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# Contemporary Debates in Moral Theory

Edited by

**James Dreier**

35 See Rawls (1971: 58); Scanlon (1998: 106). My thoughts on moral contractarianism have been shaped by Rawls's and Scanlon's works. I have also learned from Rahul Kumar's papers on contractualism, and benefited from very detailed comments by R. Jay Wallace. I am also grateful for suggestions by James Dreier, and comments by audiences at Northwestern, University of Illinois, Bowling Green State University, US Naval Academy, and a conference on Contractarianism and Law at the University of Pennsylvania Law School.

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# CHAPTER FIVE

## Can Contract Theory Ground Morality?

*Philip Pettit*

### Introduction

The contractualist theory of morality that has recently been developed by T. M. Scanlon (1982, 1998), building on the work of John Rawls (1971, 1993), represents a new departure in ethical thought, and an advance on pre-existing ways of thinking. True, it has some structural affinity with the mutual-advantage theory of morality developed by David Gauthier (1986), and some substantive resemblance to the discourse ethics associated with Jürgen Habermas (1990). But it is not clear how deep these go. In any case I shall concentrate on Scanlon's version of contractualism in this chapter.

Although it is original and imaginative, I do not think that contractualism succeeds, at least not in its own terms. More particularly, I do not think that it succeeds in displacing consequentialism as a grounding theory of moral rightness. The goal of displacing consequentialism in that role goes back to Scanlon's (1982) first statement of the doctrine, and it is a centerpiece of the Rawlsian theory of justice on which he builds. I am a consequentialist myself, and it may not be surprising that I take issue with contractualism at this point (Pettit 1991, 1997). But though I take issue there, I still think that the doctrine is of immense interest and I hope that this will come through in what follows.

This chapter is in three sections. In the first I offer a characterization of contractualism, explaining along the way that under this representation it is proof against two more or less obvious consequentialist objections. In the second section I argue that even when characterized in this manner, however, there remains an attractive and plausible way of taking contractualism that would make it consistent with consequentialism; this would cast it as a theory of the relatively right – the right relative to a practice – rather than the absolutely right. And then in the third section I show that even if this relativized way of taking it is rejected, as Scanlon himself would

certainly reject it, there is a second way in which contractualism can in principle be rendered consistent with consequentialism; it may be cast as a partial rather than a complete theory of the absolutely right. Under neither of these ways of taking the doctrine would contractualism ground morality – not at least in every relevant sense – but under each it would retain a significant place in moral theory.

## The Characterization of Contractualism

The main points in contractualist doctrine are the following (Pettit 2000b):

- 1 The central sense of ‘right’ and ‘wrong’ derives from what we owe to others, and it is this interpersonal sense that is explicated in contractualism. It contrasts with the intrapersonal sense associated with talk of what I owe to myself and the impersonal sense associated with talk of how to improve the world or society (Scanlon 1998: 6).
- 2 ‘Wrong’ is the primary moral predicate; ‘right’ is defined simply as ‘not wrong’. That an option is right will mean that it is permitted, not that it is mandatory, though of course a right option will be mandatory in the special event that it is the only option permitted – the only option that is not wrong.
- 3 An action is wrong in the central, interpersonal sense just in case it is disallowed by principles for the regulation of conduct that no one could reasonably reject as part of an informed, unforced agreement with others (Scanlon 1998: 153, 202); it is wrong, intuitively, just so far as it is unjustifiable from the point of view of others – just so far as it is exposed to reasonable complaint on the part of others (ibid. 229).
- 4 This is a contractualist account of wrongness and rightness, because a principle will be compelling under Scanlon’s approach, and will serve to justify actions, if and only if no one could reasonably reject it as a general principle of cooperation: if and only if it is, in that sense, contractually irresistible (ibid. 197).
- 5 There is no simple algorithm for deciding which principles could not be reasonably rejected. The matter can only be determined by reflection on the sorts of personal reasons – reasons are taken to form a more or less autonomous, cognitively accessible domain (ibid. ch. 1) – to which we would give relevance and weight in thinking about what cooperative life with others requires (ibid. 225, 246).
- 6 An action that is wrong and unjustifiable to someone will always be unjustifiable for a reason – because he or she finds it unfair, or unkind, or insensitive, or whatever. But the wrongness is not to be equated with any such lower-order basis of unjustifiability; it is just the higher-order property of being, on whatever basis, unjustifiable (ibid. 5, 155–6).
- 7 The wrongness of an action, understood in this way, explains why wrong actions have an aspect under which they are inherently unattractive. We shrink from acting in a way that is unjustifiable in the light of others’ claims quite independently of shrinking – as we do also shrink – from doing something that

has an unjustifiability-producing feature: doing something that is unfair or insensitive or whatever (ibid. 11).

- 8 This is the primary reason, so it is said, why the contractualist theory of rightness and wrongness is persuasive. As Scanlon puts it: “I myself accept contractualism largely because the account it offers of moral motivation is phenomenologically more accurate than any other I know of” (ibid. 187; cf. 153, 163).
- 9 A second reason that allegedly supports such contractualism, however, is that avoiding the unjustifiable in Scanlon’s sense necessarily involves “respecting the value of human (rational) life” (ibid. 106). If people avoid the unjustifiable in this sense then they will treat one another in a way that acknowledges their individual capacities for assessing and acting on reasons. By doing right, then, they will also do good: they will give rise to a palpably desirable form of community.

The notion at the centre of this theory is that of unjustifiability to others. The theory identifies the central property of wrongness – the “normative kind” (ibid. 12) that such wrongness constitutes – with the property of being unjustifiable in that sense. Unjustifiability to others means unjustifiability-to-any-other-individual, not unjustifiability-to-others-generally. That is why the doctrine can be said to equate what is wrong with what is open to reasonable complaint on the part of any other. As Scanlon himself says: “The Complaint Model calls attention to a central feature of contractualism that I would not want to give up: its insistence that the justifiability of a moral principle depends only on various *individuals*’ reasons for objecting to that principle and alternatives to it” (ibid. 229).

The striking novelty in the contractualist approach, so understood, is that it switches the traditionally recognized priority of rightness and justifiability, or indeed wrongness and unjustifiability (Scanlon 2003: 183–7). Everyone will agree that in some sense of ‘justifiable’ any right action will be justifiable so far as it is right or because it is right. But contractualists hold that there is an interpersonal sense of justification to others such that the reverse can also be true. An action can be right because it is justifiable to others; it is right because it is allowed under the principles for regulating behaviour that no one could reasonably reject – because it is not exposed to any reasonable complaint on the part of others.

There are two important ambiguities to resolve, however, in the formulation offered of contractualism. It is important to resolve these, because otherwise the approach will seem to be vulnerable to two fairly straightforward consequentialist objections.

### First objection, first ambiguity

The first objection that may be made to the doctrine is premised on the assumption that the reasons that are supposed to move contractors in rejecting or not rejecting a principle are impersonal values such as justice or kindness or happiness or whatever. The objection is that if contractors find a principle unrejectable – and therefore the actions it disallows wrong – because of such values, then what ultimately makes the principle unrejectable is that it satisfies those values. This means, in a conse-

quentialist version of what satisfaction of values requires, that the principle has its unrejectable status because it maximizes expected neutral value.

Suppose, for example, that contractors were moved only by considerations to do with what was for the maximization of happiness overall; suppose they were consequentialists of a utilitarian stamp. In that case, so the objection goes, the right would be determined for them by reference to the utilitarian criterion. But if, by their lights, the right just was whatever maximized happiness overall, then why should contractualism suggest that it was determined rather by reference to what they, the utilitarian contractors, found reasonably unrejectable? The utilitarian criterion of right would surely be basic, the contractualist derived.

A number of authors, myself included, took contractualism under earlier formulations to collapse in this manner into an independent – most plausibly, a consequentialist – theory of rightness (Pettit 1993: 302; 1997). But though not everyone agrees (Blackburn 1999; McGinn 1999; see too Stratton-Lake 2003), I think that Scanlon's 1998 book *What We Owe To Each Other* makes it clear that his doctrine can avoid that quick collapse.

Scanlon is explicit in that book that the reasons that are to count with people in identifying unrejectable principles are "personal" reasons (1998: 219) or "agent-relative" reasons (Ridge 2001); reasons, in a phrase he takes from Allan Gibbard, that you have "on your own behalf" (Scanlon 2003: 185). As he explicitly says, "impersonal values do not provide, in themselves, reason for rejecting principles of right and wrong" (1998: 222).

Under this construal of contractualism, you or I might reasonably reject a principle for the personal reason that it would serve our interests or projects or friends badly. And while you or I may not reasonably reject a principle for an impersonal reason, we might do so on a personal basis that is tied indirectly to the impersonal reasons that weigh with us. Seeing the principle as offending against a certain strongly held impersonal value – seeing it, say, as licensing cruelty to animals – I might reasonably reject it because of the personal affront or difficulty associated with having to live with the flouting of that value: having to live as if animal pain did not concern me. "If the pain of an animal is something we have strong reason to prevent, then we have good reason to reject a principle that would prevent us from acting on this reason, by requiring us to give animal suffering no more weight than personal inconvenience as a factor affecting our obligations" (Scanlon 1998: 222).

Contractualist principles are selected for not activating any personal reasons for complaint, by this account, not for promoting the expected realization of impersonal values, or any condition of that kind. They will have to pass the hurdle of my reasonable complaint, the hurdle of your reasonable complaint, the hurdle of yet another person's, and so on. But they may do this without having any profile in the space of impersonal values. There need be nothing that characterizes them in our ways of actively representing them over and beyond the fact of that they surmount those personal-level tests.

This feature of contractualism explains why there is no room for the utilitarian possibility considered earlier. Were contractors to be moved only by considerations of happiness then, plausibly, the complaints they made would all bear on the failure of certain principles to take account of the relatively low level of happiness accruing

to them or theirs. The complaints would have a personal character, with each speaking from his or her own point of view; they would not be complaints about the failure of the principles to guarantee a utilitarian optimum.

What makes an action wrong in the sense that Scanlon targets, then, is the fact that it flouts a principle for regulating behavior that no one finds good personal reason to reject – that no one finds a good reason to complain about. What makes it wrong, in other words, is that someone is bound to have a reason to complain about it, given that it flouts such a principle. Being personal in character, the reasonable complaints that show an action to be wrong in this way may be various, being backed here on this basis, there on that. What matters to the action's being wrong – what makes the action wrong (Stratton-Lake 2003) – is not the diverse bases behind the complaints but just the simple fact that the complaints can be reasonably made. Being wrong involves being such as to occasion reasonable complaint from one or another person, on one or another personal basis. Being right involves being immune to that sort of complaint: being justifiable in that sense to others.

## Second objection, second ambiguity

In the presentation of contractualism above, it is said that an action is wrong in the central, interpersonal sense just in case it is disallowed by principles for the regulation of conduct that no one could reasonably reject as part of an informed, unforced agreement with others. A very natural way of taking that claim allows of the following explication:

An action is wrong in a situation R (for Real-world) just in case it is disallowed by principles for the regulation of conduct that no one could reasonably reject in a situation I (for Ideal-world) of informed, unforced agreement with others about how to behave in I.

This is a natural way of taking contractualism, since many of Scanlon's own formulations suggest something on these lines, and none of them rules it out. He says, for example: "An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement" (1998: 153).

To speak of the principles that no one could reasonably reject as a basis for informed, unforced general agreement is very strongly to suggest that the ideal conditions of informed, unforced agreement are relevant, not just when people are given the chance to reject a principle, but also when they implement them in their own behavior. The suggestion is that the circumstances for which the principles are to be designed, as well as the circumstances in which they are examined and selected, are ones where informed, unforced agreement – for short, cooperation – rules.

Scanlon is not alone in offering a formulation which suggests that contractualism be understood in this ideal-world way. Samuel Freeman writes in explication of Scanlon's approach, for example:

Imagine a community of free and informed agents, each of whom is conscientious, sincere and motivated by a desire to justify their actions, ends and expectations to everyone else similarly motivated. Morality is the set of public norms which such idealized persons would jointly affirm and commit to. (1998: 664)

If contractualism is taken in this way, then it is construed in a manner that makes it akin to rule-consequentialism and, on some interpretations, Kantianism. Those doctrines hold that we need to identify certain privileged rules or maxims before we can tell whether an action is right or wrong. We identify in the one case the rules such that it would be for the best overall if people were generally to internalize them or act on them or whatever (Hooker 2000); in the other the maxims such that everyone can treat them – treat them simultaneously – as general laws: the maxims satisfied by everyone in the kingdom of ends. We then say that an action is wrong – wrong in the actual, non-ideal world – if it flouts one of those ideal rules, or one of those ideal maxims, right if it does not do so.

But there is a long-standing tradition, at least within consequentialist circles, of criticizing approaches of this kind to the characterization of right and wrong action. The criticism is that while acting on a certain rule or maxim may be for the best in a world of total compliance with those principles – a world like the kingdom of ends – it need not be for the best in a world where not everyone complies: a world of merely partial compliance. It may amount in that world to a waste of effort, or it may be downright counterproductive. Let no one else do anything for the environment, for example, and it is not clear that I achieve anything other than wasted effort by making my lone attempts to be ecologically sound. Let some other people be willing to impose violence on their fellows and my eschewal of violence, admirable though it would be in the kingdom of ends, may be actively counterproductive, ensuring that there is more violence overall, not less.

The point here is quite general. The theory of the second best, as developed by economists, tells us roughly that if the fulfillment of a certain number of conditions is for the (first) best, and one or more of those conditions fails, there is no reason to think that it will be for the (second) best to have as many as possible of the other conditions fulfilled (Brennan 1993: 128; Goodin 1995). The theory implies that if everyone's complying with certain principles is for the (first) best, and one or more people fail to comply, then there is no reason to think that it will be for the (second) best that as many as possible – let alone one person on their own – should comply.

Let contractualism be understood in the idealized way characterized, and it will be open to a similar line of criticism, as indeed I have argued elsewhere (Pettit 2000a). But while I think that the idealized mode of interpretation is natural in some respects, I am now persuaded that it is not the construal intended by Scanlon. What he has in mind, I think, is better rendered in a formula that exchanges the second reference to situation I for a reference – a second reference – to situation R (Scanlon 1982: 111).

An action is wrong in a situation R just in case it is disallowed by principles for the regulation of conduct that no one could reasonably reject in a situation I of informed, unforced agreement with others about how to behave in R.

The shift here is very small but it is of great significance (cf. Smith 1994). The real-world situation may vary greatly. At one highly unlikely extreme it may involve circumstances where others display informed, unforced cooperation and comply with the principles suited to ideal circumstances. But it is much more likely to involve some others defecting, whether out of ignorance, weakness, or malice, and of course it is much more likely to be a situation where cooperation is going to require a degree of force or coercion. This being the case, the people in situation I will have to agree, not just about principles that are to rule in situations of ideal cooperation, but also about the principles that are to apply in situations where some or even all others fail to comply fully with ideal principles.

Why do I say that Scanlon adopts this real-world reading of contractualism, rather than the ideal-world version? Basically, because his comments on cases of partial compliance, if not his formulations of abstract claims (but see Scanlon 1982: 111), make clear that this is the right interpretation.

Consider what he says about the punishment of the non-compliant, for example. He suggests that the possibility of defection will be something that well-intentioned cooperators may be able to foresee, recognizing that none of them is immune to temptation and may later fall away. And so he argues that the principles that none of them is in a position to reject with reason – not from the *ex ante* point of view of intending to agree with others on principles for the regulation of behavior (Scanlon 2003: 182) – may include principles governing how they should be punished for various *ex post* failures to stick with those principles. When punished for an offence, he says, “such a person has no legitimate complaint against having this penalty inflicted” (1998: 265). The reason, presumably, is that that person would be unable to complain reasonably about such treatment: no unrejectable principle would disallow it.

Or consider again what he says in an exchange where I had asked how the principle of mutual aid would apply in a case where only one donor appears from among the ranks of the rich; I did this, because of taking him to endorse the ideal-world interpretation (Pettit 2000a). Scanlon argues that provided the burden on that person is not too great, he or she should contribute in a measure that makes up for the shortfall in the contributions of other, equally rich people:

Perhaps the most equitable principle would require these burdens to be shared in some way by all of those who are in a position to contribute. But even if this is so, it does not follow that a person who is in a position to alleviate someone's suffering is released from any obligation to do so if others refuse to share this burden. It might be reasonable to reject a principle requiring one to provide assistance when doing so would be a great burden, but this does not seem to be the case in Pettit's example. (2000: 237)

Consider, finally, a comment that Scanlon makes on a somewhat different case of non-compliance with ideal principles, where the focus is not on when cooperators may be entitled to punish defectors, nor on when they may be obliged to make up for the failure of defectors to do good, but on when they may equally be obliged to do ill – or what would otherwise be ill – in order to compensate for the evil done by defectors. He argues that it may be right to kill the innocent in order to reduce the number of overall deaths in prospect, and presumably to do this even when certain



defectors would otherwise be responsible for the deaths that occur. It may be right to extend in this way, he says, a principle that would support saving a larger rather than a smaller number of people (1998: 234).

This extension is necessary not only to handle cases involving the potential death of millions, but also to deal with more modest cases, such as the famous trolley problem, in which it is permissible to switch the trolley, thus killing one instead of letting five die. (Scanlon 2000: 238)

These comments make it plain that Scanlon intends his contractualist theory of the right to be a theory that is liable to pick out a different action as right, depending on the circumstances prevailing in the real world; or at least he intends it to do this within intuitive limits on how fine-tuned to circumstances principles may be (1998: 205). He does not envisage it as an ideal-world theory according to which the right action in any circumstance is the action that is identified as right in ideal circumstances of cooperation. And so he is not open to the consequentialist objection that where that action might have been for the best in the ideal world, it is likely to occasion very undesirable consequences in real-world situations: in particular, consequences so undesirable as to make the theory counterintuitive.

## A Theory of the Absolutely Right or the Relatively Right?

### Two readings of contractualism

I mentioned earlier that Scanlon draws a distinction between different senses of 'right' and 'wrong', in particular between the sense of those words that applies in certain interpersonal contexts and the senses that apply when we are considering what someone should do for himself or herself, or what they should do in promoting impersonal causes. Let us put aside the other senses of 'right' and 'wrong' and concentrate on the sense that he targets.

If we do this, we can still find a further distinction between two ways in which 'right' and 'wrong' may be used. One is the absolute sense, as I call it, the other the relative sense: specifically, a sense of the terms that is relativized to one or another practice. The absolute sense of the terms is that which we invoke in deeming something right or wrong, without qualification; right or wrong, period. We employ a relative sense of 'right' and 'wrong', by contrast, when we speak of what is legally right or wrong, or what is right and wrong according to etiquette. In each case we take a certain practice as given – the law or etiquette – and we use 'right' to designate what accords with the rules of the practice, 'wrong' to denote anything that is in breach of them. What is right in this sense will be obligatory if the alternatives are all wrong and it will be permissible but not obligatory if some alternatives are right too.

Taking 'right' and 'wrong' in the way projected in the contractualist formula, the next question that arises is whether they can be understood in either of these ways. There is little doubt but that Scanlon means them to be understood in the absolute manner, for he never suggests – putting aside the other senses of the terms – that what is right according to the contractualist formula might not be right, period. He

invariably takes the contractually right and wrong to represent the bottom line, as it were, in determining what is right and wrong overall.

But it remains possible, nonetheless, to read contractualism in a more modest way, as identifying a certain practice and then as presenting a formula for determining what is practice-dependently right and wrong, not what is right and wrong, period. Scanlon himself takes the interpersonal sense of 'right' and 'wrong' to be associated with "a system of co-deliberation" and he says that the moral criticism that such terms may mediate is always addressed to another "as a fellow participant in a system of co-deliberation" (1998: 268). The moral reasoning that may underlie such criticism, as he describes it, looks like an attempt to work out the rules implicit in the practice of co-deliberation and to identify what is right and what is wrong, according to those rules. He writes: "moral reasoning is an attempt to work out principles that each of us could be asked to employ as a basis for deliberation and accept as a basis of criticism."

In further support of this practice-relative reading of contractualism, it may also be worth mentioning that in another context Scanlon suggests that as the contractualist formula seeks to explicate what is right-in-interpersonal-practice, as we might put it, there is also a case for seeking out what is right-in-intrapersonal-practice: that is, what is right according to the system of prudential deliberation with myself across time. He writes:

The decisions we make at earlier stages of life have obvious consequences for the options we will have later. So the question arises of "what we owe" to ourselves at other times. . . . I trust it is clear how this might lead to a structure quite similar to the one I have defended in the case of interpersonal morality. (2003: 188–9)

How should we think of the associated interpersonal practice, if we construe contractualism as a more or less modest attempt to identify what is right and wrong according to the practice? One way might be as the practice of deliberative exchange in which we engage when we seek to influence one another but only so far as we can present reasons that others should endorse, by their own lights, and do in fact come to endorse; in particular, only so far as we can do this without reducing the options that others face – without resorting, for example, to threat and coercion.

I have argued elsewhere for the centrality of deliberative exchange in social life. Michael Smith and I sum up the characterization of that practice as follows (Pettit and Smith 2004; see also Pettit 2001a: ch. 4). Deliberative exchange occurs just so far as:

- the parties sincerely communicate their beliefs, openly seeking to get one another to recognize and share them;
- the communication is intended as an epistemic exploration of one another's reasons for believing or doing various things, individually, reciprocally, or collectively;
- there are no vitiators present, so that any avowals of attitude – any commitments – are inescapable under the rules of the practice: only a later change of circumstances can excuse non-compliance.

This sort of practice has associated rules of participation – rules that must be respected for the practice to occur – and rules of compliance: rules governing how people should behave in the light of their communication within deliberative exchange. Intuitively, for example, the rules of participation outlaw force, manipulation, deception, coercion, and intimidation in the practice of deliberation with others, and the rules of compliance outlaw failures to live up to commitments made within exchange with others, where circumstances are as envisaged at the time when the commitments were made.

Although Smith and I did not make this move, it is also reasonable to suppose that the practice of deliberative exchange dictates rules governing how we should respond to failures on the part of others to conform to what we take to be the relevant rules. Such regulative rules, as we may call them, would spell out the responses that are consistent with keeping the possibility of a return to deliberative exchange open. They might require that others are given a chance to explain themselves, for example, or the chance to apologize, before any punishment is imposed. And they might outlaw vengeful responses of punishment, but allow responses of a more measured kind.

Assuming that a practice of this kind is in operation among people, we might cast contractualism as an attempt to work out and systematize the relevant rules of deliberative participation, compliance, and regulation. We might think of it as a project of explicating, not what is right and wrong period, but what is deliberatively right and deliberatively wrong, where ‘deliberatively’ operates like ‘legally’ in talk of legally right and legally wrong. On this construal, the contractualist formula can be seen as a nice way of summing up the sorts of rules that bind us, by our own intuitions, so far as we are engaged in deliberative exchange with others.

As I said earlier, I do not think that Scanlon ever thinks of his contractualism in this relativized and modest fashion. He takes it, more radically, to offer us a theory of the absolutely rather than the relatively right – though the absolutely right only in the interpersonal sense of the term. He takes it, in answer to the title question of this chapter, to ground moral theory, not just to have the derivative place within it that the relativized account would offer. But I do believe that the relativized construal points us toward quite an interesting version of contractualist doctrine.

There are three reasons for thinking this. The first is that the relativized construal represents contractualism as the explication of a significant human practice, not just a practice of passing interest; the second that it represents it in a way that makes it consistent with consequentialism; and the third that it represents it in a way that compares well with Scanlon’s own representation.

### An explication of a significant practice

One reason for taking the relativized construal of contractualism to be interesting is that deliberative exchange lies at the centre of human life and interaction. This appears in the fact that, short of going straight to threat and intimidation, I can hardly open my mouth in addressing another without activating an assumption – and so without having to acquiesce in the assumption – that I am bent on deliberative exchange with my addressees. Just by making an innocuous remark or asking an ingenuous question I will activate the assumption that I am meaning to communicate sincerely, in a

spirit of exploring reasons, and without relying on any inhibiting, intimidating or other vitiating effect (Pettit and Smith 2004).

Whatever my actual intentions, then – and these may be to deceive or manipulate or whatever – I can hardly address others without having to accept that I am subject to the jurisdiction of deliberative exchange. I will have to accept, for example, that should I deviate I will be judged according to the rules of deliberative practice and that I will not be able to declare those rules irrelevant when they are invoked in condemnation of my behavior. Any alleged breach of the rules in my mode of participation, in my compliance with commitments undertaken, or in the way I respond regulatively to breaches on the part of others, will be interrogated for whether it is in tune with deliberative practice and will be indicted if it is not. And I will not be able to claim indifference to the indictment, so far as I will have acquiesced earlier in the presumption of intending deliberative exchange.

### An explication consistent with consequentialism

Another reason for thinking that the relativized construal of contractualism is interesting is that it leaves open the possibility of a particularly plausible consequentialist accommodation (Pettit 2000a). Consequentialism is a theory of rightness according to which the right option in any choice – any choice of action or principle or motive or a mix of these (Pettit and Smith 2000) – is that which promotes impersonal value in whatever is taken to be the relevant sense: in a common version, that which maximizes expected impersonal value. The consequentialist accommodation that I have in mind would argue that the practice of deliberative exchange promotes impersonal value in a high degree and for that reason people should routinely immerse themselves within it.

Why might it be important, from a consequentialist perspective, that the practice of deliberative exchange prevail in human life? Because the world is a much better place, and we are a much more fulfilled species, for the fact that deliberation reigns amongst us, where indeed it does reign. That is to say, because people’s generally conforming to the practice of deliberative exchange – like their generally conforming to the institution of friendship – has extremely beneficial consequences. This connects with the sort of consideration mentioned by Scanlon when he says that a reason for sticking to choices that resist reasonable complaint on the part of any other is that this necessarily involves “respecting the value of human (rational) life” (1998: 106). If people behave in deliberative or deliberation-friendly ways, so his thought goes, they will treat one another in a manner that acknowledges their individual capacities for assessing and acting on reasons. By doing right, as he construes what is right, they will also do good: they will give rise to a desirable form of community.

But once we construct Scanlon’s insight in this way, then it appears that we can easily find a way toward a consequentialist accommodation. It is a long-established consequentialist observation that the best prospect of making choices which maximize expected impersonal value is associated with following decision-making procedures that are localized and restrictive (Railton 1984; Pettit and Brennan 1986). Since being a friend is inconsistent with calculating about each and every response that you make to a friend’s overture, for example, and since friendship is a highly bene-

ficial practice, the consequentialist is likely to think that in most circumstances people should simply conform without any further thought to the demands of friendship; in such circumstances, they should put themselves under the control of the institution of friendship – ultimately under their friends' control – confident in the belief that that is almost certainly for the best. Such people will not live and behave like friends because that is for the best: like everyone else, they will be moved by the natural inclinations that sustain friendships. Their recognition that behaving like a friend is for the best will explain, not their acting out of friendship, but rather their not seeking to eliminate or restrain their friendship-related inclinations. They act out of friendship with a clear, consequentialist conscience. But while that conscience monitors their behavior, it does not motor it (but see Scanlon 2000).

The model on which consequentialists are likely to think of friendship gives us a model on which they can also think of the practice of deliberative exchange. If Scanlon is right, then just as we have a natural inclination to favor friends, so we have a natural inclination to put ourselves in the right with others: to be able to justify what we do in a way that should silence reasonable complaint. Just as consequentialists can argue, then, that the normal practice for people should be to give way to their inclinations of friendship, so their normal practice should be to allow their desire for such justifiability to others – such deliberative coexistence – to shape the ways in which they behave toward others in general. As consequentialists would want people to put themselves under the pilot of friendship in most relevant circumstances, so they would equally want them generally to put themselves under the pilot of deliberative exchange. Indeed, they are likely to think that the practice of deliberative exchange is much more important than friendship in this way, since it would be intuitively for the bad to allow the demands of one's friends to justify breaches of deliberative practice in one's dealing with others.

### An explication that compares well with Scanlon's

The consequentialist accommodation suggested would leave intact a single sense of 'right' and 'wrong' – that is, absolute right and wrong – identifying this with the idea of maximizing expected impersonal value. It would argue that it may usually be right to do whatever turns out to be required under deliberative practice, as it would argue that it may usually be right to do whatever is required under the practice of friendship. It would argue indeed, as we just saw, that conformity to such practices should normally be quite automatic. But still consequentialism is going to allow that practice-relative requirements should indeed be flouted when, as it appears, abiding by them is not for the best overall. And so it would require that agents who engage in these practices should give themselves the right to review their behavior occasionally just to make sure that it is for the best; and that they should certainly review it in any instance where the red lights go on: where there are signs that by acting in a deliberatively proper way toward some, they may bring about bad consequences overall.

None of this seems outlandish, however, for it is entirely plausible that there are cases where the demands of deliberative exchange may have to be breached, however reluctantly, as there are cases where the demands of friendship will have to be

breached. It is said that a friend will help you move an apartment, a good friend help you move a body; but this is a joke precisely because there are intuitive moral bounds on what can be asked in the name of friendship (Cocking and Kennett 2000). What is true of friendship is going to be true, though perhaps not so often, of deliberative exchange. Someone who absolutizes the demands of the practice – as we can take Scanlon's contractualism to do – will have to think that those demands carry even in some cases where this is not for the best overall, since otherwise the doctrine will collapse into consequentialism. And it is surely plausible in such cases to demur, as consequentialists will demur, and argue that no, this is where the demands of deliberative exchange run out.

The consequentialist picture compares favorably, I think, with Scanlon's own picture. It keeps a single sense of 'right' and 'wrong' in place and argues that the demands of practices such as friendship and deliberative exchange, like the demands of intrapersonal prudence and impersonal benevolence, are all important, but none definitive, in determining what is right and what is wrong. Acknowledging that there are clearly some cases where we judge of what is right without reference to interpersonal, deliberative demands, Scanlon asserts that there is no single sense of 'right' and 'wrong' and that we have to live with "the fragmentation of the moral" (1998: 171). We have to think of 'interpersonally right', 'intrapersonally right' and 'impersonally right' as terms that direct us to quite different properties, and properties that do not add up or balance in any further argument as to what we ought to do, period.

This fragmentation is justified by Scanlon on the grounds that the different senses of 'right' pick out a 'diverse set of values'. But he acknowledges that in determining what is interpersonally right, we often have to balance very different claims by different people, and presumably he would acknowledge that there is a similar diversity of claims or values relevant to determining what is intrapersonally or impersonally right in a given context (Wallace 2002). So why is the diversity in the one case allowed to argue for fragmentation, but in the other case not? Why in particular is this so, given the moral indeterminacy to which we become committed once we allow the word and concept 'right' to multiply into unadjudicably different terms?

It would make much more sense to allow, as consequentialism allows, that in making up our minds as to what we ought to do, 'right' refers to the option that we take to be what we ought to do: what we ought to do overall, abstracting from the variety of considerations we may have had to take into account in our reasoning. If we were to take this line, then we could think of the interpersonal considerations to which Scanlon draws attention as having a particular importance in determining what is right overall – this, because of the importance of deliberative exchange in human life – but we would not have to insulate them behind a proprietary sense of the word 'right', protecting them from comparison with the other considerations that will often also be relevant in determining what we ought to do.

To sum up, then, the difference between the two explications of contractualism rehearsed here turns on how it is to make room for the fact that considerations that are not of an interpersonal kind often move us in judging about what we ought to do: what, as we say, is right. The modest version that I like would put a single sense of 'right' in play – in my own view, it ought to do this with a consequentialist sense of 'right' – and argue that different sorts of considerations, interpersonal and other-



wise, may be relevant to the judgment as to what is right in that overall sense. The radical version that Scanlon prefers would say that one sense of 'right' answers to the interpersonal considerations, other senses to other considerations, and that there is no further base from which we can adjudicate between the demands of these different senses of 'right': these different properties. But it is unclear why he feels obliged to go that way, since the diversity he invokes in explanation is not confined to this area. And given the moral indeterminacy that plural senses of 'right' occasion, it is unclear why he is willing to pay the high price of taking such a path.

## A Complete or Partial Theory of the Right?

Let us suppose, however, that we go along with Scanlon and adopt his more radical reading of contractualism as a theory of what is absolutely right – right in the interpersonal sense of the term – not just right according to a practice. Does this mean that there is no room left for the possibility that it is consistent with consequentialism? I argue in this section that it does not. Were contractualism in this sense sound, it would still have to be construed so as to leave open the possibility that there is truth in consequentialism; it would call on a second front for a modest rather than a radical reading. The modest reading would construe it as a partial theory of the right and the wrong, the radical as a complete theory (cf. Pettit 2000b).

As we use the terms 'right' and 'wrong' in ordinary language, we load them with a variety of connotations. Plausibly, for example, we expect any option that deserves to be called 'right':

- to be an option that we desire or would desire in the absence of failures of will;
- to be an option that we would be prepared to prescribe for any agent, not just ourselves, in the situation on hand;
- to be an option that has rightness-making properties of a familiar kind, such as fairness or kindness or just being for the best;
- to be an option that virtuous agents might choose;
- and of course to be an option that we could justify to others, being able to answer any objections they might make.

Any philosophical theory as to what rightness is will seek to marshal such connotations (Jackson and Pettit 1995; Pettit 2001b). It must select out the allegedly crucial candidate or candidates and try to show that they on their own capture the essential character of rightness: they explain the "observed normative features," as Scanlon (1998: 12) puts it, of the property. Thus an 'impartial-spectator' theory will say that the right option in any choice is that which we, were we ideally situated, would want ourselves to perform in the situation in question. A theory like R. M. Hare's (1981) 'prescriptivism' will maintain that it is the option that we would be prepared to prescribe universally, recommending it for any arbitrary agent; the fact that Hare is a non-cognitivist about judgments of right makes for a complication that I shall ignore here. A consequentialist theory will hold that it is the option that best

promotes neutral goods or values: say, fairness and kindness and happiness and so on (Pettit 1997). And a 'virtue-ethical' theory might declare that it is the option that would prove eligible for the virtuous agent. Each of these theories orders the ordinary connotations of the word 'right' in different ways: it gives axiomatic status to one or more connotations and – assuming it is not a revisionary doctrine – derives other plausible connotations as theorems.

The theories mentioned are all familiar stories about the nature of rightness and under the interpretation of contractualism as a theory of what is absolutely right, it constitutes a further story in this vein: a rival axiomatization of rightness and, more fundamentally, wrongness. Among the connotations of rightness, it privileges the linkage with justifiability – specifically, with justifiability to others in the sense characterized in the first section – and argues that all we know and need to know is that in the relevant interpersonal sense of the term, rightness is justifiability, justifiability rightness.

The fact that contractualism is a theory of rightness in this sense, however, is quite consistent with its not being a complete theory of rightness and, more specifically, with consequentialism supplying the complementary component required for a full theory. The point is best appreciated by considering the approach taken by Hare, with its particular connection to consequentialism.

Hare (1981) argues that we should think of the right as that which proves to be universally prescribable. I see an option as right just so far as I am willing to prescribe it for anyone in that situation; and this, no matter how I am positioned in the situation, and no matter how the action will impact on me. He axiomatizes the connotations of rightness, in other words, so that the second connotation on the little list given becomes the most prominent one. But though Hare embraces this prescriptivist approach as a theory of what rightness is, he goes on to argue that at another level it gives support to a preference-based utilitarianism – that is, a species of consequentialism.

He argues that if we think about whether a given action is universally prescribable, we must take account of the preferences of everyone affected; we have to be willing to prescribe that an arbitrary agent perform the action, after all, no matter what position we occupy. And he insists that if we do this, we are bound to find only those actions prescribable that maximize the expected preference-satisfaction of those involved (for a critique, see Pettit 1987). His idea is that the test of universal prescribability is a filter that will only let certain types of action through and that we can see, as a matter of a priori argument, that the only types that are going to pass through the filter are those that maximize expected preference-satisfaction. His prescriptivism is an upstream theory, as it were, and it gives support in this way to a downstream consequentialism: specifically, a downstream utilitarianism.

As it is with Hare, so it may be, for all we have seen, with the contractualist theory as to what constitutes rightness, or at least rightness in the interpersonal sense. Take the contractualist test of looking at the options that would survive reasonable complaint on anyone's part: the option that would not be disallowed under any principle for regulating behavior that no one could reasonably reject. Why can't we treat that test, on the model of how Hare treats his test, as a filter that we may expect to sift out options with a certain independent character: a character that makes them fit

to survive reasonable complaint? And why then shouldn't we be open to the thought that as we survey the actions likely to survive reasonable complaint, we may find reason to think that they will have a certain consequentialist character?

The suggestion is not, notice, that there is a quick argument to this conclusion, as there might be under the first objection considered in the opening section. That objection was that the potential complainants we envisage will always base their complaints on considerations of impersonal value and that anything that survives those complaints, therefore, will do so by serving the cause of impersonal value: say, in the consequentialist formula, by maximizing the expected realization of such value. The response to that objection was that people are only allowed to complain about actions and principles on the basis of personal reasons – reasons that they hold on their own behalf.

But consistently with complainants only being allowed to invoke personal reasons in rejecting a principle for the general regulation of behavior, it may still be the case that the principles and actions that are going to be proof against reasonable complaints must have an independent character; that character would explain why precisely they are proof against complaint. And it may still be that the independent character that they have is of a consequentialist cast. In other words, it may be that from contractualism as an upstream theory we may hope to be able to derive a downstream consequentialism.

There is good reason to think that those actions that receive a contractualist blessing must indeed have an independent character, though no ready argument for why that character must be consequentialist. Consider the contrast between the contractualist formula and the majoritarian formula – as it happens, an objectionable one – according to which an action is right if and only if it has majority support among those in the society where it occurs. It is clearly possible for just about any type of action to pass the majoritarian test, given the assumption that there's naught so queer as folk, in the old Yorkshire saying, and that there's no saying in advance where the folk may go. Thus it may be that the only commonality to be found in the various actions that satisfy the majoritarian formula will be that, well, they satisfy the formula. Their each being endorsed by the majority may be the only property that they possess in common. There may be no character that they have, independent of that property.

Might something similar be true of the options that pass the contractualist test? Surely not. What is required of those options is not just that they should happen to escape complaint as a matter of fact, but that they should be proof against complaint, in particular reasonable complaint. But how could they be proof against reasonable complaint without their being complaint-proof in virtue of their inherent nature? After all, there must be something about the options, some independent character, in virtue of which no one can raise a reasonable complaint against them.

Won't that independent character, then, be the ultimate ground or explanation of their being right options to choose? Won't it be a property that unites right options at a more basic level than that at which they display contractual, counterfactual unity: the unity associated with the fact that no one could reasonably object to them? The word 'right' may be used of those option-types because of their contractual unity – it may be, for all we have said, that this is what guides ordinary speakers in the use of the term – but it will still be the case that contractualism is not the whole story

about rightness. A full understanding of this normative kind will force us beyond the limits of contractualist theory, as Hare would have argued that a full understanding of rightness forces us beyond the bounds of prescriptivist theory.

Just to illustrate the point, suppose that ordinary people were like the contractors we imagined in the first section, being disposed to treat as reasonable all and only complaints that this or that principle, this or that option-type, would reduce the complainant to a relatively low level of happiness. People would not think of the principles they were reasonably disposed to reject in any common, impersonal terms, as utilitarians might do; they would each make their complaints on a personal, particularistic basis. But still, the principles or options that prove immune to their diverse, personal complaints would prove immune in virtue of an independent character; it is that character that would explain why they and they only enjoy such immunity. Can we say anything about that character? We certainly can. On the supposition with which we are working, the complaint-proof principles and option-types would have in common the fact of ensuring a certain relative level of happiness for the worst off in the population: a level that would silence complaint even from those in that quarter. Did people in that society not recognize this feature of the options regarded as right amongst them – were they sensitive only to the contractualist truth that obtains in the scenario imagined – then there would be something important that they were missing in their understanding of rightness.

Does this line of reasoning establish definitively, then, that contractualism is at best a partial theory of rightness? Does it demonstrate that contractualism calls or at least allows for supplementation by a theory – perhaps a downstream consequentialism, perhaps a downstream non-consequentialism – that identifies the independent character of rightness? Not quite.

Contractualists might say in response that while there is always going to be an explanation as to why any particular category of option, A, is complaint-proof – it will consist in the character of the A-option in question – there need not be any general explanation as to why options in categories A, B, C . . . are complaint-proof. There may be no independent pattern in the different categories of option, and the associated principles, that pass the contractualist filter. The A option-type may prove complaint-proof because of having an independent a-character, the B-type because of having an independent b-character, and so on. Yet there need be nothing in common to those characters: nothing binding them into a pattern (cf. Jackson et al. 1999).

This response cannot be right, however. Presumably it is by thinking about the possible realization of this or that option-type, independently characterized, that you or I or a third party is put in a position to determine, however fallibly, that no one could reasonably object to it: the type is such that we can envisage no objection that would count as reasonable. But this means that in principle we should be capable of reviewing the various option-types relevant and of fixing on the character shared by those types to which we can imagine no reasonable objection. The character shared may be disjunctive, of course, if there really is nothing in common between the feature that makes one option-type right and the features that make others right. But that disjunctive character won't matter so long as there is only a finite number of suitably distinct option-types on offer, as will presumably always be the case. The dis-

junction that tells us that right option-types are of an a-character, a b-character . . . or an n-character, up to finite 'n', will still be informative. It will still represent a way of understanding the normative kind associated with the predicate 'right' that increases the understanding available from the contractualist formula alone – assuming, as we have been doing in this section, that that formula is sound.

What sort of understanding will this independent, possibly disjunctive characterization of right option-types provide? It will give us an insight into the substantial "suchness" that we are directed to when we are told that an option-type is right if it is *such* that no one could reasonably object to anyone else's enacting it. There may be no substantial suchness shared by all the measures that are such as to attract or to have attracted majority support, given people vote in any old way. But there is bound to be a substantial suchness shared by those option-types that are such that no one could reasonably complain about them. It is going to be that suchness, that inherent character, that explains why they resist *reasonable* complaint. It is going to be that suchness that unites right option-types in themselves, explaining the unity that they have in relation to us: the unity which consists in the fact they resist reasonable complaint.

When asked about why a given type of option is right by contractualist lights, of course, we will not give a disjunctive characterization of right options in response; we will provide the characterization appropriate to the relevant disjunct, pointing to the a-character for the A option-type, the b-character for the B option-type, and so on. But that is not because the disjunctive character is irrelevant in the general characterization of rightness; it is only because, when a question is raised about any particular case, the better, more informative explanation will naturally take us to the disjunct that applies there.

Assuming that contractualism is intended as an absolute theory of rightness – rightness in the interpersonal sense of the term – and assuming that it serves well in this role, how damaging is the claim that it cannot be a complete theory: that it calls or allows for supplementation by an independent characterization of right option-types? The claim is consistent, as already mentioned, with conceding that what guides ordinary people in the use of the word 'right' – what provides the nominal essence of rightness, as it were (Pettit 2000b) – is a sense that the option-types to which it is applied satisfy the contractualist formula, being such as to resist reasonable complaint. And it is consistent with thinking that we do better in reflecting on practical questions of ethical judgment to concentrate mainly on where that formula leads; doing this may be heuristically more valuable than trying to extrapolate from the inherent character of option-types that we do regard as right or wrong. In these ways, then, the partiality of contractualist theory will not matter greatly.

Where it will matter, however, is in consideration of the question raised in the title of this chapter. It will mean that there is a sense in which the fact that an option-type is morally right is grounded, not merely in the subjunctive fact that it would resist reasonable objection, but in the categorical fact that it is of a certain independent type: the type that ensures it would resist reasonable objection. It is because right option-types have that categorical character that they would resist contractual complaint, even if it is the fact that they resist such complaint that prompts us to think of them as right.

There is an important sense, then, in which the normative kind associated with rightness will not, contrary to Scanlon's claims (1998: 12), be fully and properly characterized in contractualist terms. Contract theory identifies a role that right option-types will play, parallel to the role of being universally prescribable that Hare privileges; this is the role of proving immune to reasonable complaint. But it tends to ignore the issue, presumably amenable to philosophical, a priori specification, of what sort of property fills or realizes that role; it offers nothing akin to what Hare provides in his downstream utilitarian claims. Thus there is a sense in which contractualism does not take us to rock bottom. Under the absolute construal of the doctrine that Scanlon endorses, as under the relativized construal that I myself find attractive, contract theory fails to provide a complete grounding for morality.

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### Acknowledgment

My thanks to Jamie Dreier, Nic Southwood, Michael Ridge, Tim Scanlon, Michael Smith, and Jay Wallace for very useful comments on an earlier draft of this piece.

# Are the Virtues the Proper Starting Point for Ethical Theory?