Rights and Circularity in Scanlon’s Contractualism

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In The Difficulty of Tolerance, T.M. Scanlon has at long last collected many of his influential essays in political philosophy. The collection includes his ‘Contractualism and Utilitarianism’, as well as other essays whose ideas are further developed in his recent book, What We Owe To Each Other. But the presence of this essay chiefly highlights the relatively minor role the thesis of contractualism has in the main lines of Scanlon’s political thought. Far more prominent is his ‘instrumentalist’ conception of rights, which he applies with rich supporting detail to freedom of expression, as well as to due process, freedom of religion, rights to privacy and human rights.

This may seem puzzling. If contractualism is correct, should not questions about rights give way to questions of what, more generally, is right? Should not reasoning about rights be supplanted by the reasoning specified by the contractualist formula—reasoning, that is, about what could be ‘reasonably rejected’?

In fact, as I will highlight in this brief discussion, reasoning about what could be reasonably rejected partly depends on an instrumental conception of rights. Or, rather, reasoning about what could be reasonably rejected, if it

* I am grateful to Philip Nickel for his comments on this article.
1. Parenthetical or otherwise unspecified page references are to this work.
3. Aside from ‘Contractualism and Utilitarianism’ (ch. 7), the contractualist thesis only has a prominent role in ‘Promises and Contracts’ (ch. 13).
4. Scanlon’s has reservations about the label ‘instrumentalist’ (p. 4), because it suggests a form of consequentialism he now rejects. I will keep it, with the stipulation that it does not entail consequentialism.
5. See chs. 2, 3, 5, 6 and 8.
6. See below for the formula’s full formulation.
is to have any relevance to contractualism, must be framed or structured by the kind of independent concrete, case-specific reasoning that Scanlon provides in developing his instrumentalist conception.

In part, this dependence is important because it bears on the familiar objection that contractualism is ultimately either ‘circular’ or ‘empty’. I will return, in closing, to this objection.

**Structural Analysis**

According to Scanlon, arguments about rights occupy a position intermediate between ‘the level of policy’, at which the overall desirability of an action or policy is considered, and the ‘foundational level’, at which the ultimate sources of justification are identified. Scanlon summarizes this intermediate, ‘instrumentalist’ conception of rights as follows:

> To claim that something is a right...is to claim that some limit or requirement on policy decision is necessary if unacceptable results are to be avoided, and that this particular limit or requirement is a feasible one, that is, that its acceptance provides adequate protection against such results and does so at tolerable cost to other interests. (p. 99)

What sort of analysis is this? Scanlon offers this as a ‘framework’ for reasoning about rights of particular kinds. In more general terms, it is what I will refer to as a *structural analysis*. The goal of a structural analysis, in general, is not to deliver first-order moral conclusions (in this case, conclusions about what rights we have) without aid of interpretation and judgment. It is precisely to specify the kinds of empirical and normative judgments that any reasoning under the moral concept in question (the moral concept of rights) must draw from. The merits of a structural analysis will depend, first, on how perspicuously we can explicate, solely in the terms provided, ‘easy cases’ of the moral kind in question (familiar civil and political rights); and, secondly, on whether the terms provided offer guidance in the ‘hard cases’, at least by helping us to see why the kinds of judgments required make the hard cases hard.

It is tempting to think that Scanlon’s account of rights must be either circular or empty. His analysis has no immediate implications for which rights we have, without further normative judgments about what results are ‘unacceptable’ and which costs are ‘tolerable’. It may therefore be claimed, for example, that what is unacceptable is tolerating the violation of people’s moral rights, say, by trading off benefits required by their rights as a means to benefiting others. But in this case, rights do arise at the ‘foundational level’, and the analysis is circular, because it depends on the moral notion it is supposed to explain. Alternatively, one might insist that results are unacceptable and costs tolerable if and only if they combine to maximize overall happiness. But in this case, ‘rights’ are justified at the ‘level of policy’, and the analysis is empty, in the sense that it is compatible with
utilitarianism, a view normally thought to reject genuine rights.

The answer to these objections lies in closer examination of what a structural analysis of rights is supposed to accomplish. Inserting rights into the foundational level of justification, as suggested, is arguably unsatisfying as a structural analysis. This does not provide any general characterization that might guide reasoning about what rights claims are justified in hard cases. Since the aim of a structural analysis is to provide such guidance, however, we can simply forbid direct appeal to rights and assess the resulting account based on how well it guides reasoning under this prohibition. Such reasoning might still include rights-like elements. Scanlon assumes, for example, that we can identify important classes of interest, which, unlike, say, morally irrelevant preferences, are eligible as grounds for limits on policy and other decisions. Eligible grounds are not rights, however, and Scanlon allows, with the utilitarian, that even important interests will not demand protection when this is intolerably costly. On the other hand, this is far from allowing utilitarian aggregation, as suggested above. As a structural analysis, this would be premature. For it might instead turn out that different contexts require different balancing tests. If utilitarian balancing is a structural feature of any reasoning about rights, this must emerge from interpretation of particular cases. We first need to plausibly specify the relevant facts of both easy and hard cases within the proposed structure. Only then can we ask, as a further question, whether utilitarian balancing is in every case appropriate.

The Role of Institutions

Any structural analysis faces two opposing demands. First, since it cannot be tailored ad hoc to particular cases and retain any claim to guide reasoning, there is pressure toward greater generality—generality, at least, across all cases falling under the moral concept being analyzed. Scanlon’s account faces little danger here. It invites the charge of being either circular or empty precisely because it is quite general. But second, there is also pressure toward greater specificity. For the more a structural analysis calls for judgment in particular cases, the weaker its claim to guide reasoning in any useful and interesting way.

I think Scanlon’s instrumental conception of rights can be reconstructed in somewhat more specific terms, by emphasizing the central role it (implicitly) assigns to institutions. The occasion for speaking of rights arises when there exists an institution or social practice of a specifiable kind, K, which is generally recognized and believed to exist for the sake of certain legitimate purposes, G. Insofar as K characteristically threatens certain important interests, as most institutions in one way or another do, it stands in presumptive need of justification. To claim that something is one’s right,

against K, is to claim that K must, in order to meet its burden of justification, implement some effective special protection P. It must do so because such protection is feasible. That is to say, first, P does not hinder K from fulfilling its legitimate goals G; and second, any further costs P creates satisfy any appropriate balancing tests (they are fairly distributed, not excessive, and so on; the costs are ‘tolerable’).

On this reconstruction, institutions have at least three distinct roles. First, institutions shape the content of a right, what it is a right to. Rights are not merely claims to states of affairs (e.g. having food, being free from harm), but to institutional protections, in the form of constraints or requirements on what specified agents can do or take as reasons for action, which curb or reduce ways the institution in question characteristically threatens certain important interests. In Scanlon’s words, ‘rights do not promise to ensure the full realization of the values with which they are concerned, but only to ward off certain serious threats to these values’ (p. 158).

Second, and relatedly, the target of a right—what or whom it is a right against—is always an institution or social practice, of a particular kind. It is not, for example, a right against anyone able to promote the interests rights are designed to protect. Even the human right not to be tortured is not a right against anyone that might intentionally cause one certain harms, but a right against government institutions (to relevant institutional protections). As Scanlon puts the point, ‘The recognition of a human right against torture reflects the judgment that the temptation to rule in this manner is a recurrent threat and that the power to use torture is a power whose real potential for misuse is so clear as to render it indefensible’ (p. 117).

Third, the nature and purpose of an institution can shape the kinds of arguments that need to be made in order to claim that effective protections against characteristic threats are one’s right. The ‘nature and purpose’ of an institution is given by ‘some conception of the social goods the institution is taken to serve and of the way in which the authority exercised by participants in the institution is rationally related to these goals’, which is ‘generally accepted as legitimate’ (p. 50). Although appeal to such a conception can often be controversial, it is, Scanlon suggests, open to rational argument and in some cases supports persuasive political arguments. As Scanlon illustrates, ‘a labor union could not use its power of expulsion to collect dues to be used to support a particular religious group but…it could, at least in some cases, compel dues members to pay to support a political candidate or party’ (p. 51).

This third feature may seem most problematic. Consider it in greater detail. The fact that appeals to the nature of an institution can be controversial helps to explain why there is often controversy about the content of certain classes of rights. On Scanlon’s account of rights to due process, what kinds of procedural safeguards a kind of institutional authority is required to follow depends on the nature of the authority in question, on the social goals in virtue of which powers associated with the form of
authority are valuable and necessary. Thus, the judgment of a court that
due process has been violated, because, say, powers assigned to the
legislature or an administrative office ‘exceed’ the authority required by its
legitimate social purposes, must take some position about what the
legitimate purposes and required means are. Since such judgments are
particularly open to differences in interpretation, they are particularly
controversial.

Ideas about the nature of government may partly explain Scanlon’s shift
away from a purely autonomy-based justification of freedom of expression,
which forbids under most conditions any regulation of expression that takes
as its reason the fact that free expression creates certain harms (see ch. 1; for
the shift, see chs. 5 and 8). As Scanlon points out, however, laws against
deceptive advertising are usually seen as unproblematic (p. 96). In other
words, it is ordinarily believed, without clear implausibility, that the
legitimate government purposes of protecting citizens against harm can
include protection against harm that requires the careful abridgement of
speech (even when the possibility of justified paternalism is not at issue).
The right to freedom of speech is nevertheless justified, according to
Scanlon, on more complicated grounds. Restriction of speech of particular
kinds, such as political speech, threatens various important interests, and
where political speech is concerned, governments are ‘notoriously partisan
and unreliable’ (p. 98). That is to say, use of assigned institutional authority
by the party in power for political gain does not serve the legitimate public
aims in virtue of which authority of the kind in question is justified.

Of course, appeals to purposes of an institution can be most overt in
argument for the suspension of rights. For instance, it is because security is a
central and clearly legitimate aim of government that arguments for the
curtailment of civil liberties, in order to protect against terrorist attacks, say,
can be particularly persuasive in political argument. For much the same
reason, however, the strongest line of defense against appeals to security can
be to show that people are no safer when civil liberties are curtailed, and so
that their curtailment serves no clearly legitimate aim.

What this brings out is that, although the role of feasibility can seem to
soften the idea of a moral right, it in fact creates a strong burden of
justification. In order to justify the removal of restrictions on a form of
institutional authority, when this poses significant threats to important
interests, one must show, first, that this serves some definite legitimate

8. Although in this essay, his early paper ‘Due Process’, Scanlon goes on to say that
‘arguments by appeal to the nature of an institution occupy a kind of gray area between
considerations of rights and considerations of good policy’ (p. 51). I am suggesting, more
generally, that such appeals are central to the idea of a right. Scanlon made this comment,
however, before he repudiated the consequentialist framework in which he first proposed his
instrumentalist conception. (For the consequentialist version, see ‘Rights, Goals, and
Fairness’, ch. 2. For comment on his repudiation, see pp. 3-4.) As I have suggested, the
institution orientation of the account is clearer in later essays.
purposes; and, second, that, in fact, no other means are available. This is a heavy burden of justification, because both conditions must be met. Even if legitimate goals such as security can be identified, a clear specification of their content may show that it is not truly necessary to relax special protections. In other cases, greater authority might be clearly essential for certain goals, but none that are clearly legitimate. For example, although any government requires powers of search, seizure and detention, it is unclear and highly doubtful that any legitimate government aim requires such powers to be substantially unrestricted. Why should anyone but the tyrant or the dangerously zealous ideologue complain of procedural constraints?

It is an advantage of the reconstruction I have suggested that, in calling merely for the ‘appropriate balancing tests’, we explicitly bracket the question of what the appropriate balancing test is. The analysis draws our attention, instead, to other relevant features of a given case, such as the relation between characteristic threats and the legitimate goals of an institution. This makes Scanlon’s account of rights more specific as a structural analysis. One important consequence of this is to rule out the possibility of non-institutional rights. Aren’t there such rights, even in Scanlon’s own view? If I make you a promise, then you have ‘right to rely’ on me for its fulfillment. According to Scanlon, my requirement to keep my word arises merely because I have given you expectations about my future conduct, something I might do and be obligated by even in the absence of institutions or social practices (ch. 13). Does this show that my institutional reconstruction of Scanlon’s account is too narrow?

This question brings us to what might be called the ‘escape valve’ of any structural analysis. Such an analysis seeks only to specify features that structure any reasoning under a particular kind of moral concept. So when the quest for greater specificity rules out cases (as the institutional reconstruction rules out cases of non-institutional rights), one can simply argue that the cases ruled out are of a different moral kind.9 Thus, one may argue—as I think Scanlon would—that a ‘right to rely’ on someone’s promise is not really a bona fide right, or at least not a right in the core sense associated with the familiar array of civil, political and human rights.10

Is Contractualism either Circular or Empty?

The thesis of contractualism is that judgments of right and wrong, in the

9. This is essentially Scanlon’s move in narrowing the scope of his theory to the domain of ‘what we owe to each other’. He then has no need to deny that judgments of moral wrongness of some kinds are not supported by contractualist reasoning. See What We Owe, pp. 171-87.

10. Notice that, in his discussion of promises (ch. 13), Scanlon consistently uses the phrase ‘right to rely’ in scare-quotes, suggesting hesitation as to whether it is a right in the central sense.
sense concerned with ‘what we owe to each other’, are judgments about ‘what would be permitted by principles that could not reasonably be rejected, by people who were motivated to find principles for the general regulation of behavior that others, similarly motivated, could not reasonably reject’. It is commonly objected that this is, in one way or another, ultimately either ‘circular’ or ‘empty’. I have suggested that Scanlon’s account of rights is open to a similar kind of charge, and that the answer lies in viewing that account as a structural analysis. The objection is no more successful as applied to the contractualist thesis, since it, too, is best seen as a structural analysis.

In one sense, contractualism is empty. The thesis itself has no immediate implications for which actions or policies are right or wrong, without supplementary judgments about what principles could be reasonably rejected. It should be clear from our discussion of rights that lack of immediate implications is not necessarily an objection. If contractualism is offered as a structural analysis, of the domain of ‘what we owe to each other’, then its goal is to explicate and guide reasoning about what we owe to each other, but not to deliver answers in particular cases unaided by interpretation and judgment.

If judgment is required, however, this may seem to show that contractualism is objectionably circular. Scanlon leaves the idea of reasonable rejection unanalyzed. But since, in the abstract, it is exceedingly vague, it can seem that in determining what is reasonable we are forced to rely, or at least that we are not prevented from relying on, intuitive judgments of precisely the kind to be explained—judgments about which actions or policies are morally wrong.

Above, we excluded direct appeal to rights in a structural analysis on the grounds that this undermines the aim of guiding reasoning about the justification of rights. A similar reply is available here. The contractualist thesis is an idealization of ordinary interpersonal justification. In that case, we can hold that reasoning about what could be reasonably rejected is irrelevant to the thesis if it is not reasoning that could be given in an ordinary interpersonal context. But if you ask why I made such a hurtful or insensitive remark, asking me to justify my conduct to you, I will not advance the issue simply by insisting that I did nothing wrong. You are asking precisely for the reasons why I thought, and think, that I was doing nothing wrong, in spite of your hurt feelings and the ease with which I might have simply held my tongue. (Perhaps we would not agree even after giving reasons. Still, I would need to offer reasons that at least suggest that my position is a reasonable one, something bald insistence could not establish.) The same point applies at the level of theoretical reasoning. If we add, as premises, judgments of rightness or wrongness, our reasoning has no relevance to what is right or wrong, according to contractualism. That must be settled on other

11. What We Owe, p. 4.
It is unproblematic if these grounds are ‘moral’, in the thin sense of facts or considerations that we might take into account in reasoning about what is justifiable to persons. Virtually any fact could be relevant in this sense, under suitable circumstances. One might require, further, that morality be explained in wholly non-moral terms, say, in terms of prudence or instrumental rationality. Scanlon’s contractualism would not meet this condition. But if this supports an objection of ‘moral circularity’, it is an objection that falls to any morally non-reductive explanation, not simply Scanlon’s contractualism.

If we cannot rely on judgments of rightness and wrongness in reasoning about what can be reasonably rejected, this may seem again to raise the charge of ‘emptiness’. Our best judgments about what is reasonable do seem wholly indeterminate in the abstract. If what is reasonable must be settled in general terms, for all cases in which what we owe to others is at issue, then we do better on contractualist utilitarianism, namely, the view that one can reasonably reject a principle if and only if its acceptance would fail to maximize overall utility.

The answer here is that no such general characterization of reasonable rejection is required. If contractualism is a structural analysis, then, as in the case of rights, to insist on any such general rule is premature. We should accept such a rule only after all of the relevant facts of both easy and hard cases have been plausibly specified, and it becomes clear that the rule is in every case appropriate. It makes no difference to the contractualist thesis if our idea of ‘reasonable rejection’ is wholly indeterminate in the abstract. It needs only to be determinate in (many) particular cases.

Is reasoning about what people could reasonably reject ever determinate in particular cases? Not, it would seem, when we are merely surveying the unstructured, non-evaluative facts of a proposed case. But this is the crucial point: the idea of reasonableness, by itself, is not a free-standing structural analysis. In reasoning about rights, for example, it supplements the structural analysis of rights. In principle, one could reasonably reject principles that allow social organization of a particular form (such as slavery) because the burdens it imposes can clearly be reasonably rejected. However, generally, so long as an institution or practice realizes generally available social goods (as security or judicial practices do), one cannot reasonably complain of its bare existence. One’s complaint must be against its organization, because the ways it threatens important interests can be feasibly protected against. When a rights claim is justified, considerations of what could be reasonably rejected will enter into the judgment that the costs of protection are tolerable. The burden to persons adversely or unequally affected may, for instance, be relatively insignificant.

The rich supporting detail Scanlon provides in support of his structural analysis of rights shows how much agreement there actually is about what is reasonable when particular institutions and threats are at issue. Scanlon has
also shown that much the same can be said in many non-institutional contexts, such as cases of promising. Having determinate implications in many such cases is all that is necessary for contractualism<sup>sic?</sup> to have more or less determinate implications in general.

A moral theory that requires significant independent interpretation and judgment may seem uninteresting. But this is not to reject contractualism per se as circular or empty. It is simply to doubt or deny the usefulness or interest of a structural analysis.