

## **Daniel Eggers, Applied ethics: A challenge to contractarianism?**

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If we are to believe mainstream introductions to applied ethics and to the family of theories commonly referred to by the name ‘contractarianism’, the two are something of a bad match. According to contractarianism, which is essentially an enterprise in moral justification, we should conceive of political authority or moral norms as the result of an agreement based on considerations of mutual advantage. Political structures or moral norms are justified, on this view, if rational self-interested individuals would agree upon those structures or norms because they stand to gain more from the existence of and general adherence to them than from their non-existence or violation. Understood in this way, contractarianism is exemplified by the works of Thomas Hobbes, David Gauthier or Peter Stemmer, and while Hobbes can be seen as an advocate of both political and ethical contractarianism, Gauthier and Stemmer are primarily concerned with the latter.

However, a widespread view both among authors engaged in the applied ethics debate and commentators interested in contractarianism in its own right is that ethical contractarianism is unable to provide satisfactory answers to the practical moral problems of our time: While contractarian approaches to morality may initially seem attractive since they promise to provide a straightforward and fundamental justification of basic moral principles, their implications with regard to particular moral challenges seem to contradict our deeply ingrained moral intuitions to such a degree as to make the overall contractarian package unacceptable. Thus, it is often claimed that contractarian morality is seriously limited in that it cannot award to children, disabled people, future generations or animals anything like the moral status we ordinarily ascribe to them.<sup>1</sup> As a result, contractarianism suggests views on

euthanasia, environment protection, cloning or factory farming that the majority of us would deem morally inappropriate.

In this chapter, I want to inquire more precisely into what it is about contractarianism that threatens to make it an unreliable guide to the issues of bioethics and public policy. In doing so, I will briefly review some of the attempts to defend contractarianism against the charge in question: attempts to show that contractarianism, suitably refined, can provide more acceptable solutions to those problems than is usually acknowledged. In order to better identify the particular properties that give rise to the difficulties to which critics allude, I will, first, reject some common objections to contractarianism that I consider to be misguided. Relying on a systematic distinction introduced by the German contractarian Peter Stemmer, I will, secondly, try describe the true source of the problems with which contractarianism is routinely charged. In section 3, I will show that the troublesome practical consequences are implicitly or explicitly confirmed by leading contractarians such as Hobbes, Gauthier and Stemmer. In section 4, I will try to show that there are indeed ways for the contractarian to avoid some of the counter-intuitive practical consequences. However, rather than suggesting that Hobbes, Gauthier and Stemmer are mistaken about their own theory and, in particular, about the central metaphor of the contract and its practical implications,<sup>2</sup> my central claim will be that their radical conclusions are the result of their conscious commitment to a quite narrow conception of self-interest and mutual advantage. This commitment, which needs to be strictly distinguished from the general contractarian rationale, can be reduced to certain views about the demands of moral justification in the political arena, views which, however, appear somewhat misguided if scrutinized more closely. My overall conclusion will be that a residual challenge remains for contractarians and that they, more so perhaps than proponents of rival normative-ethical theories, face a decision that arises from the janus-faced nature of applied ethics: to take a stand on whether their main goal consists in providing the most

straightforward philosophical justification of morality or in providing a consensualist solution to the moral and political problems of our time.

## I.

The aim of this and the next section is to more precisely locate the source of the problems that supposedly follow from the commitment to contractarianism, and the first step in order to do so is to reject some common but misguided ideas about why contractarianism must have counter-intuitive practical implications. Given the heavy use contractarians make of the contract metaphor, or of the slightly more neutral concept of mutual agreement, it seems natural to think that contractarianism must exclude all those beings from the sphere of morality that cannot enter into express agreements. On this understanding, not only animals but also fetuses, people with severe and permanent mental disabilities and perhaps even comatose patients or small children would fall outside the range of morality simply because they are unable to expressly consent to agreements of any kind.

Given the way in which contractarians conceive of the agreement that provides the foundation for their moral principles, however, the above understanding is clearly misguided. Modern contractarians, such as Gauthier and Stemmer,<sup>3</sup> explicitly emphasize that the agreement on which their argument relies is purely hypothetical: the idea central to ethical contractarianism is not that individuals *actually* create the moral norms they are subject to by way of an identifiable collective act, but that we can justify moral norms by showing that individuals *would* rationally agree to such norms *if* they were given the chance to decide about whether or not having them established. By way of charitable interpretation, we can attribute this understanding to Hobbes as well. Hobbes's moral theory, the doctrine of the laws of nature, is presented as that set of rules on which all individuals must rationally agree.<sup>4</sup> However, their validity and normative force is in no way dependent on an *act* of agreement

but simply follows from the fact that the ways of behavior prescribed by the laws of nature are necessary for the attainment of certain goals which the individuals happen to have and happen to share, most importantly their own preservation.<sup>5</sup>

If the argument crucial to contractarianism only consists in the claim that individuals would rationally consent to certain moral principles, then there is *prima facie* no reason to think that beings that are unable to actually consent to such principles cannot either be subject to them or protected by them.<sup>6</sup> In order for the contractarian rationale to be applicable, it seems sufficient if we can plausibly ask ourselves to what kind of agreement the members of certain groups would give their consent *if* they were able to do so.

The purely hypothetical nature of the contractarian agreement also shows why ethical contractarianism is not affected by Hume's famous objections to political contract theory. Hume rejects the view that consent provides the foundation of the existing governments and that it is only in virtue of some kind of promise that citizens presently owe allegiance to their rulers. First, Hume claims that there is no record of the relevant agreements and no knowledge of them among the citizens themselves.<sup>7</sup> Secondly, he points out that we cannot derive our civic duties from agreements possibly made by our ancestors because their consent would fail to bind us in any way.<sup>8</sup> Thirdly, Hume vehemently rejects the idea that our duties result from some form of tacit consent we have given by deliberately living under the dominion of our rulers, asking famously: "Can we seriously say, that a poor peasant or artizan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day, by the small wages which he acquires?"<sup>9</sup>

It should be obvious that neither of these three arguments has any force against a position such as that of modern ethical contractarians which appeals to the contract as merely hypothetical. Moreover, although some ethical contractarians employ the notion of moral obligation and develop it by reference to the hypothetical contract, they do not try to ground this obligation in the fact that the contracting parties haven given a promise to one another

and are thereby bound to behave in a certain way. As already indicated with regard to Hobbes, ethical contractarians typically conceive of moral obligation as a prudential obligation that does not arise from acts of promising or any other acts, but from the fact that a certain way of behavior is in the agent's interest because it is a necessary means to the agent's goals. As a result, ethical contractarianism is neither vulnerable to the objection that hypothetical promises do not bind anyone, nor to the objection that the notion of a binding promise is itself a moral notion and therefore incompatible with the fundamental contractarian idea of deriving moral principles from non-moral premises.

Of course, one may argue that, if we understand the agreement that establishes the moral sphere in this way, the appeal to an agreement becomes superfluous because the real work is done by the notion of self-interest and its practical implications. As a matter of fact, this view is already suggested by Hume who argues that both the duty of civil obedience and the duty to keep promises have the very same foundation, namely our interests and the "necessities of human society"<sup>10</sup>, and that the attempt to justify the former in terms of the latter introduces an unnecessary philosophical detour. Similarly, one may want to argue that a purely hypothetical agreement is simply not an agreement in a substantial sense any more.<sup>11</sup> However, all this ultimately amounts to a mere dispute of words and concerns the outer presentation of the contractarian position rather than its internal coherence.

There is one worry, though, which cannot be assuaged by simply pointing to the hypothetical nature of the agreement because it is raised by it. If the crucial question for the ethical contractarian is what terms of agreement would be accepted by diverse groups of individuals, then contractarianism must presuppose that we can know the exact preferences of the individuals in question. It seems that the problem of including beings that are incapable of entering into express agreements must reoccur at this point in a different form because the individuals of which this is true are typically ones with whom we cannot engage in discussion and whose true interests are not easily determinable by speculation. In my view, this worry is

in principle justified. The reason why it does not give rise to any decisive objection against the contractarian approach, though, is that rival moral theories face the problem in about the same way. Whether we embrace a deontological position, a form of utilitarianism or some other kind of ethical theory: in order to be able to practically decide how to morally treat fetuses, animals, severely mentally disabled people or comatose patients, we need to have some idea of what these beings want, or of what it would feel like for them to be treated in a certain way.

A slightly different worry concerns the fact that the interests to which contractarians typically appeal are not the actual interests of individuals but only their rational interests, that is, those wishes or desires they would have if they were more rational than they usually are. To award rationality such an important role, one might want to argue, affects the neutrality of the contractarian approach and means that certain kinds of interests, and perhaps certain groups of beings, cannot be given due consideration. Worries of this kind have particularly been raised by defenders of a kind of care ethics who suggest that contractarianism tends to over-emphasize the value of rationality and autonomy and to thereby neglect the value of caring and, as a result, the interests of beings to whom we can have a relation of caring but not one of rational discussion and argument.<sup>12</sup>

Whether contractarianism entails this kind of ‘paternalism of rationality’, and whether it is in any way objectionable, obviously depends on the particular conception of practical rationality that is in play. The first thing to be emphasized here is that the appeal to rationality or rational desires which we find in contractarianism is in principle compatible with the view that we should value other things, such as love, care or empathy, over autonomy. Yet, a conception of rationality can surely be too demanding in a more formal manner as well. For example, if the conception of rationality employed by contractarians were derived from the idea of an omniscient being that has no false beliefs and all the relevant true beliefs, the contractarian approach would surely be in danger of losing its grip on reality and much of its

practical relevance. However, contractarians usually employ a much more moderate conception of practical rationality which very much focuses on the necessity of having a coherent set of preferences and consistently pursuing them.

It is hard to see how a rationality constraint of this kind should be objectionable and how any plausible care ethical approach could do without it. Even at an extremely particular or localized level, it seems that a requirement of coherence is indispensable in order for the moral question of how to act to make sense: if we were to claim that we ought morally to satisfy the desires of some individual, perhaps somebody entrusted to our care, but at the same time allow that these desires might be utterly incoherent, we might obviously end up requiring something impossible from ourselves. In order to take the practical or directive nature of moral judgment seriously, therefore, we cannot but subject the desires or preferences of the individual affected by our behavior to some kind of rationality constraint. Moreover, the characteristic task for both normative ethical theory and applied ethics is not to come up with a directive that works at an extremely particular level and can be accepted by a single individual with whom we may personally be in contact. It is to provide a justification for moral rules or principles that are applicable to a variety of relevantly similar cases and can inter-subjectively be accepted by different individuals in the same way. However, there simply is no such thing as justification outside the sphere of rationality, which means that the appeal to the point of view of rationality is not specific to contractarianism but something to which any plausible position in ethical theory or applied ethics is committed to: once we give up the weak rationality constraint described above, we are not doing 'ethics' in any substantial sense anymore but are merely clinging to our own subjective take on things (or to the subjective take of those others that we happen to care about).

## II.

We see, then, that some of the objections raised against contractarianism do not do justice to the views of leading contractarians such as Gauthier or Stemmer and are based on certain misunderstandings concerning the theoretical import of the concept of rational agreement. However, this is not to say that the prevailing views regarding the practical implications of contractarianism are without foundation. In particular, the idea that the scope of contractarian morality is seriously limited and that contractarians have a hard time including severely disabled people or animals in the moral community clearly has a basis in the works of leading contractarians – if for reasons slightly different from the ones already discussed.

In order to identify the true source of the problem, we need to reformulate the question that lies behind the worries discussed above: rather than asking ourselves what qualities a being needs to possess in order to be capable of entering into express agreements, we need to ask ourselves what qualities a being needs to possess in order for others to be willing to either enter into an agreement with the being itself or to pay attention to its interests when entering into an agreement with others. Stemmer explicitly takes up this question and attempts a systematic answer, and a similar attempt has since then been made by Chris Tucker and Chris MacDonald.<sup>13</sup> According to Stemmer, we can distinguish three relevant qualities, namely a) interests, b) power, and c) reason (or rationality), and the three conditions identified by Tucker and MacDonald (vulnerability, potency and responsiveness) are roughly equivalent.

Given that I have just spent some time refuting the view that reason is a necessary condition for an individual's being part of contractarian morality, it is important to start with this last aspect and to better explain to what kind of capacities Stemmer's reason condition refers. According to Stemmer, beings can only be part of the moral community if they are able to control their behavior and to make it accord with what morality requires of them: if a being is unable to comply with the particulars of the agreement that establishes morality, there is no reason for others to respect the agreement with regard to this being because they cannot expect anything in return. What Stemmer concludes from this is that the interests of beings

who are incapable of rational self-determination will not be given any consideration in the agreement and hence not protected by it.<sup>14</sup>

While Stemmer clearly has a point here, he tends to slightly overstate the issue by sometimes suggesting that beings need to be able to engage in conscious deliberation or reasoning and to conceive of the requirements of morality *as requirements*, or even as *moral requirements*.<sup>15</sup> The crucial point is merely that beings are able to direct their own behavior in response to the behavior of others and to thereby establish some kind of cooperative and mutually advantageous venture on which others can rationally rely.<sup>16</sup> However, contrary to what is suggested by Gauthier,<sup>17</sup> we may plausibly argue that we find a situation of this kind even in the symbiotic relationship of pet owners and their pets: while horses are probably unable to reason and form a conception of rational or moral requirements, they seem to make a difference between how they treat those that treat them well (feed them, etc.) and those that do not. Moreover, they thereby offer a gratification for the former kind of treatment that may rationally lead their owners to behave in certain ways. What we have here, then, is a relationship that not only happens to be mutually advantageous, but that is established and perpetuated for this very reason. If this much is true, however, then it seems that we can reconstruct the relationship as the result of a hypothetical agreement.

Stemmer's first condition, the interest condition, requires some slight qualification as well. Stemmer repeatedly claims that the mere having of interests is not sufficient for a being to be considered in and protected by the agreement that establishes contractarian morality. Rather, these interests need to be ones that are shared by others or converge with the interests of others and thereby provide a common ground on which to erect the rules of morality.<sup>18</sup> Again, this seems to be not exactly true. If person A is interested in the cherries that grow in the garden of his neighbor, B, and B is interested in the pears that grow in the garden of A, then, other things being equal, we can expect them to rationally enter into an agreement that leaves A with the cherries and B with the pears. We can expect this to happen even if A does

not share B's interest in pears and B does not share A's interest in cherries. In fact, this is the situation where we have *most* reason to expect an agreement to be made. In order for an agreement to come about, therefore, it is not necessary that the parties share the *same* interests, but only that their interests are *related* in a certain way, namely in a way that allows all parties to relevantly contribute to the satisfaction of the interests of the others.

The above considerations concerning the role of reason and interests suggest that the condition that crucially determines whether a being will come to be part of morality within a contractarian framework is Stemmer's second condition, the power condition. A being only has good reasons to enter into an agreement with others and to henceforth comply with the terms of the agreement if the resulting loss of liberty is outbalanced by certain benefits which the being could not, or not as easily, attain without the agreement. In order for this to be the case the beings involved in the agreement must all have the power to behave either in ways from which others want to protect themselves or in ways of which others want to assure themselves.<sup>19</sup>

It is easy to see that the power condition occupies a crucial role within the contractarian rationale and that the other two conditions are in an important sense subordinate to it. If specified in the above way, the reason condition simply follows from an application of the power condition: What the reason condition demands is that a being is able to reliably determine its future behavior, and the reason why this is necessary is that without this ability, a being would not possess power as determined by the power condition because it would be unable to offer other parties to the agreement anything in return. Moreover, the interest condition, if understood as an independent condition, ultimately has an even narrower range than previously described and consists only in the fact that a being has any interests at all. The reason is that the more comprehensive condition, i.e. that the interests are of such a nature that other beings can relevantly contribute to their satisfaction, is already captured by the power condition. Although their substantial ideas about what is fundamentally required for a being to

become part of contractarian morality seem correct, therefore, the kind of tri-partite taxonomy employed by both Stemmer and Tucker and MacDonald is slightly misleading

Unsurprisingly, then, it is the power condition from which the *prima facie* questionable practical consequences of the contractarian approach result. If only beings that can seriously harm us or provide us with benefits that would otherwise be out of our reach will be considered in the agreement from which the rules of morality derive, then it seems that morality can no longer achieve what many people consider to be one of its primary functions: to protect the weak and dependent against the strong and independent. It seems therefore that the general gist of the worries discussed in section I may be valid even if the considerations meant to support them were slightly confused. As we will see in what follows, we find ample confirmation for these worries in the works of the leading contractarians themselves.

### III.

While we cannot, of course, expect to find a discussion of the issues that occupy contributors to the modern applied ethics debate in historical writers such as Hobbes, he does address some problems that fall into the general sphere of applied ethics and are suited to throw light on the practical implications of his approach – or at least on what he himself considered this practical implications to be. More specifically, we find in Hobbes’s works some brief remarks concerning the moral status of disabled people and animals as well as a somewhat more extensive discussion of the moral status of children.

Hobbes’s brief discussion of disability appears in part II, chapter 10 of *The Elements of Law* and likewise in part III, chapter 17 of *De Cive*. In the relevant passages, Hobbes raises the question of whether “upon the occasion of some strange and deformed birth [...], the same be a man or no”<sup>20</sup>, and his answer is that this depends entirely on the laws of the civil sovereign which determine who is to be considered a human being and to be protected in his

life and limbs. Although this clearly leaves the sovereign at liberty to endow disabled individuals with an extensive set of civil rights, Hobbes does not seem to think that the sovereign is morally bound to actually do so. The way in which Hobbes derives the laws of nature from the individual goal of self-preservation and, in doing so, repeatedly appeals to the individuals' equality of physical and mental abilities and thereby to the power condition, strongly suggests that he does not recognize any necessity for healthy individuals to give up their natural right to all things with regard to severely disabled individuals, given that the latter do not seem to pose a serious threat to the self-preservation and contented life of the former.

The same general considerations apply in the case of animals. In some of his works, Hobbes explicitly attributes to animals a natural right to all things.<sup>21</sup> However, given that Hobbes understands the right to all things as a mere liberty-right, these natural rights of animals do not impose any moral obligations on human beings. Accordingly, in the very same passages where Hobbes grants animals a right to all things, he claims that the natural right of human beings includes the right to kill or subdue animals. Their having certain rights, therefore, does not mean that animals must in any significant sense partake in Hobbesian morality. Moreover, animals do not seem to belong to the kind of beings towards which we have strong reasons to give up our right to all things in order to render peace and self-preservation possible. Thus, animals do not seem to pose enough of a threat to self-preservation in order for them to satisfy the power condition and for Hobbesian individuals to be interested in some kind of mutual agreement. That this is Hobbes's view is especially obvious in certain passages of the *Questions concerning Liberty, Necessity and Chance* in which Hobbes claims that, though some animals such as lions or bears may be stronger than a single human being, "yet the strength, and art, and specially the Leaguings and Societies of men, are a greater power, than the ungoverned strength of unruly Beasts"<sup>22</sup>.

Finally, and most radically, Hobbes does not seem to recognize any fundamental moral obligations towards small children. In those passages of his works that discuss parental dominion, Hobbes grants mothers the natural liberty “to either nourish, or expose”<sup>23</sup> a newborn child, and there is *prima facie* no reason to think that the laws of nature must entail a general prescription for mothers to give up this part of their natural right. As with disability, of course, the sovereign is free to set up civil laws that keep parents from harming their children, and there are good reasons for thinking that any rational Hobbesian sovereign will actually do so, given that the preservation of the commonwealth depends to some extent on the citizens’ offspring. However, nothing in Hobbes’s discussion suggests that the sovereign is bound by natural law to set up a civil law that indiscriminately protects the life of all children or even of all fetuses whatsoever. The least we must consider possible within the Hobbesian framework is that severely disabled children will receive no governmental protection, and the same seems to apply to fetuses with genetic disorders.

If we take Hobbes as our guide, therefore, contractarian morality differs in an important way from common sense morality, by being unable to grant fundamental moral rights to small children, disabled people and animals.<sup>24</sup> This view is explicitly confirmed by modern contractarians such as Gauthier and Stemmer. Though Gauthier does not greatly enter into the question of who will come to be protected by contractarian morality, he concedes that the constraints developed which arise from the condition of mutual advantage do not fully correspond to the duties of conventional morality: While Gauthier seems to presuppose that there is some way to include children in a contractarian morality, he admits that “Animals, the unborn, the congenetically handicapped and defective, fall beyond the pale of a morality tied to mutuality.”<sup>25</sup> Stemmer points out the radical implications of the contractarian program even more systematically. Not only, as we have seen, does he theoretically describe the conditions that need to be satisfied in order for a being to become a part of contractarian morality. He also discusses at length what follows from these conditions. Stemmer’s ultimate conclusion is

that neither animals nor seriously disabled people nor future generations will be protected by contractarian morality and that children will be protected only to a certain degree.<sup>26</sup>

Leading contractarians, then, explicitly confirm some of the worries raised by critics of the contractarian approach. Moreover, by repeatedly appealing to the power condition or the condition of mutual advantage, they also seem to confirm the view that the counter-intuitive conclusions of their theories inevitably follow from the general contractarian rationale. The aim of the final section of this chapter will be to critically examine this latter idea and to show that there are in fact more ways to include small children, disabled people or animals in a contractarian morality than Hobbes, Gauthier and Stemmer are inclined to allow. Contrary to what is suggested by Tucker and MacDonald, however, one can make this claim, without subscribing to the somewhat implausible view that, despite their reflected and nuanced discussion of it, contractarians such as Gauthier and Stemmer must have fundamentally misunderstood the central metaphor of the contract. What I will argue instead is that their radical conclusions result from a theoretical commitment which is logically independent of the general contractarian rationale, namely from the commitment to a narrow conception of self-interest.

#### **IV.**

Despite Gauthier's and Stemmer's willingness to accept the limitations of ethical contractarianism, some commentators that are sympathetic to the general contractarian idea of deriving moral principles from considerations of mutual advantage have maintained that these limitations do not necessarily follow from the contractarian approach itself.<sup>27</sup> In view of these attempts to defend a broader scope of contractarian morality, I want to have a closer look at whether the contractarian rationale and the associated conditions for membership in the moral

community really have the implications that leading contractarians and critics of contractarianism take them to have.

My attempt to critically specify the interest, the power and the reason conditions suggests two main strategies for arguing that even small children, disabled people and animals will significantly be protected by contractarian morality. The first strategy relies on the idea that certain cooperative relationships may organically arise by way of a mutual display of care and affection and an emergence of mutual trust, such as in the example of the horse and its owner. We can generally assume that all beings that are potential candidates for membership in the moral community have interests and thereby satisfy the first of the three relevant conditions. Whether cooperative relationships interpretable in terms of a hypothetical rational agreement will arise, therefore, depends on the remaining two conditions.

First, the parties involved must be equally capable of determining their future behavior in accordance with the cooperative idea. This obviously applies to children, even smaller ones. It applies to some physically and mentally disabled individuals but arguably not to all of them, and likewise, it applies to some animals, in particular domesticated animals, but arguably not to all of them. Secondly, the parties must have interests that are mutually related to one another. Thus, small children, disabled people and domesticated animals will only become a party to an agreement of the above kind if they have anything to offer that the other parties – mature healthy human beings – want from them and cannot achieve in any other way.

Now it should be clear that all three groups have to offer something that other people might care about. Moreover, it seems that at least some of those things, most importantly perhaps affection, gratitude and beauty or an appeal of a similar kind, such as cuteness, are of such a nature that they cannot be attained by force, but only by means of peaceful cooperation. However, it should equally be clear that not *all* possible other parties will actually care about those gratifications and be able to derive significant benefits from them:

While we can expect parents and other close relatives and friends to significantly benefit from their contact with children or disabled people, this does not apply to all other individuals in the same way. Similarly, while the benefit that pet owners derive from the affection of their pets seems beyond doubt, it is not clear whether and how others should derive a similar benefit from it. Given that we cannot equally attribute to all mature healthy human beings other-regarding interests that concern the well-being of children, disabled people and animals, agreements of the kind sketched above must therefore have a somewhat narrow range in the sense that a considerable number of individuals will not partake in them. However, what this means is that these latter individuals would not be under an obligation to recognize the interests of either children, disabled people or animals or, in fact, of any of the three groups.

These problems are insufficiently acknowledged by Tucker and MacDonald who largely content themselves with pointing out that animals can offer certain benefits to human beings and are possible cooperators, without, however, addressing the question of whether these benefits could perhaps equally well (or even better) be reaped in an uncooperative manner or the possibility that the kinds of benefits which do presuppose peaceful cooperation might be ones that only a limited number of human beings cares about.<sup>28</sup> The first argumentative strategy, therefore, will only lead to an effective inclusion of the groups in question if it is complemented by a second strategy, which I will refer to as the ‘indirect rights strategy’. The indirect rights strategy is already suggested by Grice in his book *The grounds of moral judgement*, published in 1967.<sup>29</sup> The idea behind this strategy, which I have implicitly taken for granted in my previous discussion, is that there are two different ways in which a being may come to be protected by contractarian morality: One way is to be among the actual parties to the agreement that establishes morality; the other is to belong to a group of being about whom all or some of the actual parties to the agreement care and whose interest they therefore take into account in making the agreement with one another.

Grice concedes that the contractarian cannot award any fundamental rights to, for example, children under the age of ten, because, given their insufficient bargaining power, it is not necessarily in the interest of mature men and women to enter into an agreement with such children. As Grice emphasizes, however, this does not mean that young children will not be *protected* by any fundamental moral rights: since we can expect many mature men and women to care about the well-being of children, we can expect the agreement to give rise to certain rules about how to treat them. Therefore, while children under the age of ten themselves may not possess any fundamental moral rights, there may nevertheless be protected by those rights that mature men and women acquire as a result of the agreement.

The indirect rights strategy is discussed at some length by Stemmer. Stemmer's final conclusion on the matter is that the strategy does not allow the contractarian to significantly include animals because we cannot plausibly suppose that all parties to the agreement have an interest in the well-being of animals on account of which they are willing to sacrifice a part of their personal liberty.<sup>30</sup> For the same reason, Stemmer thinks that the protection which small children will receive in virtue of Gricean indirect rights is only an imperfect one, given that the only interest we can plausibly attribute to all parties is the interest that the next generation is enabled to at some point take over the duties of the older generation: while this interest may give rise to rules that provide *some* protection for small children, it will not give rise to a general prohibition on hurting or killing them.<sup>31</sup>

Stemmer's argument, however, relies on an assumption I have already criticized above: the assumption that only those interests which are *shared* by everybody will have any bearing on the agreement that establishes contractarian morality. As the cherry and pear example was meant to demonstrate, it is fully compatible with the general contractarian rationale that particular interests, i.e. interests that are only possessed by some parties and not by others, have an effect on the outcome of the bargaining process. The general contractarian rationale, therefore, does not force us to exclude interests that one rationally may or may not

have, such as genuinely altruistic desires or other-regarding interests of a more mundane kind, from the picture: interests that concern the well-being of small children, disabled people or animals can in principle affect and alter the rules of contractarian morality even if only a minority of mature healthy human beings may happen to have them.

Of course, it is possible that the exclusion of other-regarding interests, though not logically implied by the contractarian rationale, might nevertheless follow in virtue of some further assumptions that concern the actual distribution of human interests. It might be the case that, unlike in the cherry and pear example, we must expect some parties to the agreement not only to have no other-regarding interests themselves, but to have only self-regarding interests that the other parties to the agreement have as well. To illustrate this point, let us grant that there are some interests ( $s_1, s_2, \dots, s_n$ ) that are shared by all beings that might plausibly become a party to the agreement, and that there are some additional interests ( $a_1, a_2, \dots, a_n$ ) which they may or may not possess. If we imagine that one being, B, has *only* interests  $s_1$  to  $s_n$  and *none* of interests  $a_1$  to  $a_n$  whatsoever, it seems that there is nothing that those beings who do in fact have interest  $a_1$  or  $a_2$  can offer B to make him respect their additional interests. In such a situation, it seems plausible to assume that the agreement will entirely protect interests  $s_1$  to  $s_n$  since at least one of the parties to the agreement has no reason to consent to rules that protect interests  $a_1$  or  $a_2$  or any other additional interests.

In order for this conclusion to follow, however, we need to make at least two further assumptions. One assumption is that interests  $s_1$  to  $s_n$  are equally strong in all parties. The other assumption is that the overall number of individuals that resemble B in not having any additional interests is so considerable that the other parties, even when considered as a group, depend on their interests  $s_1$  to  $s_n$  being respected by these more moderate individuals. If the first condition is not satisfied, we can expect trade-offs between the different interests which may ultimately lead to interests  $a_1$  or  $a_2$  being considered. If the second condition is not satisfied, we must allow for the possibility that the more demanding individuals will

exclusively enter into an agreement with one another and thereby become sufficiently powerful to enforce their interests against the more moderate individuals. However, especially with these further assumptions, it seems extremely doubtful whether the above picture has much in common with the situation of larger groups of mature healthy human beings. While it might perhaps seem plausible to suppose that some of these human beings will not have any altruistic interests whatsoever, the quite artificial scenario above introduces further constraints that are highly implausible.

My contention in what follows, therefore, is that much of the radical consequences of contractarianism, which are so willingly accepted by Gauthier and Stemmer, are not the result of the basic contractarian commitment to self-interest, utility-maximization, instrumental rationality or mutual advantage, but follow from a further and quite different commitment, a commitment to a particularly narrow understanding of self-interest that generally abstracts from altruistic desires and similar other-regarding interests. That Stemmer bases his argument on such a restricted conception of self-interest has already been emphasized. That Hobbes and Gauthier do so as well is clearly visible from their writings. Genuinely benevolent desires do not play any significant role in Hobbes's derivation of the laws of nature which is entirely dominated by the logic of self-preservation. Similarly, Gauthier's argument is explicitly founded on a conception of "non-tuism"<sup>32</sup> according to which the parties to the agreement are mutually unconcerned and take no interest in those with whom they interact.<sup>33</sup>

It is important to note that in order to accept the above characterization of Stemmer's, Hobbes's and Gauthier's arguments, we do not need to claim that any of these writers embraces psychological egoism. Both Gauthier and Stemmer suggest that their exclusion of altruistic interests is not based on substantial psychological views but only pays tribute to the fact that the existence of altruistic desires is controversial. In a similar manner, we may agree with commentators such as Gert or McNeilly that Hobbes is not the kind of psychological egoist he has routinely been taken to be,<sup>34</sup> but still claim that Hobbes's justification of the

laws of nature is deliberately designed not to presuppose any genuinely benevolent desires in order to be equally appealing to those who doubt their existence.<sup>35</sup>

Of course, one might agree with the view that the contractarian justification of morality we find in Hobbes, Gauthier and Stemmer proceeds from a narrow conception of self-interest, but think that their ultimate disregard for animals, disabled people and small children follows from this starting point only contingently. Accordingly, one might think that there are ways to stay within the conceptual framework of narrow self-interest but nevertheless extend the sphere of morality and moral rights to those very groups of beings, and Shane Courtland's recent effort to provide a *Hobbesian Justification for Animal Rights* can be interpreted as an attempt to do just that. Courtland's argument is based on the idea that the only way for narrowly self-interested and 'strong' individuals to ensure stable cooperative structures with other 'strong' individuals over time is to develop and cultivate certain pro-social dispositions which will make them comply with the rules of cooperation even where they could possibly reap short-term benefits from violating them. Courtland's key point is then that these pro-social dispositions will extend to 'weaker' beings as well and provide protection for animals, small children and disabled people.<sup>36</sup>

In order for this claim to amount to a vindication of the view that a more comprehensive contractarian justification of morality can be derived from a narrow conception of self-interest, it must not merely consist in the idea that the pro-social dispositions in question will extend to 'weaker' individuals as a matter of psychological fact, in the sense that 'strong' human beings who care for honoring their agreements with other 'strong' individuals will *de facto* come to care for 'weaker' beings as well. If this were the idea, then Courtland's argument would not provide a normative-ethical *justification* of animal rights, but only an empirical *prediction* to the effect that animals would in fact be respected in a world of rational Hobbesian individuals. Accordingly, Courtland tries to show that there are "good Hobbesian reasons, separate from mere sentimental attachment, as to why we should

protect weak individuals”<sup>37</sup>. His crucial point is that ‘strong’ individuals need to acquire pro-social dispositions towards ‘weak’ individuals because displaying the lack of such dispositions will inevitably lead other ‘strong’ individuals to exclude them from their cooperative endeavours.<sup>38</sup>

Courtland’s general idea about the necessity of pro-social dispositions has a certain affinity to Gauthier’s claim that rational self-interested utility maximizers would choose to become ‘constrained maximizers’. Like Gauthier’s claim, it is dependent upon three important presuppositions, namely:

- a) that it can in principle be rational for narrowly self-interested individuals to no longer act on considerations of narrow self-interest,
- b) that it is more rational to actually *have* pro-social dispositions than to merely *pretend* to have them, and
- c) that human beings have the ability to choose their own behavioural dispositions.

All these three presuppositions have received their share of criticism in the past.<sup>39</sup> However, even if we grant them for the time being, Courtland’s claim concerning the rationality of extending one’s pro-social dispositions to ‘weak’ beings still depends on a further presupposition, namely that we can generally expect rational agents to make a transition from the thought ‘this individual has some disposition to harm children/disabled people/animals’ to the thought ‘this individual has no disposition to honor possible agreements with strong individuals such as me’. Courtland supports his claim with recent empirical psychological evidence which indicates a significant statistical link between violence toward humans and violence toward animals, and he also appeals to the intuition that we would not invite a person we have just seen tormenting a cat to sleep in our house or take care of our children.<sup>40</sup> Even if

this latter intuition may be widely shared, it only seems to establish that we would not allow animal abusers into cooperative endeavours of a particularly personal or intimate nature, not that we would restrain from cooperating with them altogether. However, the more fundamental problem with both the intuitive argument and the empirical evidence is that we were all brought up within the ideological framework of traditional morality, that is, in a world where ‘weak’ beings are awarded a moral status that is not so very different from the moral status of ‘strong’ individuals (especially where children and disabled people are concerned). What Courtland would need to demonstrate is that even among ‘strong’ individuals whose behaviour towards ‘weak’ beings has never been subject to any moral restrictions, violence against ‘weak’ beings would indicate, and be taken to indicate, a high probability of non-cooperative behaviour towards other strong individuals, and it is not clear whether and how such a demonstration is available.

My conclusion, therefore, is that, as long as we stick to a narrow conception of self-interest and apply the general contractarian rationale, the exclusion of ‘weak’ beings is not easily avoided. The question to be asked in the final section therefore is: why should contractarians want to embrace such a conception in the first place?

## V.

Gauthier himself confirms that his exclusion of other-regarding interests is required neither by his conception of rationality nor by the fundamental contractarian idea of deriving moral principles from non-moral premises, even though he tends to sometimes obscure these facts by suggesting that fellow feeling and other affective dispositions can have no place within the kind of rationalist framework he is after.<sup>41</sup> Thus, in the introduction to *Morals by agreement*, he points out that, on the maximizing conception of rationality favored by him, “it is not interests in the self, that take oneself as object, but interests of the self, held by oneself as the

subject, that provide the basis for rational choice and action”<sup>42</sup>. Moreover, in a reply to his critics published in 1988, Gauthier emphasizes that the inclusion of altruistic or other tuistic interests would be fully compatible with his general approach to moral justification since even tuistic interests are morally neutral.<sup>43</sup> In a similar vein, Gregory Kavka has argued that we may reconstruct Hobbes’s moral and political theory on the basis of a somewhat broader notion of self-interest and that the resulting theory, if perhaps not identical to Hobbes’s actual position, may still qualify as ‘Hobbesian’.<sup>44</sup>

If, as I have argued, the exclusion of other-regarding interests cannot be justified by plausible assumptions about the distribution of human interests, the question we need to ask is: what other reasons are there to justify it? It seems that there are two main ideas here. The first idea, which has already been alluded to above, is that the exclusion of other-regarding interests allows the contractarian to provide a significantly stronger justification of morality: given that the question of whether there is such a thing as genuinely altruistic motivation in human beings is notoriously disputed, it may seem that the contractarian can strengthen his argument and better the prospect of furthering some kind of moral consensus by exclusively relying on egoistic human interests whose existence nobody denies. That this is the idea behind the exclusion of altruistic desires is suggested by several of Gauthier’s and Stemmer’s statements, and this ‘official’ explanation is also common among commentators such as Nussbaum.<sup>45</sup> However, the idea seems to be based on a fallacy: that certain moral principles will be the object of rational agreement among narrowly self-interested parties by no means entails that these principles must also be the object of rational agreement among parties who have interests above and beyond the ones possessed by narrowly self-interested individuals. Moreover, even if the inference were valid, it would still not follow that a justification of morality in terms of narrow self-interest will be the one that can gain widest acceptance. As I have tried to argue elsewhere,<sup>46</sup> the way in which people respond to moral doctrines does not seem to primarily depend upon whether these doctrines provide a straightforward justification

of some core moral principles which everybody can accept. It depends to a considerable degree on whether the doctrine positively affirms people's way of life and their view of human nature, and the quite hostile reactions that contractarian approaches have suffered up to this day suggests that this may just not be true of ethical contractarianism.

The second consideration which may explain, if not perhaps justify, the exclusion of altruistic and similar other-regarding interests is that the inclusion of such interests and the resulting possibility of trade-offs will make it extremely difficult to predict the outcome of the mutual agreement and thus to determine the exact content of contractarian morality. As Stemmer's theory strikingly demonstrates, the consequence of the powerful restrictions associated with the exclusion of other-regarding interests is that there will not be much bargaining going on between the parties in the pre-moral state of nature after all: since all parties share the same interests, the moral principles established by way of mutual agreement will simply be principles that protect those very interests.<sup>47</sup> In other words, the content of contractarian morality thus conceived is perfectly identical with the content of the interests of each and every party. However, once we allow that the parties may have quite different sets of interests and that these differences may directly affect the bargaining process, it is not at all clear what the outcome of this process is going to be: whether and to what extent small children or animals will be protected by the moral principles on which broadly self-interested individuals will agree very much depends on the particular distribution of interests we can plausibly presuppose among larger groups of human beings, and this matter is not a philosophical but an empirical one.

It does not seem too far-fetched to assume that the aim of avoiding these serious difficulties may partly have driven modern contractarians to rely on a narrow conception of self-interest. What works in the favor of contractarianism, however, is that, without the required empirical basis, critics of the existing contractarian theories are not in a position to determine the extent to which Gauthier's and Stemmer's version of ethical contractarianism

goes astray and specify the ways in which a contractarian theory based on a broader conception of self-interest will differ from their accounts. While it should be clear that the moral status of small children, disabled people or animals will not be perfectly identical in both types of theory and that the scope of morality will be significantly broader once altruistic and similar other-regarding interests are included, the exact boundaries of contractarian morality thus conceived must to some extent remain a matter of speculation. Moreover, there is little reason to assume that the inclusion of altruistic interests will be sufficient to weed out all discrepancies between contractarian morality and conventional morality altogether, which means that even the suggested revised version of ethical contractarianism may face a residual challenge from applied ethics.

We may conclude, therefore, that no matter whether he subscribes to the egoistic or the enhanced version of ethical contractarianism, the contractarian is ultimately faced with a choice that corresponds to the janus-faced character of applied ethics which is both an enterprise in philosophical justification and an enterprise in political problem-solving: if, as I have suggested above, the idea that the most fundamental and straightforward justification of morality is also the one that can best attain universal acceptance is misguided, then it seems that contractarians engaging in the applied ethics debate might actually have to make a choice and be willing to either sacrifice the goal of justification or the goal of moral consensus and political impact.

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<sup>1</sup> See, for instance, M. C. Nussbaum, "Capabilities and disabilities: Justice for mentally disabled citizens," *Philosophical topics* 30 (2002): 134–137; and M. C. Nussbaum, *Frontiers of Justice: Disability, nationality, species membership* (Cambridge, MA: Belknap Press, 2006), 14ff. That this way of viewing contractarianism is standard in the literature is also confirmed by writers who reject the view in question and try to show that and how contractarianism can satisfactorily include some or all of the beings mentioned above. See, for instance, C. Tucker and C. MacDonald, "Beastly contractarianism," *Essays in philosophy* 5 (2004): 1 and 4f.; and S. D. Courtland, "Hobbesian justification of animal rights," *Journal of environmental philosophy* 8 (2011): 23.

<sup>2</sup> See Tucker and MacDonald, "Beastly contractarianism," 2 and 4.

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<sup>3</sup> See D. Gauthier, “The social contract as ideology,” *Philosophy and public affairs* 6 (1977): 135; D. Gauthier, *Morals by agreement* (Oxford: Clarendon Press, 1986), 9; and P. Stemmer, *Handeln zugunsten anderer* (Berlin; New York: de Gruyter, 2000), 204f.

<sup>4</sup> See, for example, T. Hobbes, *The elements of law, natural and politic*, ed. by F. Tönnies (London: Cass, 1969): 93f.; T. Hobbes, *De cive*, ed. by H. Warrender (Oxford: Oxford University Press, 1983): 119f.; and T. Hobbes, *Leviathan*, ed. by N. Malcolm (Oxford: Oxford University Press, 2012): 80.

<sup>5</sup> The view expressed here is often referred to as the ‘orthodox’ interpretation of Hobbes’s laws of nature. It ought to be noted that this interpretation has been challenged in the past, most importantly by Alfred Taylor and Howard Warrender who claimed that Hobbes conceives of the laws of nature as divine commands (see A. Taylor, “The ethical doctrine of Hobbes.” *Philosophy* 13 (1938); and H. Warrender, *The political philosophy of Hobbes. His theory of obligation* (Oxford: Oxford University Press, 1957); and, more recently, by Lloyd who interprets Hobbes as a kind of Rawlsian contractualist (see S. A. Lloyd, *Morality in the philosophy of Thomas Hobbes: Cases in the laws of nature* (Cambridge: Cambridge University Press, 2009)). For defences of the orthodox interpretation against these non-orthodox readings of Hobbes, see D. Eggers, *Die Naturzustandstheorie des Thomas Hobbes* (Berlin; New York: de Gruyter, 2008), 198–378; and D. Eggers, “Religious conflict and moral consensus,” in *Hobbes on politics and religion*, ed. by L. v. Apeldoorn and R. Douglass (Oxford: Oxford University Press, forthcoming).

<sup>6</sup> For a similar conclusion, see Tucker and MacDonald, “Beastly contractarianism,” 2; and Courtland, “Hobbesian justification,” 26.

<sup>7</sup> See D. Hume, “Of the original contract,” in *Essays moral, political, and literary*, ed. by T. H. Green and T. Grose (Aalen: Scientia, 1964): 446.

<sup>8</sup> See Hume, “Original contract,” 447.

<sup>9</sup> Hume, “Original contract,” 451.

<sup>10</sup> Hume, “Original contract,” 455.

<sup>11</sup> This point is made by Dworkin in his critical discussion of Rawls: “A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.” (R. Dworkin, “The original position,” *University of Chicago Law Review* 40 (1973): 501.)

<sup>12</sup> For a critique of contract theory from a care-ethical point of view, see E. F. Kittay, *Love’s labor: Essays on women, equality and dependency* (New York: Routledge, 1999), who focuses, however, on contractualism as exemplified by Rawls’s theory of justice.

<sup>13</sup> See Tucker and MacDonald, “Beastly contractarianism,” 7f.

<sup>14</sup> See Stemmer, *Handeln*, 257.

<sup>15</sup> See, for instance, Stemmer, *Handeln*, 249 and 256.

<sup>16</sup> For this point, see also Tucker and MacDonald, “Beastly contractarianism,” 2 and 7f.

<sup>17</sup> See Gauthier, *Morals*, 17.

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<sup>18</sup> See Stemmer, *Handeln*, 84, 193 and 198.

<sup>19</sup> See Stemmer, *Handeln*, 255.

<sup>20</sup> Hobbes, *The elements*, 189.

<sup>21</sup> See Hobbes, *The elements*, 130f.; Hobbes, *De cive*, 163; and T. Hobbes, *The Questions concerning Liberty, Necessity, and Chance* (London: Crook, 1656): 141f.

<sup>22</sup> Hobbes, *Questions*, 142.

<sup>23</sup> Hobbes, *Leviathan*, 103. For similar claims, see Hobbes, *The elements*, 132; and Hobbes, *De cive*, 164.

<sup>24</sup> For a similar conclusion, see J. Hampton, “Two faces of contractarian thought,” in *Contractarianism and rational choice. Essays on David Gauthier’s Morals by agreement*, ed. by P. Vallentyne (Cambridge: Cambridge University Press, 1991): 48f.: “[T]he Hobbesian moral theory gives us no reason to respect those with whom we have no need of cooperating, or those whom we are strong enough to dominate, such as old people, or the handicapped, or retarded children whom we do not want to rear...”

<sup>25</sup> Gauthier, *Morals*, 268.

<sup>26</sup> See Stemmer, *Handeln*, 261.

<sup>27</sup> See, for instance, Tucker and MacDonald, “Beastly contractarianism”; L. Becker, “Reciprocity, justice, disability,” *Ethics* 116 (2005); and Courtland “Hobbesian justification.”

<sup>28</sup> See Tucker and MacDonald, “Beastly contractarianism,” 8-10. That Tucker and MacDonald’s argument is unsatisfactory is also emphasized by Courtland. However, Courtland focuses on the first of the two points and does not explicitly discuss the possibility that the benefits we might reap from our interaction with weaker beings might be unattainable by force (see Courtland, “Hobbesian justification,” 26f.).

<sup>29</sup> See G. R. Grice, *The grounds of moral judgement* (Cambridge: Cambridge University Press, 1967): 147–150. See also C. W. Morris, “Moral standing and rational-choice contractarianism,” in *Contractarianism and rational choice. Essays on David Gauthier’s Morals by agreement*, ed. by P. Vallentyne (Cambridge: Cambridge University Press, 1991): 81f.; Tucker and MacDonald, “Beastly contractarianism,” 5; and Courtland, “Hobbesian justification,” 25. Courtland also suggests that the idea is already implicit in Hobbes’s concession that “Children, Fools, and Mad-men that have no use of Reason, may be Personated by Guardians, or Curators” (Hobbes, *Leviathan*, 82).

<sup>30</sup> See Stemmer, *Handeln*, 274f.

<sup>31</sup> See Stemmer, *Handeln*, 277–83.

<sup>32</sup> Gauthier, *Morals*, 329.

<sup>33</sup> See Gauthier, *Morals*, 87, 311 and 328f.

<sup>34</sup> See B. Gert, “Hobbes, mechanism, and egoism,” *The Philosophical Quarterly* 15 (1965); F. S. McNeilly, “Egoism in Hobbes,” *The Philosophical Quarterly* 16 (1966); and G. S. Kavka, *Hobbesian moral and political theory* (Princeton: Princeton University Press, 1986): 29ff.

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- <sup>35</sup> For a more detailed defence of the view that Hobbes's moral theory is explicitly designed to appeal to some kind of *consensus omnium*, see Eggers, "Religious conflict."
- <sup>36</sup> See Courtland, "Hobbesian justification," 34.
- <sup>37</sup> Courtland, "Hobbesian justification," 35.
- <sup>38</sup> See Courtland, "Hobbesian justification," 43f.
- <sup>39</sup> See, for example, Hampton, "Two faces," 41; K. Binmore, "Bargaining and morality," in *Rationality, Justice and the Social Contract. Themes from Morals by Agreement*, ed. by D. Gauthier and R. Sugden (New York; London: Harvester Wheatsheaf, 1993): 131 and 136; and Lloyd, *Morality*, 175.
- <sup>40</sup> See Courtland, "Hobbesian justification," 38f.
- <sup>41</sup> See Gauthier, *Morals*, 327 and 329.
- <sup>42</sup> Gauthier, *Morals*, 7. Cf. also D. Gauthier, "Reason and maximization," *Canadian journal of philosophy* 4 (1975): 21.
- <sup>43</sup> D. Gauthier, "Morality, rational choice, and semantic representation: A reply to my critics," *Social philosophy and policy* 5 (1988): 214.
- <sup>44</sup> See Kavka, *Hobbesian theory*, 3f.
- <sup>45</sup> See Nussbaum, *Frontiers*, 55.
- <sup>46</sup> See Eggers, "Religious conflict."
- <sup>47</sup> See Stemmer, *Handeln*, 193ff.