

Contractualism, Politics, and Morality

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Abstract Rawls developed a contractualist theory of social justice and Scanlon attempted to extend the Rawlsian framework to develop a theory of rightness, or morality more generally. I argue that there are some good reasons to adopt a contractualist theory of social justice, but that it is a mistake to adopt a contractualist theory of rightness. I begin by illustrating the major shared features of Scanlon and Rawls' theories. I then show that the justification for these features in Rawls' theory, the centrality of cooperative fairness to social justice, cannot be used to defend their use in Scanlon's. Finally, I argue that Scanlon has not provided an adequate alternative defense of these features, and show that they create problems when contractualists try to explain major features of our common-sense morality.

Keywords Contractualism · Rawls · Scanlon · Justice · Fairness · Generality

1 Two Contractualisms

John Rawls' theory of justice is known as a “contractualist” theory because it employs a thought experiment about what social arrangements people would agree to, or contract into, under certain special conditions. The theory was intended to explain and justify requirements of social justice. These are requirements on how a state should design the central economic and social institutions of a society, what Rawls called its “basic structure” (Rawls 1999). These institutions include, for instance, the structure of the economy, the system of fundamental rights given to citizens, and so on. Rawls' initial theory was thus limited in its application, applying only to questions about political decision making.

However, Rawls and others suggested that a contractualist theory might be developed with application to a much larger set of moral questions. The thought experiment about what people would agree to might be used, it was thought, not just to settle how basic political decisions should be made, but also how people should act more generally. This broader theory would tell us when any given action is right or

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wrong. We might call this a theory of “rightness”. Such a theory was developed most fully by Thomas Scanlon.

We can thus distinguish between contractualist theories of social justice, such as Rawls', and contractualist theories of rightness, such as Scanlon's. And we can ask whether it was a good idea to use the contractual model, first developed to settle questions of social justice, to develop a theory of rightness more generally. In this paper, I am going to argue that this was a bad idea; that there may be good reasons to adopt a contractualist theory of social justice, but that it is a mistake to adopt a contractualist theory of rightness.

I proceed as follows. Firstly, I explain, drawing on Rawls, the most plausible motivations for adopting a contractualist theory of social justice. Secondly, I argue that those motivations do not support adopting a contractualist theory of rightness. Nor, I claim, do some other motivations suggested by Scanlon. Thirdly, I show some problems with using a contractualist theory of rightness to explain why some intuitively wrong acts are wrong.

Before proceeding, I would like to qualify my aims in one respect. The idea of appealing to a contract or “original agreement” to justify political arrangements did not, of course, originate with Rawls. Hobbes, Locke and Rousseau all endorse some version of this idea, though in seemingly quite different ways from Rawls', and there may be other ways of deploying a contract thought experiment.

But I will focus just on the use that Rawls and Scanlon make of the contract idea. Scanlon carries over to his theory of morality much of the structure of Rawls' view of social justice, and I will be concerned with this particular manoeuvre. So, my concern is just whether a broadly Rawlsian contractualist theory of morality, of the kind Scanlon offers, is correct. It may yet be that there is a different theory that can reasonably be called “contractualist” that would be a good theory of social justice and morality more generally.

2 Rawls' Contractualism About Social Justice

In this section, I am going to focus on Rawls' contractualist theory of justice and the justifications for it. I will be mainly concerned with presenting the motivations that Rawls himself offers for the theory in a plausible light, though I will not offer a full defense of it.

Rawls' theory of “justice as fairness” is addressed at the problem of political decision-making in a state. In addressing this problem, Rawls suggests that our starting point should be to think about a political society as a cooperative scheme. He writes: “In justice as fairness society is interpreted as a cooperative venture for mutual advantage. The basic structure is a public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds” (Rawls 1999, 73–74).

Let me explain this claim and show how Rawls motivates it. A state is a central decision-making authority that makes decisions about the structure of the central social and economic institutions of a society for the sake of the common good. For instance, the state must enact rules governing the assignment of basic rights to

citizens, regulate the economy, and so on. The existence of these institutions makes available various goods, such as security, resources, and so on. But for these institutions to exist, citizens need to *comply* with the rules. Only given the cooperation of the citizens will there be the institutions or the benefits the institutions bring.

Thus, Rawls makes a plausible case that a political society can be viewed as a cooperative scheme because it is a rule governed association in which various benefits are created for the members through their compliance with the rules. The task of a theory of social justice, he suggests, is to tell us which set of cooperative rules to adopt. This view of social justice gives rise to three major features of Rawls' view that I am going to emphasise. In what follows, I will explain each feature and how it is justified by reference to the idea that a political society is a cooperative scheme.

2.1 Focus on General Rules

The first feature of Rawls' view that I want to emphasize is that on his theory we evaluate principles of justice by imagining what would happen if they were used as general rules. General rules, in the relevant sense, are rules that are complied with by the members of society, and that are commonly known to be complied with by members of society. In evaluating principles of social justice, we imagine that they were actually implemented in a society as rules governing, and publicly known to be governing, people's behaviour.

Why does Rawls' view have this feature? We saw earlier that on Rawls' plausible view, the task of a theory of social justice is to tell us which set of cooperative rules to adopt. This accounts for why principles of social justice must be suitable as general rules. Political decision makers must come up with rules for regulating a society over time that will be followed by all: that is the task they face. So, a theory of social justice ought to tell them which rules to adopt.

2.2 Evaluation by Reference to Benefits and Burdens

Suppose that we imagine various principles of social justice being implemented as general rules. How should we then evaluate them? Since these rules are cooperative rules, their existence creates various benefits, but only by also distributing various burdens among the members. Thus, suggests Rawls, we should evaluate potential principles of social justice by considering what distribution of benefits and burdens would result were they used as general rules. For instance, we look at who has what resources, who has what restrictions on their liberty, and so on.

2.3 Evaluation by Reference to Benefits and Burdens

When we consider the consequences of implementing different principles of social justice, which distribution of benefits and burdens should we look for? Rawls' theory was developed, he tells us, primarily as a response to the utilitarian theory of how to distribute these benefits and burdens. So, to understand his view, it will help to first consider the utilitarian theory of social justice. According to the utilitarian theory, we should evaluate different possible distributions according to their effects on the

aggregate “utility”, or pleasure, experienced by citizens. One choice is to be preferred to another if it produces greater aggregate utility. The just decision is the one that produces the greatest possible aggregate utility.

Why might an alternative to utilitarianism be needed? One potential problem with utilitarianism is that it seems to conflict with some strongly held convictions we have about what justice requires. For instance, according to utilitarianism, it is permissible to deprive some individuals of basic liberties, such as freedom of religion and speech, if doing so will lead to sufficient benefits for the majority. But we think that individual rights must be protected, even if such benefits could be gained.

According to Rawls, there is an explanation for why utilitarianism has these untoward consequences. The utilitarian theory of justice, Rawls says, is “inconsistent with the idea of reciprocity implicit in a well-ordered society” and “incompatible with the conception of social cooperation among equals for mutual advantage” (Rawls 1999, 13). What exactly does this mean?

Rawls' thought seems to be along the following lines. Citizens in a state are not merely passive recipients of benefits. As I have explained, the rules governing a political society are cooperative rules, which citizens are expected to comply with for the common good. The goods that a state makes available—such as resources, security and so on—are only made available through the efforts of its citizens. Citizens do their part in making these goods available by following the law, serving in the armed forces, serving on juries and performing other civic duties. Their cooperation is essential.

Once we think of a political society as a cooperative association in which citizens participate, it is plausible to suppose that norms of reciprocity will play an important role. That is to say, once we think of citizens as co-operators who jointly make certain goods available, it is plausible to think that there will be a moral requirement that each citizen gets something in return for her participation. Each citizen ought to gain a fair share of the benefits of the association. The reason why utilitarianism has unattractive implications is that it gives no role to the requirement that citizens be treated fairly in the allocation of benefits and burdens – that political decisions treat them in ways that befit their status as cooperating members of society.

Thus, Rawls aimed to create a theory that captured the requirement that each citizen be fairly benefitted and burdened by the scheme of cooperation. Why, then, did he appeal to the idea of a “contract” or agreement between persons, what he called an “original position”, in his theory of justice? How could this idea help capture the requirements of fairness that he was concerned to include in his theory? Why didn't he just elaborate further on what is required for citizens to be treated fairly and in a way that shows how that requirement explains some more specific precepts of justice? Well, Rawls says that we could just do this, but he proposes that the idea of the original position may be a useful “device” for helping us to work out more clearly what treating citizens fairly amounts to (Rawls 1999, 19). I'm now going to turn to that device and how it might help us model the requirements with which Rawls is concerned.

To see the intuitive idea behind the original position, return to Rawls' criticisms of utilitarianism. As we saw, Rawls objects that utilitarian policies may treat citizens unfairly by requiring that they accept lower prospects than others just for the sake of small benefits that this would bring for the others. Now, consider such a policy from

the perspective of a citizen who is being asked to accept the lesser prospects. This citizen seems to have a legitimate complaint against those who make the policy. We can imagine her formulating the complaint as follows: “I see that this policy will produce a sum of benefits for various others. But, hey, what about me! I am being left out. I do my part as a cooperating member of society, but I am being asked to accept less than others even though they do no more than me.”

Thinking about the policy from the perspective of the person who loses out is, perhaps, a useful way of seeing that it is unfair. By considering the complaint that this person could legitimately make about the policy, we can see that it treats her unfairly.

This suggests a more general strategy for thinking about the fairness of state policies. Perhaps we can think about whether or not a policy (or set of policies) is fair by thinking about what complaints any individual citizen could raise against it. If some citizen has a legitimate complaint, then the policy treats her unfairly; but if no citizen does, then the policy is fair. Since citizens are equal members of society, each doing their part, each can make the same complaints as another. Thus, Rawls proposes that we think about fairness in policies by asking what “persons who view themselves as equals, entitled to press their claims upon one another, would agree to” (Rawls 1999, 13). The idea is that if a set of policies would be acceptable to each citizen, then no one would be treated unfairly were we to enact them.

So, there is some motivation for using a thought experiment about what citizens would agree to in order to work out which political decisions would treat citizens fairly. By using a thought experiment about which policies would be acceptable to each citizen, and hence agreed to by them, we can ensure that the policies we enact are fair to each citizen, or give each her due.

More needs to be said if this thought experiment is to be useful. For it to work, we need to specify what grounds a citizen can legitimately offer for complaint. We need to think about what counts as a good reason for complaint to ensure that the chosen policies will give each citizen her due. And we also need to think about the limits on what the parties can complain about, so that we don’t reject a policy just because there’s an alternative that someone would prefer. Rawls specifies in more detail how the thought experiment is to work, telling us what a citizen can complain about and how we might place limits on what each can demand. He suggests that we proceed as follows.

We imagine parties who will only accept a set of policies if the policies are in their interests. (Rawls discusses exactly which interests they are to consider, but we can ignore this for now). This ensures that whatever policies are accepted will be in the interests of each citizen, and hence that, unlike in a utilitarian society, no one will be left out.

But this still leaves the problem of placing limits on what parties in the thought experiment demand, of ensuring that no one demands more than her due. Rawls ensures that there will be some such limits by placing further constraints on the thought experiment. We are to imagine, he suggests, that the parties are subject to a “veil of ignorance”, which prevents any of them from knowing exactly which person they are and from knowing their individual characteristics, such as their race, sex, class and so on. All they know is that they are members of society with certain interests. Since they don’t know any of their own particular characteristics, no party will demand special benefits for themselves. Rather, the parties will choose policies

that advantage each citizen who will live under them, since each party will want to ensure good prospects for herself, whoever she turns out to be. What we have just seen, then, is that the basic function of the original position thought experiment is to help us find principles of justice that would produce a fair distribution of benefits and burdens were they implemented as general rules.

To summarize my discussion of Rawls so far, we have seen that Rawls evaluates principles of social justice by considering what would happen if they were used as general rules and, in particular, whether they would produce a fair distribution of benefits and burdens. His view has these features, we have seen, because a political society can be viewed as a cooperative scheme.

3 Scanlon's Contractualism About Rightness

Let us now turn to Scanlon's theory. As I said in the introduction, Scanlon's aim is broader than Rawls': he hopes to provide a theory of not just social justice, but morality more generally. Such a theory should tell us not just what the correct principles of justice are, but the correct principles for evaluating all actions; principles such as, *do not tell lies* and *do not steal*. I am going to call this a theory of "rightness," a theory that tells us when an action is right. Also, I am going to assume, as Scanlon does, that an action is right just in case it is not wrong, so I will speak interchangeably about a theory of "rightness" and of "wrongness".¹ Scanlon's view parallels Rawls' in three ways that I will now illustrate.

3.1 Focus on General Rules

Scanlon tells us that on his theory we should evaluate principles of rightness by considering what would happen if they were used as "rules for the general regulation of society" (Scanlon 1998, 4). This amounts to considering what would happen if they were used as general rules, in the sense I discussed earlier with respect to Rawls: we consider what would happen if everyone followed the rules and it was common knowledge that everyone followed them. Take, for instance, the principle, *If you utter "I promise to X," then you ought to X*. We evaluate that principle by considering what would happen if everyone followed it and it was commonly known that everyone followed it.

3.2 Evaluation by Reference to Benefits and Burdens

What we consider in particular, according to Scanlon, is what distribution of benefits and burdens would arise if we implemented a principle as a general rule. The principles we are considering restrict people's actions in various ways, so what we look at is "the weightiness of the burden for those on whom it falls and the importance of the benefits it offers, for those who enjoy them" (Scanlon

¹ I don't mean to fully endorse this suggestion, but it will be useful, for the sake of simplicity, to follow Scanlon in making it.

1998, 208). For instance, the principle prohibiting promise breaking places burdens on those who would like to be able to renege on their promises, but provides benefits for others, such as the ability to make plans in the knowledge that those who have made promises will keep them. Scanlon, like Rawls, evaluates rules by considering the distribution of benefits and burdens they would produce.

3.3 Evaluation by Reference to Fairness

Having seen the consequences of adopting different sets of rules, how are we to decide which should be adopted? We should choose those rules that no one could “reasonably reject,” says Scanlon. He tells us that he focuses on reasonable *rejection* rather than *acceptance*, because he wants to avoid the possibility of arrangements being reasonably accepted by someone because they are especially giving or self-sacrificing. But one could just as easily focus on acceptance and *stipulate* that none of the parties to the agreement are self-sacrificing because they are concerned to advance their interests (as Rawls does). The “contract” is, after all, a thought experiment that is up to us to design.

I thus suggest that without any serious loss, we can restate Scanlon’s claim in terms of what reasonable people, motivated to advance their own interests, would accept, rather than what reasonable people could reject. When we do this, Scanlon’s claim is that rules for general regulation should be evaluated by considering whether they would be accepted by reasonable people who were attempting to advance their own interests.

Consider again Rawls’ contractualism. We saw that Rawls uses the “veil of ignorance” to ensure that the parties to the original position demand no more for themselves than they are due. The veil ensures that no one demands more for herself than she is willing to ensure for others.

We can easily imagine other ways of constructing the thought experiment, which also ensure that no citizen demands more than her due. One obvious thought would be to suppose that the parties to the agreement are motivated by not just self-interest, but also a concern to demand only what they can reasonably expect. On this way of imagining the contract, the parties themselves accept that they, and other citizens, are equal cooperating members of society and that hence that they should be willing to accept the same benefits and burdens as others. Given this acceptance, they limit their demands to only what can be ensured for other citizens also. No one demands more than her due as an equal member.

Rawls, at various points in “A Theory of Justice,” touches on this alternative way of constructing the contract thought experiment, though he does not opt for it in the end. For instance, he at one point asks us to consider not what self-interested individuals behind a veil of ignorance would agree to, but what “persons who view themselves as equals, entitled to press their claims upon one another, would agree to” (Rawls 1999, 13). Rawls calls this version of the contract thought experiment an “ethical variation” (Rawls 1999, 512–513).

Scanlon’s contractualism is extremely close to this ethical variant of Rawls’ contractualism. It also employs a thought experiment whose function is to ensure that no one can complain about the package of benefits and burdens that a rule would place on her. Just like Rawls’ thought experiment, the aim and effect of Scanlon’s is

to ensure everyone who would be subject to a rule would be benefitted and burdened fairly by it.²

Just as Rawls' theory can be contrasted with the utilitarian theory of justice, Scanlon's view can be contrasted with rule utilitarianism. According to the rule utilitarian, we evaluate rules for general regulation solely by considering their effects on aggregate utility or well-being. By contrast, Scanlon's account includes a constraint of fairness because the rules are evaluated by considering the benefits and burdens they would impose on each individual. In sum, Scanlon's view, like Rawls', evaluates principles by considering whether they would produce a fair distribution of benefits and burdens if they were implemented as general rules.

4 The Difference

We have seen that Rawls and Scanlon's views share three basic elements. We also saw that the justification for those features in Rawls' view is that political decision making is concerned with coming up with rules for an ongoing cooperative scheme. Principles of social justice are principles for the regulation of a cooperative scheme. I will now argue that this justification is not available to Scanlon.

Suppose that I am considering whether or not to manipulate Imran. I am not, on the face of it, considering anything to do with the regulation of a cooperative scheme. I am just deciding how to treat this particular person. Unlike the state, I am not making rules that anyone else will have to follow.

Now, in some special cases, private individuals are involved with coming up with rules for the regulation of cooperative schemes. For instance, they may be involved with creating the rules for a car-pool scheme or a joint business venture. In these cases, they will have to consider what would happen if certain rules were followed by all members of the scheme and, in particular, whether those rules would produce a fair distribution of benefits and burdens. But many—probably most—of our actions are not like this. When I am deciding whether to manipulate Imran, it does not seem that I am coming up with rules for any cooperative scheme. I am just thinking about how I should treat this particular individual on this particular occasion. The correct principle that governs my behaviour will be one that just regulates how particular individuals may influence each other, not how cooperative scheme should be organised. On the face of it, then, there are large parts of our morality that have nothing to do with the fairness of cooperative schemes.

Perhaps it will be said that if one looks closely enough, in fact all members of society are involved in a large cooperative scheme and so the rightness of our individual actions does depend on the fairness of cooperative schemes. There are two problems with this defence of Scanlon. Firstly, it seems very implausible that we really are in a cooperative relationship with everyone we owe duties to. Suppose that while hiking in South America, I come across a member of a tribe of people who have

² Scanlon does not actually use the word "fairness" in *What We Owe to Each Other* to describe the fundamental basis of his view, but he does say elsewhere that contractualism incorporates his earlier view, in "Rights, Goals, and Fairness," that individual rights are determined by which rules would produce "fair" distributions of well-being (Scanlon 2008, Introduction). In any case, I think the description I have given of the motivation for, and effect of, the contractualist thought experiment is accurate.

lived separately from the rest of humanity for centuries. Clearly, I cannot stab this person for fun, but it is very implausible to think that I am in some sort of cooperative association with her. Secondly, even if we do share a cooperative scheme, this will not help Scanlon. Scanlon's contractualism says that which actions are right depends on the fairness of various *hypothetical* schemes; it does not say that what I should do depends on the existence of *actual* fair schemes.³ So, common membership in a cooperative association cannot be the basic source of our moral duties on Scanlon's view.

The similarities between Scanlon's view and Rawls' are thus puzzling. Rawls' view focuses on the fairness of general rules, because he thinks that the rules we need to regulate the basic structure are rules for the regulation of a cooperative association. Scanlon's theory also focuses on the fairness of general rules: he thinks which actions are right is determined by which general rules would produce a fair distribution of benefits and burdens if implemented. But his theory cannot be motivated in the same way. The correct principles governing individual actions do not seem to be rules for the regulation of cooperative associations.

5 Other Justifications

We saw in the last section that the features Scanlon's view shares with Rawls' cannot be justified in the same way. I would now like to consider whether there is an alternative justification for those features, and will consider what Scanlon says to motivate them.

5.1 Principles

Firstly, let us consider the fact that, on Scanlon's view, principles are evaluated by considering what would happen if they were implemented as general rules. We've seen that there is a natural justification for this feature of contractualism about social justice, but not contractualism about rightness.

One suggestion Scanlon makes is that it is natural to appeal to facts about rules for general regulation once we see the role that principles play in ordinary moral explanations of wrongness. In ordinary cases of moral judgment, Scanlon suggests that we appeal to general principles to explain why certain actions are wrong (Scanlon 1998, 255).

By "general principles", Scanlon has in mind principles that apply to more than one action. For instance, suppose I hear that Jones killed Smith in North Cambridge today, and that Smith was wholly innocent: Jones killed him just for fun. I would conclude that Jones' action was wrong, and if someone asked me why it was wrong, I would likely appeal to a general principle. "Murder is wrong," I might say, "and Jones murdered Smith." The general principle that murdering is wrong seems to provide a good explanation for why this particular action is wrong. And it also applies to other individual actions, such as Kelly killing Jane and Tyrone killing Sanjay.⁴

³ Scanlon himself emphasizes this contrast. See Scanlon 1998, Chapt. 7.

⁴ Some recent writers, so called "particularists", such as Dancy 2006, have denied that general principles have any important role to play in the explanation of why particular actions are wrong or why we judge them to be wrong. But it seems to me that they do and, for present purposes, I'll grant Scanlon that they do.

Given that principles have this role to play, we need to figure out which moral principles are correct if we are to determine which actions are wrong. The evaluation of principles, then, ought to be central to moral theory. We—moral theorists—ought to be concerned with working out what the correct set of moral principles is.

Scanlon infers from this that we should focus on whether those general principles should be used as rules for general regulation. But no such conclusion follows. It is one thing to ask whether the principle *Murder is wrong* is correct. It is quite another to ask whether the principle *Murder is wrong* should be used as part of set of rules for the general regulation of society. A range of extra considerations comes into play when we consider the latter question.

An example of Scanlon's illustrates this contrast (Scanlon 1998, 203). He asks us to consider principles obligating us to provide for others if they come by our house. One way to evaluate these principles would be to just ask how much sacrifice one individual ought to bear for the sake of another. The correct principle governing giving at your door, on this approach, strikes the right balance between self-concern and concern for others.

Scanlon's approach requires us to do more to evaluate these principles: we have to consider the effects on society as a whole of instituting them as general rules. And instituting a principle requiring people to help as a general rule would have important effects on how people would lead their lives. For instance, knowing that they would be called upon to provide for people who show up at their doors, they would have to plan accordingly by buying food in advance to make sure they were prepared for these situations. But Scanlon's argument doesn't give us any reason to think that these effects are relevant when we are evaluating principles. All he shows is that general principles are central to our moral thinking; but, this tells us nothing about how to evaluate those principles and, in particular, does not show that they should be evaluated by considering what would happen if they were instituted as general rules.

It might be thought, though Scanlon doesn't suggest it, that some ideas of universality could bolster Scanlon's argument here. Suppose that I think you should not steal from Jean. All else being equal, I must also think that I should not steal from Jean. In fact, I must think that any individual in your situation must not steal from anyone in Jean's situation. We can call this the "universality constraint" in our moral thinking: if one ought to X, then all other agents in relevantly similar circumstances ought to X.

This universality constraint might seem to require that we evaluate moral principles by imagining what would happen if everyone followed them. If I think I ought to X then the universality constraint requires me to think that all other relevantly situated agents should do the same, so it might seem that one way to see if an action would pass the universality constraint would be to see what would happen if all relevantly situated individuals performed that act. But in fact, no such strong conclusion follows from the universality constraint. To satisfy the constraint, I have to think that anyone in the same relevant circumstances as me ought to do what I ought to do. But I don't have to think about what would happen if we were all actually to perform those actions and it was publicly known that we all performed those actions.

Scanlon's example of helping those in need illustrates this again. Someone, Gina, comes to my door in need of help. I decide that the inconvenience to me of helping her is large enough that I am not required to help her. The universality constraint

requires me to think that anyone else facing someone similarly needy, and where helping would be similarly inconvenient, would also not be required to help. For instance, it requires me to think if I were to show up at Gina's door in similar need, and it would be similarly inconvenient for her to help me, then she would not be required to help me. But it does not require me to think about what would happen in a world where no one in fact helped anyone else in these circumstances, or worlds where everyone did help.

5.2 Moral Relations and Justifiability

The most central idea to which Scanlon appeals in his original paper and more recent work is the importance of standing in "moral relations" to others (Scanlon 1998; Scanlon 2003). Scanlon claims that the morality of right and wrong fundamentally concerns what relations we stand in to other persons. An action is right or wrong in virtue of the relation to others we would be in were we to perform it. When we act rightly we put ourselves into a kind of moral harmony with others (Scanlon 1998, Chapter 3). When we perform a wrong action, doing so puts us in a defective relation with others.

This is an attractive suggestion, I think. Often, it seems to me, an action is wrong in virtue of the relation to others that performing it would put me in. For instance, it seems to me that spreading malicious gossip about someone is wrong, because it would put me into a bad relation with the person whose reputation might be tarnished by the gossip. I would be treating them with a lack of regard. Conversely, actions also often seem to be required because the good relations they would put me in with others. For instance, when someone has done you a favour, you should do something in return, so as to be in the relation of showing her gratitude.

So, there is some plausibility to Scanlon's idea that relations with others are fundamental to morality. Let us call this thesis the "relations thesis":

Relations Thesis (RT): An action is wrong if it would put us in into defective relations with others.

What is the defective relation (or, what are the defective relations) we stand in to others when we act wrongly? Scanlon makes a few different suggestions. One suggestion he makes is that when we act wrongly, we put ourselves in a relation to others such that they could "reasonably object to" what we are doing. In another formulation, the objectionable relation is one where we are unable to "justify our actions to others on grounds that they could not reasonably reject" (Scanlon 1998, 154). He also suggests that these formulations connect with the Kantian requirement that we must avoid being in relations with others where we are treating them as "mere means" (Scanlon 2008).

These suggestions have some plausibility. When we think we have acted rightly, we often say such things as "I did all he could ask of me" or "No one had a right to complain about that". These common phrases suggest that there is some moral importance to being able to justify ourselves to others or to what they can, within limits, complain about in our actions.

Here is the formulation Scanlon uses most often to express this idea:

Justifiability Thesis (JT): An action is wrong if it could not be justified to others on grounds that they could not reasonably reject.

As I said, the Justifiability Thesis is supposed to be a more specific version of the Relations Thesis. RT tells us that an action is wrong when performing it would put us into a defective relation with others, or involve mistreating them. Thus, for instance, stealing is wrong, according to RT, because it would involve mistreating the person from whom one steals.

But RT leaves open what exactly it takes to mistreat someone or to be in a defective relation with them. It seems to me that there are many different ways of mistreating people. For instance, we can mistreat people by disrespecting them, being cruel to them, abusing their trust, showing them callous indifference and so on.

According to JT, these various ways of mistreating people are all instances of one basic way: treating them in ways that cannot be justified to them. Kant similarly claimed that there is one fundamental way of mistreating others: treating them as a means and not as ends in themselves.

Can RT or JT be used to defend the idea that the wrongness of individual acts depends on whether we would treat people fairly by implementing certain rules for the general regulation of society? Let me make some points that suggest otherwise.

Firstly, neither RT nor JT justifies the evaluation of principles by considering them as general rules. As the examples we have looked at illustrate, the intuitive idea behind RT and JT is that there is some moral importance to being in certain relationships with other people. The relevant relationships are between oneself and particular other persons. As Scanlon himself says, “When we think of those to whom justification is owed, we naturally think first of the specific individuals who are affected by specific actions” (Scanlon 1998, 202). But, as we have seen, Scanlon’s final contractualist formulation requires that we judge actions not by looking at how we would treat particular people in performing them, but by considering how we would treat people generally by adopting general rules prohibiting those actions. This feature remains unsupported.⁵

Secondly, I suggest that Scanlon’s shift from RT to JT is not justified. RT is plausible because many actions seem to be wrong in light of the bad relations they put us into with others. In particular, many actions seem wrong because they involve mistreating other people by, say, damaging them or manipulating them. On the face of it, there are many ways of mistreating others. For instance, we can mistreat people by disrespecting them, being cruel to them, abusing their trust, harming them, using them and so on.

On Scanlon’s account, there is just one central way of mistreating people: acting in a way that cannot be justified to them. Why should we think this? I explained, when discussing Rawls earlier, why the idea of justifiability may play some useful role in the political context. In that context, it is plausible that the central requirements are those of reciprocity and fairness: ensuring that each citizen receives her due benefit from the state, given the contribution she makes to the political community.

The idea of justifiability to each, I showed, is useful, in so far as it is useful, because it can help us to capture a requirement of fairness: if no citizen can complain about a set of social arrangements (if it can be justified to each) then no one is being treated unfairly. So there is some reason for focussing on justifiability to each as the

⁵ Sheinman 2011 also points out that JT does not provide any reason for evaluating principles by considering their use as rules for general regulation.

central requirement when we are thinking about social justice because, arguably, the central requirement of social justice is that each citizen be treated fairly.

There is no similar reason for focussing on justifiability to each when we are thinking about rightness generally rather than social justice. Sometimes individuals must distribute benefits among others. And perhaps the idea of justifiability to each (along with associated ideas of reasonable complaints and so on) can help us figure out what those individual should do to treat the recipients fairly. But, as I have emphasized, aside from unfairly favouring individuals with greater benefits or fewer burdens, there seem to be many ways in which people can mistreat others, such as manipulating them, failing to aid them when in great need, harming them, and so on.

Now it might be said that we can understand the idea of justifiability to each more broadly, so that it means not that each person gains a share of benefits that they can't complain about, but something much more broad, such as that each person must have their interests given due consideration when we act. So understood, it would be more plausible to think that treating people in ways that we can justify to them is the central moral requirement. The trouble is that if we broaden the notion of justifiability in this way, then it doesn't seem to have any useful role to play in the theory. I showed how in Rawls' theory, the idea of justifiability to each person plays a potentially useful role as a heuristic for working out what it takes to treat them fairly. On the current proposal, there is no clear use for that idea. Nearly all moral theories agree that each individual must have their interests given due consideration: they disagree heavily about how to interpret that requirement. If that is all the contractualist means by justifiability to each, then she is not making any distinctive claim with any explanatory power.⁶

I have argued that the idea of justifiability to each is useful in a theory of social justice, because of the centrality of fairness to social justice, but is much less useful in developing a theory of rightness, because fairness is just one among several requirements that apply to individual actions. This problem with contractualism about rightness helps to explain some familiar problems with using the theory to explain large parts of our intuitive morality.

Consider, for instance, deontic restrictions. Our common-sense morality includes the idea that one may not kill one person even for the sake of saving five others (or even preventing five other killings). It is often said that contractualism cannot explain why this would be wrong.⁷ The problem I have raised explains why contractualists face this difficulty. Suppose that I kill the one in order to save the five. What is wrong with my behaviour? Surely not that I have unfairly benefitted some over others.⁸ It is true that the one loses his life while the five have theirs preserved, but had I not acted, the one would have survived while the five died. So whichever way I act, I will favour some over others. What seems to be wrong with my behaviour is that I

⁶ In other words, the proposal under consideration invites the familiar objection that the contractualist idea of justifiability to each is "redundant". See, for instance, Pettit 1999; Blackburn 1999 and McGinn 1999.

⁷ See, for instance, Brand-Ballard 2004.

⁸ You might say that actually my action is unfair if we understand fairness broadly enough, so that it isn't just concerned with the equitable distribution of benefits and burdens. But if there is such a broad notion of fairness available, then it doesn't seem that the contractualist apparatus would play any useful role in helping us to capture it.

mistreat the one in some other way, perhaps because I harm him, or perhaps because I use him as a means of helping others without his consent.

Things are no better if we focus on rules, as I have recommended against, rather than individual actions. The rule that prohibits killing one to save five can be complained about by those who would otherwise be saved. The rule that allows killing one to save five can be complained about by those who would then be killed. The former rule does not seem to distribute benefits more fairly than the latter. And if anything, the latter rule seems fairer because it benefits more people.

Thus, I suggest that Scanlon's step from RT to JT is not only unmotivated, but also creates problems for his theory with explaining some central common-sense moral requirements. What happens if we sever the step from RT to JT: if we take seriously the idea that morality is fundamentally concerned with the relations we stand in to others, but eschew the idea that justifiability to each is the fundamental morally important relation? It remains open that a theory of this kind could be developed. It could take the form of a pluralist theory, where we explain the wrongness of various actions by appealing to various different ways in which people can mistreat others, such as harming them, manipulating them and so on. The challenge for this sort of theory would be its lack of simplicity and the seemingly ad-hoc nature of some of its explanations.

Or perhaps a theory could be developed according to which all these various ways of mistreating people are really instances of one central way such as, say, treating them with disrespect. The challenge for this theory would be to give enough content to the central notion of, say, disrespect, to allow it to serve a useful explanatory role.

So, even if we abandon JT, we could still develop a theory consistent with RT. But this theory would not look much like Scanlon's contractualism. Consistent with this theory, we could keep the central ideas of contractualism for developing a theory of social justice, but we would not be using them to develop a theory of rightness.

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