sort of moral status, namely, moral standing.

A being with moral standing is directly owed some moral consideration. Speaking purely of the formal features of the concept, moral standing is relational, scalar, and unilateral. I discuss each feature in turn.<sup>5</sup>

First, consider how moral standing is a *relational* quality. Beings have moral standing only with respect to some specifiable other beings. When a being has moral standing, it both figures in moral reasoning and it is true that at least one other being owes it some moral consideration. In this sense, moral standing is unlike anything's intrinsic features (such as its height, temperature, or any

<sup>4</sup> Kamm 2008, 227; Morris 2011. I mean for 'counts in moral reasoning' to be normative, and not merely descriptive.

<sup>5</sup> For more detailed discussions of the various features of moral standing, see Morris 1991; Morris 1996; Morris 1998; Cohen 2007; Cohen 2009.

natural quality or faculty). When a being has moral standing, it is the object of at least one duty that binds at least one other entity. At least one other being *owes* the performance of some duty *to* it. For instance, a cat may have moral standing with respect to some person, P (and perhaps many other persons) such that P owes forbearance from torture *to the cat*. Were P to torture the cat (or assist or facilitate others in torturing the cat), then P would not merely have done something wrong. P would have *wronged the cat*.<sup>6</sup>

Next, moral standing is *scalar*. Though various substantive theories of moral standing would be keen to deny this possibility (an issue to which I return later), here I only outline the formal features of moral standing. Moral standing can vary in degree in the sense that one being may have more moral standing than another. The extent of moral standing is a function of various considerations such as how many beings owe an entity moral consideration, how many considerations it is owed, and the stringency of the relevant considerations. A cat may have more moral standing than a tilapia if, for instance, both are subjects of equally stringent directed duties to forbear torture but there are more entities that owe such forbearance to the cat than there are entities that owe such duties to the tilapia. A human person may have more moral standing than a penguin if someone's duties not to restrict the human's freedom of movement are more stringent than similar duties owed to the penguin.<sup>7</sup>

Last, moral standing is *unilateral*. While moral standing is a relational quality, it is not necessarily bilateral or symmetric. One being, A, might owe some duties to B, which means B has moral standing with respect to A (regarding the relevant moral considerations). However, B does not necessarily reciprocally owe similar duties to A. In the case of certain duties (such as those of justice), it is possible that moral standing must be bilateral, mutual, and symmetric, but whether this is so is a function of our substantive moral theory and not something about moral standing itself.

I next consider a contractarian account of moral standing. I focus particularly on what sort of standing contractarianism can confer on nonhuman animals and human beings who fail to exhibit full (if any) agency.

### 3. Contractarianism and Moral Standing

Moral standing is the relational quality of an entity that is directly owed moral consideration.<sup>8</sup> Contrast two beings: A, which has moral standing, and B, which does not. Though B has no moral standing, it might still have some

<sup>6</sup> Morris, 2011, denies that being the target of directed duties is part of the concept of moral standing, but he allows that beings who can claim the performance of such duties have a special (higher) form of moral standing.

<sup>7</sup> Typically, of course, the 'entities' that owe duties are only (some) human persons, but the formal account thus far need not introduce any undue restrictions.

<sup>8</sup> For related discussion, see, e.g., Cohen 2007.

moral *status*. For instance, depending upon our substantive moral theory, it is possible that no one owes any moral consideration *to* certain artifacts such as, for instance, a Renoir painting. If it has no moral standing, one then cannot *wrong* the painting, though one can surely do things to the painting that might wrong many persons. Wanton destruction of a painting might wrong the painting's owners/trustees, or it may wrong members of the public who have some legitimate stake in the continued display (or perhaps simply the continued existence) of the painting.

The moral duties that bind a person in contractarianism are a function of the moral norms to which she has agreed with other agents. Rational choice contractarianism would then root a thing's moral standing in the preferences of the contractors.<sup>9</sup> However, if the contractors are roughly equal rational agents who are readily disposed to cooperate with similarly disposed others, then it may seem that many beings are excluded from the bargaining table from the start.<sup>10</sup> As critics might note, the problem is not simply that many animals are not represented in formative agreements; many human beings are omitted as well. How then would a contractarian moral theory provide any significant moral status, let alone moral standing, to things (living or not) that are not among the contractors?

Certainly contractarian theory would have no problems in justifying duties *regarding* many things. A person may have a duty *to* other persons not to damage their property, including, say, a Renoir painting. Critics of contractarianism worry, however, that the theory can only protect animals as property or only insofar as doing so promotes human interests. This may seem to be a devastating strike against the theory.<sup>11</sup>

Insofar as contractarianism simply rests moral status in whatever norms the contractors might endorse, the theory may seem inattentive to some features of things that are sources of independent moral reasons for us. Critics may say that in the case of many animals, for instance, their sentience roots claims against us.<sup>12</sup> Similarly, their vulnerability to suffering may be a source of reasons to forbear treating them in certain ways—regardless of what the contractors might take to be moral reasons.

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<sup>9</sup> There is some dispute over whether the preferences need to be 'considered.' Gauthier thinks so; see Gauthier 1987, 29–38. But Murray (1998) has his doubts.

<sup>10</sup> This seems to be a big part of Nussbaum's worry about the contractarian approach. See Nussbaum 2004, 2007.

<sup>11</sup> Compare Kant's views on our responsibilities to animals, where our obligations regarding animals are mainly a function of preserving our dispositions to satisfy our duties to other persons. Kant 1996, II.II; Kant 1963. See also the discussion of Kant's views at Korsgaard 2004. Narveson 1999, Ch. 6 admits that privileging human interests is a feature of contractarianism, but does not find this troubling.

<sup>12</sup> See, e.g., Hooker 2003, 67–68.

Contractarianism can provide a moral standing for such creatures that is just as robust as that for human beings.<sup>13</sup> Briefly, we can distinguish two sorts of moral standing purely by their genealogy. *Primary moral standing* is what agents enjoy when some others directly owe them the performance of some duties. In a contractarian account, this moral standing comes about when mutually vulnerable agents agree to certain norms under which some agents in some circumstances can owe another some constraint. *Secondary moral standing* is the status an entity enjoys when it is not party to the agreement by which it comes to have moral standing.

In contractarian accounts, a being's secondary moral standing comes about when a second party insists that a third party extend it some direct moral regard. So, for instance, Jack might at first owe nothing to cats. However, suppose that Jill and many or all other contractors agree to cooperate with Jack (or, they agree to *continue* to cooperate with Jack) only on condition that Jack extend some or all cats some direct moral regard. Jack might then value cooperative arrangements with the cat benefactors highly enough that he agrees to owe cats some direct moral consideration. Jack might, for instance, agree to norms that forbid torture of or eating cats, and perhaps also to norms requiring assisting cats under certain circumstances. Cats would then come to have moral standing with respect to Jack. Entities with such moral standing are not merely beneficiaries of the performance of duties owed elsewhere. Here, Jack agrees with contractors to *owe moral considerations to the cats*.

On this account, Jack would previously have done no moral wrong to the cats in treating them as he pleased. His agreement with Jill and other contractors changed the moral story. The cats would then not merely be beneficiaries of the performance of duties owed to the contractors. Jack would then owe such duties to the cats. They would have moral standing with respect to Jack.

It should be clear that Jack need not care one way or the other *about* cats in order to agree to extend them direct moral regard. In other words, he need not take any interest in their interests. He need only value cooperative arrangements with the contractors.<sup>14</sup> Those contractors would demand that Jack agree to constrain himself regarding certain third parties.<sup>15</sup>

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<sup>13</sup> See also Cohen 2007.

<sup>14</sup> Gauthier 1987, 102–103.

<sup>15</sup> I am grateful to an anonymous reviewer who suggested that Jack's agreement to extend the cats direct moral consideration would suffice for affording the cats certain moral protections with respect to Jack. Initially, Jack might have been indifferent about cats. Because of arrangements with other contractors, Jack might come to appreciate cats as independently valuable beings worthy of his care. In this way, reason alone is sufficient to generate the relevant moral relations between Jack and the cat, but Jack might later acquire some 'other-regarding' preferences. This contractarian moral standing is then compatible with moving away from uncaring moral relations. I discuss related issues below in Sec. 5.3.

It may seem, however, that it is incompatible with the motivational assumptions of rational choice contractarianism to suppose that contractors would care enough about the interests of other beings that they would insist on certain treatment for them as a condition of continued cooperation with others. Peter Vallentyne has argued, however, that contractarianism “should make *no assumption* concerning the nature of people’s preferences.”<sup>16</sup> Given their preferences, agents have an interest in mutual constraint. It is inappropriate to rule out consideration of other-regarding preferences if we hope to explain the appeal of moral norms to actual contractors.<sup>17</sup>

In this way, contractarianism can underwrite some moral standing for disabled persons and nonhuman animals. These are parties who might not otherwise be in the circumstances of justice with contractors and who might not be part of the original agreement. The extent of such moral standing will vary depending upon the relevant norms to which contractors agree.<sup>18</sup> Elsewhere I address worries that such secondary moral standing is overbroad or under-inclusive, that it is defeasible by the wrong sorts of considerations, or that secondary moral standing is a second-class moral status.<sup>19</sup> I here focus instead on whether contractarian accounts of moral standing are responsive to morally enfranchising qualities.

#### 4. Morally Enfranchising Properties

One important contrast to this contractarian account of moral status comes from writers who hold that beings have moral standing because they have certain special qualities or attributes. I call these ‘morally enfranchising properties’: they endow their bearers with the status of being directly morally considerable. Some writers tag sentience as a morally enfranchising property.<sup>20</sup> Other writers widen the scope of morally considerable entities by pointing to a cluster of properties or attributes that both human and nonhuman animals exhibit, including marginal members of the various kinds.<sup>21</sup> Some writers widen the scope even further by

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<sup>16</sup> Vallentyne 1991, 73.

<sup>17</sup> Vallentyne 1991, 73–74.

<sup>18</sup> Chimps, for instance, may have more moral standing than gerbils, who may have more than lizards, and so on. Which moral considerations are owed and at what stringency might also vary, and it is quite possible that contractors would allow that the moral standing of some animals may be more for certain persons than others. Pets, for instance, may be due more direct moral regard by their owners than third parties.

<sup>19</sup> Cohen 2007.

<sup>20</sup> Singer’s account is a good example. See Singer 2007. Relatedly, DeGrazia claims that anything with a welfare has some moral status. See, e.g., DeGrazia 2002, Ch. 2; DeGrazia 1996.

<sup>21</sup> Nussbaum is an example here, with her notion of the dignity of various living creatures. See, e.g., Nussbaum 2007, Ch. 6.

appealing to life itself as the marker of moral considerability.<sup>22</sup> On the other end, of course, some writers are more inclined to make moral standing a privileged status; they hold that the only morally enfranchising property is either rational agency or personhood or some feature that only fully functioning rational agents or persons exhibit. Immanuel Kant is one example.

If a being's moral status is a function of one or more morally enfranchising qualities, it may seem that, the more one has of the morally significant properties, the more morally considerable one can be.<sup>23</sup> However, writers who endorse some quality as morally enfranchising often suppose that moral standing cannot vary, especially when it comes to persons. They might say moral standing is an invariant 'threshold status.' If moral standing is simply the status an entity has when it is owed some duties, then it would seem one does not get 'more' of it by having more of the qualities that entitles one to moral standing in the first place.<sup>24</sup> Moral standing might be a bit like citizenship or pregnancy. Enfranchising qualities are either true of a person, or not, but they happen to show more in some cases than in others.

Jeff McMahan, for instance, describes a liberal egalitarian commitment to the fundamental equality of all persons such that the extent to which a killing is wrong is not a function of the extent of any morally enfranchising properties or many other factors such as how well liked a person is.<sup>25</sup> Similarly, Allen Buchanan sets out a "moral equality assumption" under which "all who have the characteristics that are sufficient for being a person have the same moral status."<sup>26</sup> On such accounts, while moral standing does not vary, in some respects it might nevertheless be *worse* for someone with more of some enfranchising quality to die when compared to someone with less.<sup>27</sup> Moreover, one's moral standing need not be a source of indefeasible reasons. Perhaps, for instance, it is always wrong to kill a being with moral standing against its will, but sometimes it is permissible all things considered to do so.<sup>28</sup>

The contractarian approach denies that there are morally enfranchising properties. More precisely, it denies that any properties, in and of themselves, qualify a being for moral standing. Contractors might agree that some quality (or cluster of properties) qualifies an entity for moral consideration but, in such a case, it is the agreement, not the property alone, that confers moral standing. What gives a being moral standing on the contractarian approach is that some rational agents agree to constrain their behaviour regarding such a being, and

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<sup>22</sup> See, e.g., Taylor 1986 and Goodpaster 1978.

<sup>23</sup> Compare, e.g., Frey 2005.

<sup>24</sup> Harman 2003, 183; Morris 2011, Sec. 3.

<sup>25</sup> McMahan 2003, 235ff.

<sup>26</sup> Buchanan 2009, 347.

<sup>27</sup> McMahan, 2003, Ch. 3, makes a similar point.

<sup>28</sup> Kamm 2008, 231.



they agree to *owe such constraint to that being*. That some entity is sentient, for instance, does not necessarily give a rational actor a reason to constrain her conduct regarding that entity. The agreement would set out the norms governing what contractors ought to do.<sup>29</sup>

Critics object that this makes contractarian accounts of moral standing entirely arbitrary.<sup>30</sup> Unless we constrain the choice situation in some significant way by appealing to some moral considerations (such as fairness), then the contractors might agree to norms that protect all sentient life. Or maybe not. Or they might just as well choose norms that protect only human persons. Or perhaps only those of a certain race, sex, or nationality. Contractors may privilege what seem to be irrelevant or arbitrary features of certain entities as morally significant.

On the one hand, this objection misses how moral significance is a function of the agreement and does not precede it.<sup>31</sup> On the other hand, certain features of the contracting situation rule out certain outcomes, even in unconstrained contracts.<sup>32</sup> If, for instance, coercion is ruled out, and contractors greet one another as mutually vulnerable and roughly equal persons, moral standing is unlikely to be restricted to some subset of human persons.

This shows the thin commitments of contractarian constructivism regarding moral status. Unconstrained contractarian accounts do not extend moral status according to morally enfranchising qualities since these accounts deny that there are any such properties. Do contractors have reason to endorse norms allowing for scalar moral status? I next turn to explore this issue in detail.

## 5. Contractarianism and Scalar Moral Status

Contractors might only agree to moral norms that recognize and preserve their fundamental equality. Such equality rests partly on the idea that each contractor is mutually vulnerable but stands in a position to benefit from mutual restraint.<sup>33</sup> The equality they wish to preserve and recognize is then not a *moral* one; moral equality (if there is to be any) must be *constructed* through the contractors' agreement.

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<sup>29</sup> An anonymous reviewer worries that this seems not to offer an account of how agreements can bind all of us in a way to generate a sort of egalitarian moral standing. While there are no guarantees, it seems the agreements can do so, especially with regard to certain moral considerations such as justice. For other moral considerations, there may (and I think, likely would) be variable moral standings. I discuss this further below, in Section 5.

<sup>30</sup> See, e.g., Nussbaum 2004; Goodpaster 1978, 310.

<sup>31</sup> Cohen 2007; Cohen 2009.

<sup>32</sup> The contract Gauthier envisions is far less constrained than that of Rawls. Hobbes's contract is perhaps even less constrained than that of Gauthier. For the distinction between "constrained" and "unconstrained" contract theories, see Morris 1998, 189.

<sup>33</sup> This claim needs to be qualified a bit, since not every agent has an indefeasible interest in peace. For related discussion, see Cohen 2002.

Recall that moral standing might vary along any of at least three dimensions: (1) *how many* agents owe an entity (2) *how many* moral considerations with (3) *what degree* of stringency. I next consider how varying each of these metrics might generate different degrees of moral standing, and whether contractors have reason to endorse norms that allow for such differences.

### *5.1. Scalar Moral Status: Varying the Number of Agents Owing Moral Consideration*

Would contractors endorse norms that vary the scope of moral standing? To answer this question, we might hold the number and stringency of owed moral considerations constant and ask whether there is a reason for contractors to allow for variable numbers of persons to owe others some moral consideration. Much depends on which moral consideration is at stake.

Suppose the moral consideration is support for one's basic needs. Insofar as support for one's basic needs is an independent moral consideration and insofar as it can be owed, it seems that contractors might allow that only some persons owe this to particular others. Take, for instance, the duty to provide support for the young. Again, assuming this is a duty and that it can be owed to the young, it seems such duties are typically assigned to those independently responsible for the existence of the young in question. Since agents have reason to satisfy their preferences by giving up the least compared to similar concessions by others, agents might very well adopt some version of what Leif Wenar calls the "least cost principle."<sup>34</sup> According to that principle, responsibility for supporting wellbeing or avoiding threats to wellbeing falls to the persons (often occupying various *roles*) who can do so at least cost.<sup>35</sup> In this way, if support for wellbeing is a moral consideration that can be owed, then contractors might assign such responsibilities to a restricted set of persons. Contractors might shun the extra burdens of everyone's having equal moral standing with respect to such consideration. Some may be entitled to more from others because of the roles they occupy or the choices they make.

Critics may object that these sorts of differential responsibilities do not establish an inegalitarianism of moral standing with respect to the number of bearers of the relevant duties.<sup>36</sup> The contractarian account seems to allow that entities might have different moral standing with respect to different beings, but in many cases, the critic may say, it seems that no one is closed off from enjoying such moral standing. In the case just discussed, it seems any child is eligible for having such standing with respect to *someone*. Contractors might endorse norms that uphold such equal eligibility. This equal eligibility, the critic may continue,

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<sup>34</sup> Wenar 2007, 261.

<sup>35</sup> Wenar 2007, 255–274.

<sup>36</sup> My thanks to an anonymous referee for asking for greater clarity about the issues in this paragraph.

establishes and affirms contractors' equal moral standing with respect to the number of contractors who owe them some moral consideration.

This objection does not seem to undermine the possibility of a variable moral standing whose extent tracks how many persons owe someone support for wellbeing. *Candidacy* for being owed some consideration is not what is at issue. The issue is whether some people can owe some moral consideration to an entity while others do not. Role responsibilities clearly show that there are persons who are due more from some than they are from others.

Similarly, contractors might very well endorse norms that establish the moral standing of all human persons with respect to cases of easy rescue. Any easily rescued drowning baby<sup>37</sup> might have equal moral standing with respect to *all* persons everywhere to deliver easy rescue *provided* such persons are nearby. Easy rescue might be something any person might owe the baby, regardless of shared nationality, ties of affection, or family connections.<sup>38</sup> Nevertheless, contractors might endorse at least a weak requirement to provide easy rescue such that, were someone to fail to provide such easy rescue, she would have done something wrong. If someone is nearby and can provide easy rescue, and that person ought to provide such rescue to the baby, then the baby has *more* moral standing with respect to that person than with respect to other persons who are distant or who know nothing of the baby's condition.

### 5.2. Scalar Moral Standing: Varying the Number of Moral Considerations Owed

Contractors agree to be bound by moral considerations owed to other entities provided the benefits from cooperation through accepting such constraints offset the costs involved. There would be plenty of reasons for contractors to agree to a set of norms that would be mutually and equally owed, e.g., prohibitions on coercion, theft, assault, fraud, and so forth. Against certain forms of inegalitarian constraint, there would not seem to be a reason to enter an agreement where only some contractors were forbidden to assault others. In these regards, everyone would enjoy the same moral standing: all contractors would owe to each other forbearing violence.<sup>39</sup>

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<sup>37</sup> Singer 1972.

<sup>38</sup> Whether the baby can *claim* such support, and, more importantly, whether drowning babies are analogous to world poverty, are other matters. See Cohen 2014.

<sup>39</sup> Strictly speaking, certain forms of interaction would not count as *violent* until contractors agree to the relevant norms. To speak of 'norms forbidding violence' is then a shorthand for norms that would forbid certain forms of interaction that we currently (and uncontroversially) classify as violent. We could make the same point in clumsier and lengthier terms by talking about interactions that set back certain parties' interests without any offsetting gains elsewhere. However, see the discussion of "rule-following punishers" in Gaus 2012, III.7.

Of course, forbearing torture is something we are owed by *justice*. All persons can *claim* it as their due, and when someone violates this norm, she does not merely do something wrong. She also *wrongs* her victim. All agents who enjoy primary moral standing would seem to have moral standing regarding justice with respect to all other contractors. Indeed, that seems to be the main point of morals by agreement: agents agree to mutual constraint, and such constraints become the norms of justice. All agents enjoy the same extent of moral standing regarding justice.

The case of entities enjoying secondary moral standing, however, might be a platform for some variation in the extent of their standing, particularly with regard to which moral considerations they are due. Recall again that, holding other measures constant, the more moral considerations that an entity is owed, the more moral standing it has. It seems that contractors might have no reason to insist that all nonhuman animals must be owed the same moral considerations (let alone the same as those owed to human persons). Suppose contractors were to endorse norms that gave some nonhuman mammals some moral standing but less than that of humans. Perhaps the number of moral considerations that *everyone* owes such mammals is less than what they owe to human persons but more than they owe to, say, any birds. (This leaves room for *some* persons to owe more to some such mammals.) Contractors might very well insist on such direct moral regard if, for instance, they had reason to believe that certain behaviours toward the mammals had unappealing spillover effects.<sup>40</sup> Contractors might insist as a condition of agreement that certain behaviours are *due* animals and other behaviours are *forbidden*. Creatures who benefit from such moral regard may have a form of moral standing, even if it is not as robust as that reserved for beings with primary moral standing. Fewer considerations would be due the animals than would be due human persons.

Endorsing norms that allow such variable extents in moral standing might be a product of morals by agreement. This would introduce a nuance in the norms governing moral standing that could help achieve sufficient compliance and stability to guarantee contractors' safety and prosperity—perhaps more so than any alternative 'on/off' account.<sup>41</sup> Contractors might, for instance, endorse norms allowing confinement and experimenting on certain laboratory animals. Those animals may then have more moral standing than others of the same kind. Of course, critics will object that this is a devastating inconsistency<sup>42</sup> but, under rational choice contractarianism, contractors are

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<sup>40</sup> Kant's argument about how we should treat nonhuman animals is a good example; see Kant 1963. Of course, the effects of animal (mis)treatment are disputable. People seem amenable to bracketing. They have no difficulty eating factory-farmed poultry but find cockfighting deplorable.

<sup>41</sup> This account would contrast with Harman 2003, 183.

<sup>42</sup> See, e.g., Singer 2009, O'Neill 1996, Ch. 4.

not required to treat all members of the same kind in the same way unless doing so suits their shared purposes.

Among beings with primary moral standing, however, consider whether contractors would allow that some moral considerations can be owed to some contractors but not others. Much depends on the scope and structure of justice. If justice captures anything and everything that can be *owed*, then it would seem no one could be due *more justice* than anyone else. If some treatment is *due* another, then a failure to provide it is unjust. Justice on this account shows its 'imperial' tendencies: it becomes a virtue that crowds out some or all others.<sup>43</sup> Even under such an imperial regime of justice, however, some beings might have more moral standing than others in the sense that there are *greater opportunities for justice/injustice*: more might be owed to human persons than to gerbils. While it might be *worse* to torture a human being than a gerbil, perhaps torturing a human is equally unjust as torturing a gerbil.<sup>44</sup>

If justice is not quite so imperial, then perhaps there are some virtues that can be owed but cannot be claimed by justice. Some moral consideration might then be *due* others such that it would be wrong not to act accordingly. Contractors might then agree that some such moral considerations are due certain creatures but not others, giving the former a greater moral standing than the latter. For example, contractors might agree to owe beneficence to nonhuman animals of one sort but not to those of another, even while they agree that creatures of either sort are owed freedom from torture. Christopher Morris notes this represents a departure from the "*juridical* interpretation of moral standing."<sup>45</sup> On the juridical model, anything that is owed to an entity is something that entity can *claim* as its due.<sup>46</sup> But, on this alternative model, creatures may have some moral standing even if they cannot *claim* the considerations they are owed.

Here I do not resolve whether justice necessarily has the imperial qualities some accounts attribute to it. Contractarian accounts might very well leave this up to the outcome of deliberations among the contractors. Contractors might very well find sufficient (indeed, better) guarantees for their safety and prosperity if they leave certain virtues outside the scope of justice.<sup>47</sup> In this way,

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<sup>43</sup> Morris 2007, 15–16.

<sup>44</sup> It might be *worse* to torture a human, but it may be just as wrong. See McMahan, 2003, Ch. 3, for a discussion of the 'equal wrongness thesis.'

<sup>45</sup> Morris 2011, 267.

<sup>46</sup> Morris 2011, Sec. 4.

<sup>47</sup> Compare Badhwar's suggestion that we "break the link between rights and demands" so that we might sometimes be due certain treatment (where we have a right to it) even if we cannot demand it. Her examples concern the sorts of intimacy and care friends legitimately expect of one another but is inappropriate to elicit by demand. See Badhwar 1993, 269. See also Morris 1998, Sec. III, for a discussion of the possibility of nonjuridical contractarian virtues.

there would be room for variable moral standing if contractors would agree to owe certain treatment to some creatures but not others.

The norms contractors endorse would protect all contractors as well as any others extended secondary moral standing. What about human persons who do not or will not reciprocate? Many such human beings will be protected through secondary moral standing. Some disabled persons might be thus protected if they are the objects of some contractors' interests and securing such benefactors' cooperation is sufficiently important to other contractors. Contractors may be inclined to protect those unable to cooperate out of some interest in protecting themselves should they suffer some such fate.<sup>48</sup> Human beings who are unwilling to cooperate are another issue. Some contractors might balk at accepting norms that bind them to noncooperators. Other contractors may insist that all humans are due some minimal moral regard, even if it is unreciprocated. Given that we are prone to biased judgments about who is a cooperator and who not, and given the possibility of change, contractors might well endorse norms that extend justice to all human persons.<sup>49</sup> In practice this might mean, for instance, everyone has a right not to be tortured (at least sometimes). Contractors would then likely find reason not to endorse norms that say 'all bets are off' with noncooperators.<sup>50</sup> Likely many contractors would insist on it as a condition of their cooperation.

### *5.3. Scalar Moral Standing—Varying the Stringency of the Owed Considerations*

The last metric of moral standing I consider concerns the stringency of the moral considerations that are owed. Formally speaking, one entity may then have more moral standing than another if, holding constant the number of entities owing and the number of considerations owed, the stringency at which the considerations are owed to that entity by some beings is greater than it is for the same considerations owed to another. Suppose that everyone owes both Jack and Jill some moral consideration. Jack would have more moral standing in this respect than Jill if the reasons for at least one other person to extend such moral consideration to Jack are weightier (or have a greater exclusionary scope) than that person's reasons to forbear torturing Jill.<sup>51</sup>

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<sup>48</sup> Compare Becker 2005.

<sup>49</sup> See Morris 1998, Sec. IV, for a discussion of the universal scope of justice.

<sup>50</sup> Compare to Frey 2005, 93–95, in which he argues against the "anything goes" view about treatment of animals.

<sup>51</sup> For explanatory ease, suppose some version of internalism is true such that moral considerations generate reasons. If the version of internalism that makes such claims possible were false, or if we are agnostic about its truth, then we can express the idea of variable stringency without appealing to the weight of reasons but instead by appealing more abstractly to weight or significance. See related discussion at Morris 1998, Sec. 4.

Would contractors endorse norms that allow for such variable moral standing? On the one hand, it seems that for at least some moral considerations they would not. Jill's standing regarding torture would seem to have the same normative significance as anyone else's. This sort of equality is something contractors would want to establish and protect; contractors would not allow for morally privileging some over others regarding such moral considerations. Indeed, contractors might very well steer clear of scalar moral standing in certain respects: they may suppose that, beyond a certain threshold, all persons have the same standing regarding some set of moral considerations. Freedom from torture is likely among them.<sup>52</sup>

Perhaps the reasons not to torture anyone are equally stringent, since each person is equally owed such forbearance. But it might be *worse*, for instance, for an adult child to inflict such treatment on a parent. It might be worse, but not because the reasons not to torture him, arising from his standing with respect to freedom from torture by the torturer, are any more stringent than they are regarding anyone else. It simply might be that there are other moral considerations due the parent, from the child, which make such treatment worse when it comes at the hands of that particular torturer. There are other considerations the torturer owes her victim, likely some filial duties. So, instead of saying such conduct is more wrong, perhaps it shows more wrongs.

This shows that contractarian norms regarding moral standing might often generate equally stringent reasons to respect the moral considerations one owes to others. On the other hand, permitting variable stringency for certain moral considerations might be part of pursuing projects that are central to contractors' lives. Fulfilling the responsibilities that we have to those near and dear is often a crucial component of our wellbeing. It is not as though satisfying the needs of loved ones contributes to our personal utility. Often the welfare of others partly constitutes our own good.<sup>53</sup> For some moral considerations, the relational ties that give meaning to our lives may provide reason for privileging some persons over others. The reasons one has to satisfy certain moral considerations regarding loved ones may indeed be more stringent than they are regarding strangers.

Contractarian norms are then likely to allow, indeed, *require*, that parents privilege their children in the distribution of some scarce resources such as material goods, time, and patience. Reasons to support the conditions of wellbeing might be more stringent regarding one's child than they are for distant strangers. The norms emerging from the contract might acknowledge such reasons and thereby give certain near and dear greater moral standing than strangers with respect to certain moral considerations.

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<sup>52</sup> See related discussions by McMahan and Buchanan about the distinction between a "morality of respect" and a "morality of interests"; Buchanan 2009, Sec. III; McMahan 2003, Sec. 3.2.

<sup>53</sup> See related discussions at Hunt 1999, 202, 208; Kavka 1985, Sec. III.

Of course, this is only suggestive of a lengthier argument that contractors would sometimes endorse partialist norms. For some moral considerations, however, it seems contractors would find plenty of reason to favour those near and dear. Contractors may restrict the scope of such partiality to cases not exhausted by the demands of justice. Much now depends on whether justice has the imperial character it sometimes purports to have.<sup>54</sup>

## 6. Concluding Remarks

I have discussed how agents in rational choice contractarianism may find reason to endorse norms allowing for different levels of moral standing. Moral standing is the status an entity enjoys when someone directly owes it some moral consideration. How much standing the entity has might then vary according to how many entities owe it which moral considerations and at what stringency. For many moral considerations, contractors will endorse norms that give equal and universal moral standing. There is room, however, for variation in moral standing among nonhuman animals and among those persons near and dear.

Varying one metric of moral standing while holding the others constant passes over a problem that a fuller account of moral standing would need to resolve. How are we to compare moral standing across the relevant metrics? What if two of the metrics were to vary? Suppose every agent on the planet owes Jill forbearance from torture at great stringency. Suppose also that all and only Slovenians owe Jack forbearance from torture at *immense* (perhaps *indefeasible*) stringency. On the one hand, it is unclear who has more moral standing than whom. On the other hand, it is unclear whether such uncertainty matters from the standpoint of contractors hoping to secure peace and mutually beneficial cooperation. Jill might have more moral standing than Jack does, if, say, it also turns out that (somehow) a group of ISIS fighters owe forbearance from imprisonment to Jill but not to Jack. This might be beside the point of their agreement, unless, of course, ISIS fighters present a similar clear and present danger to both Jack and Jill. It might be enough for Jack and Jill that they are parties to agreements to stop burning each other's crops and beating on one another.

Critics are sure to press on vexing determinacy issues. What shape the norms governing moral standing will take will depend on the preferences, circumstances, and bargaining dynamics of the contractors. Perhaps more worrisome, the norms contractors accept might endorse multiple and sometimes incompatible conclusions regarding who has what level of moral standing and with respect to whom. Indeed, it might be unclear how we are to conceive the bargaining situation or what the preferences of the contractors are. While I do not think the agreement needs to generate a determinate finding in all such cases, I do think it needs to be determinate enough to generate sufficient compliance

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<sup>54</sup> See Morris 2007; Wolf 1982.



and stability. Contractors might then not bother to agree to norms to handle some or all cases involving runaway trolleys, ticking time bombs, or 'Sophie's choice.' So long as such tragedies or catastrophes are rare, the norms can do what they need to do while remaining silent (or even generating inconsistent conclusions) regarding unusual cases. Contractors do not need norms that generate consistency and completeness for all possible timelines. They need norms that provide sufficient compliance and stability as to secure contractors' mutual wellbeing.<sup>55</sup>

The conclusion here is thus modest: allowing for norms that endorse variable moral standing for at least some agents and some moral considerations might better secure contractors' abilities to satisfy their preferences. The precise shape, stringency, and defeating conditions of such norms are topics best left for another occasion.

**Acknowledgements:** For comments or conversation on earlier drafts of the text, I am indebted to Andrew Altman, Christopher W. Morris, George Rainbolt, anonymous reviewers and editors for this journal, and an audience at York University's conference to honour the 25<sup>th</sup> anniversary of David Gauthier's *Morals by Agreement*.

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<sup>55</sup> For a related discussion, see Morris 1998, 201.

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