

## Rights and What We Owe to Each Other\*

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### Abstract

This article evaluates what Scanlon has written on contractualism from the perspective of the theory of rights. It asks: where are the rights within contractualism? And: where is contractualism within the space of rights? Scanlon's discussions and omissions show the urgency of aligning contractualism (indeed any normative theory) with an adequate analysis of rights. Topics include what rights are, how to tell who has them, and the importance of thinking about the power to change them.

### Keywords

Scanlon, contractualism, rights, will, interest, authority

When you and I attune our perceptions to rights, we discover them everywhere. A poster in the waiting room, the constitution of China, and the international *Laws of Chess* assert rights. We debate the extent of the right to life, to marry, to condemn to death. "Congress has the right to declare war," "his boss had no right to fire him," and "she has a right to wear skimpy clothes to school," are statements in our normative mother tongue. The concept of a right pervades our thinking about what is justified: it is the distinctive, even the dominant, normative concept of modernity.<sup>1</sup>

Here we'll look at what Scanlon has written about contractualism from the perspective of the theory of rights. Scanlon's own characterization of

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<sup>1</sup> See FIDE, *The Laws of Chess*, [www.fide.com/component/handbook/?id=124&view=article](http://www.fide.com/component/handbook/?id=124&view=article) (accessed July 14, 2010). Rights also pervade our thought about justified beliefs, feelings, and desires; see Wenar, "Rights," *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), [plato.stanford.edu/entries/rights/](http://plato.stanford.edu/entries/rights/) (accessed July 11, 2011), section 5.5.

rights is too restrictive. Scanlon joins a group of important theorists who have made this error, and in his case it is harmless. More surprisingly, finding rights within Scanlon's contractualism proves quite difficult. By the end of our study it will be hard to avoid the question of whether "what we owe to each other" can really be what contractualism is about.

### 1. The Structure of Rights: A Quick Analysis

Let's begin with a quick analysis of rights. Some rights are legal, some are moral, some are conventional, and so on. Within each of these realms, rights divide along the same dimensions. For our purposes here, two large distinctions will be enough. One distinction is between first- and second-order rights, the other between active and passive rights.

The first- and second-order distinction corresponds to Hart's division between primary and secondary rules.<sup>2</sup> First-order rights specify how agents may, must, or must not conduct themselves. A citizen's right to march in protest, or a citizen's right that the police protect her while she marches, are first-order rights. Second-order rights define authority: these rights specify who can, and who cannot, change facts about how agents may, must, or must not conduct themselves. Examples of second-order rights are the legislature's right to change the laws on protest marches and a citizen's right against the legislature passing laws unduly restrictive of her speech. Other examples of second-order rights are your right to promise to act in certain ways and your right to permit others to touch you. First-order rights define requirements on conduct; second-order rights assign authority to change requirements on conduct.

The other distinction is between active and passive rights. Active rights are rights to do (or not do) some thing. So you have an active right to walk the highlands of Scotland, and an active right to bequeath your estate to your children. Passive rights are rights that *others* do (or not do) some thing. You have a passive right that your university pay you your wages and a passive right that the state not require you to tithe to a church. Your active rights concern your own permissions and powers. Your passive rights concern the permissions and powers of others.

These distinguishing features of your rights – regarding conduct and authority, and between active and passive – overlap in a simple two-by-two grid.

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<sup>2</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

Second-order	Own Authority	Others' Authority
First-order	Own Conduct	Others' Conduct
	Active	Passive

On the left are your active rights of conduct (first-order) and of authority (second-order). On the right are your passive rights regarding others' conduct (first-order) and others' authority (second order).

Innumerable rights fit into each quadrant; as a finger exercise we can sort a few familiar rights from Locke's *Second Treatise* into the grid. In Locke's state of nature each person has an active first-order right to defend himself against attack, and a passive first-order right that no one harm him in his life, liberty, or property. Locke says that each man may give up his natural liberty by exercising an active second-order right to join a political community, and that each citizen will then have a passive second-order right that the state not dispose of his property arbitrarily.<sup>3</sup>

Sometimes we find all four types of rights bonded together, forming a more complex whole. An example is your property rights as a homeowner. You have an active first-order right to move within your house. You have a passive first-order right that others not enter your house. You have an active second-order right to give others permission to enter your house. And you have a passive second-order right against others giving permission to enter your house. Your property rights define, with respect to your house, how you may act and how others may act; they define your authority and the limits of the authority of others.<sup>4</sup>

2. Scanlon's Characterizations of Rights

The question that will guide us is: 'Where are the rights within Scanlon's contractualism?'

That is: If all valid contractualist norms were specified solely in terms of duties and obligations, permissions, and powers, how could we tell which of these norms ascribe what rights? If we could look through the (very big)

<sup>3</sup> Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1988).

<sup>4</sup> Those who know the Hohfeldian analytical system will know that diagram divides up the four logically distinct Hohfeldian incidents (privilege, claim, power, and immunity). This paper will mostly use this terminology parenthetically: Hohfeld will be a kind of *basso continuo*, and one can just listen to the melody if one prefers.

book that lists all the principles that no one could reasonably reject, and if all the principles in this book were stated without using the term “right,” how could we tell which of these principles ascribes a right – and to whom?

The question may sound easy to answer, but it will turn out to be quite challenging. Allow me to underline that our question is purely conceptual, and tightly confined. We’re not concerned with any priority relationships between normative concepts – we’re not asking whether contractualism is “duty-based” or “rights-based” or anything like that. And we won’t be asking which principles really are valid principles of contractualism. Our question concerns only the concept of rights, and how we can locate this concept within contractualism when its principles (whatever they are) are stated in other terms.

One might think that the best way to find the rights within contractualism is to use Scanlon’s own description of what rights are: if we know what Scanlon thinks rights are, we will know how to find them within his normative theory. Yet Scanlon’s own characterization of rights is too restrictive. This turns out to be harmless: Scanlon could substitute a better characterization of rights without changing any feature of contractualism, or anything important within his discussions of the rights to free expression, due process, and so on. Scanlon is not alone in offering an overly-constrained characterization of rights: almost every theorist does this, just in a different way.

Although rights are the distinctive normative concept of modern times, philosophers’ analyses of the concept are a jumble. Moral and political theory is full of assertions about what rights are, but these assertions are at odds with each other and none comes close to capturing the range of rights-assertions that everyone easily understands. Theorists have tended to seize on one feature of rights or another, and to call that feature essential to rights. Yet different theorists have seized on different features, and the result is unedifying. Here I’ve sampled from the literature a few incompatible characterizations of rights:<sup>5</sup>

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<sup>5</sup> H.L.A. Hart, *Essays on Bentham* (Oxford: Oxford University Press, 1982), p. 185; John Plamenatz, *Consent, Freedom, and Political Obligation* (Oxford: Oxford University Press, 1938), p. 82; Robert Louden, “Rights Infatuation and the Impoverishment of Moral Theory,” *Journal of Value Inquiry* 17 (1983): 95; Glanville Williams, “The Concept of a Legal Liberty,” in R. Summers, ed. *Essays in Legal Philosophy* (Oxford: Blackwell, 1968), p. 125; Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994), p. 275; J.L. Mackie, “Can There be a Rights-Based Moral Theory?” in Jeremy Waldron, *Theories of Rights* (Oxford: Oxford University Press), p. 179; Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell), p. 93.

“It is hard to think of rights except as capable of *exercise*.” (Hart)

“A right is a *power* which a creature ought to possess.” (Plamenatz)

“Rights are permissions rather than requirements. Rights tell us what the bearer is at liberty to do.” (Louden)

“No one ever has a right to do something; he only has a right that someone else shall do (or refrain from doing) something.” (Glanville Williams)

“A person who says to another ‘I have a right to do it’ ... is claiming that the other has a duty not to interfere.” (Raz)

“A right, in the most important sense, is the conjunction of a freedom and a claim-right.” (Mackie)

“All rights are essentially property rights” (Steiner)

Hart, Plamenatz, and Louden hold up the active aspect of rights as their essence: Rights are capable of exercise, they tell us what the rightbearer is at liberty to do. (All rights are on the left side of the grid above.)

Williams and Raz, by contrast, seize on the passive aspect of rights as definitive: all rights are rights that someone else shall do or not do something. (All rights are on the right side of the grid above.)

Mackie captures both active and passive rights, but only on the first order. A right is a conjunction of a freedom and a claim-right: a liberty regarding one's own conduct, and a requirement on the conduct of others. (All rights are on the lower level of the grid above.)

Steiner's propertarian characterization includes all four types of right from our grid, but insists that rights must have specific kinds of holders, structures, and objects. (All rights must mimic the rights you have over your home.)

These characterizations are incompatible, and each is too restrictive. In fact, each of these characterizations captures a different subset of rights: each is subject to a large number of counterexamples drawn from the others.<sup>6</sup> When theorists have been confronted with such counterexamples, they have tended to make one of two kinds of response.

The first response to counterexamples has been concessive; it is to say, “I wasn't talking about *those* rights.” So, for example, after publishing his “active” definition of legal rights, Hart was confronted with uncontroversial passive legal rights (citizens' constitutional rights not to have their speech unduly restricted by legislation). Hart's response was not to give up his

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<sup>6</sup> See Wenar, “The Nature of Rights” *Philosophy and Public Affairs*, 33 (2005): 223–53; and “The Analysis of Rights” in M. Kramer, C. Grant, B. Colburn, and A. Hatzistavrou (eds.), *The Legacy of H. L. A. Hart* (Oxford: Oxford University Press, 2008), pp. 251–73.

analysis of legal rights, but to say that his analysis was not meant to explain “the important deployment of the language of rights by the constitutional lawyer.”<sup>7</sup> In describing the essence of rights, he wasn’t talking about *those* rights.

The second response to counterexamples has been to dig in one’s heels: *those* rights aren’t *really* rights. So Kramer, who has a passive definition, says of active rights that “our ordinary ways of speaking about rights as entitlements to do various things are loose.”<sup>8</sup> Active rights, Kramer says, aren’t *really* rights. The difficulty here is that the rights that one theorist says *really* *aren’t* rights are exactly the rights that another theorist says *really* *are* rights, and vice-versa. So Steiner, for example, has no trouble endorsing active rights to do various things. But Steiner denies that it could make sense to say that babies have a right against being tortured – which is a right that Kramer takes as an exemplar.<sup>9</sup>

Having spent some time cataloging characterizations of rights, I’ve come to suspect that there are two different explanations for philosophers adopting restrictive analyses. These could be labeled “occupational hazard” and “insidious theorizing.” It’s an occupational hazard to start thinking that the features of some subclass of X that one has worked on for many years are definitive of all X’s. This first source of error is less dangerous than the second, which tempts a theorist to present a restrictive conceptual analysis of rights in order to pre-empt objections to his preferred normative theory of rights.<sup>10</sup>

Scanlon seems to have fallen into the first, more innocuous, error. Scanlon spent many years working on (illuminating) studies of major constitutional rights, such as the rights to free expression and due process. So he came to believe that all rights are like the subclass he worked on. Yet it is not so.

Let me start with one minor example of Scanlon giving an overly restrictive characterization of rights, and then go on to show that Scanlon’s official definition of rights is also too restrictive.

<sup>7</sup> Hart, *Essays on Bentham*, p. 193.

<sup>8</sup> Matthew Kramer, “Rights Without Trimmings,” in *A Debate Over Rights*, ed. M. Kramer, N.E. Simmonds and H. Steiner (eds.) (Oxford: Oxford University Press, 1998), pp. 13–14.

<sup>9</sup> Steiner’s analysis forces him to say that babies cannot have any rights, because all rights are essentially property rights and babies cannot be competent property-owners. (Steiner does of course believe that it is wrong to torture babies.) For the exchange between Kramer and Steiner, see their essays in *A Debate over Rights*.

<sup>10</sup> I’ve discussed this second kind of error in Wenar, “The Analysis of Rights”. I mean “insidious” here in the medical sense: proceeding in an inconspicuous or seemingly harmless way but actually with grave effect.

The minor example is that Scanlon asserts that all rights are important. So for example “Rights, Goals, and Fairness” says that “[not] just any possible improvement in the way people generally behave will become the subject of a right. Rights concern the alleviation of certain major problems ...” His human rights essay asks, “what lies behind the claim that the complex of elements I have briefly described here represents a *right*? This claim is supported, first, by the idea that religious belief is important, and important in a particular way.” And the same essay says, “Rights do not promise to bring the millennium, and not just any way of improving things gives rise to a right. Rather, rights arise as responses to specific serious threats ...”<sup>11</sup>

Now it’s not correct that all rights are important – a great many rights are trivial. Your right to make a right turn on red is not an important right, nor is your right against getting a ticket before your meter expires. The right you still have in Texas to smoke in restaurants does not alleviate a major problem, nor does an actor’s right to smoke on stage in London (when this is necessary for the performance). The right of first-come, first-served at a fast food restaurant is not a response to a serious threat, and neither is your right to put “Doctor” in front of your name after you earn a PhD. You have a right that others not follow you around the beach with an umbrella, blocking your sun – and a right, by the official rules of baseball, to an unoccupied base when you (as a runner) touch it before you are out.<sup>12</sup>

We can give these kinds of examples all day. Of course Scanlon could try to bar these counterexamples by saying he wasn’t talking about *those* rights, and in rights theory we’ve seen that move many times before. Yet barring counterexamples by repeating that move will only produce a long proof that all important rights are important. We could, alternatively, put on a philosopher’s squint and insist that these familiar rights aren’t *really* rights. Yet let’s not do that again either; let’s rather keep the full range of rights in view and retire the idea that all rights are important.

When we keep the full range of rights in view we find that Scanlon’s official characterization of rights is also too restrictive. Scanlon has what we might call a “constraint” analysis of what rights are: a right constrains what others can do with respect to the rightholder. Here are some passages where Scanlon sets out this analysis.

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<sup>11</sup> T.M. Scanlon, *The Difficulty of Tolerance [DT]* (Cambridge: Cambridge University Press, 2003), pp. 36, 115, 116.

<sup>12</sup> *Official Rules of Major League Baseball 2010*, [mlb.mlb.com/mlb/downloads/y2011/Official\\_Baseball\\_Rules.pdf](http://mlb.mlb.com/mlb/downloads/y2011/Official_Baseball_Rules.pdf), 7.01.

‘Introduction’ to *The Difficulty of Tolerance*: “Rights are constraints on the discretion of individuals or institutions to act.”

‘Content Regulation Reconsidered’: “In my view, rights are constraints on discretion to act that we believe to be important means for avoiding morally unacceptable consequences.”

‘Freedom of Expression and Categories of Expression’: “Rights purport to place limits on what individuals or the state may do.”

And the longest version of the characterization, from the essay on human rights: “To assert a right is not merely to assert the value of some goal or the great disvalue of having a certain harm befall one. Rather, it is either to deny that governments or individuals have the authority to act in certain ways, or to assert that they have an affirmative duty to act in certain other ways, for example to render assistance of a specified kind. Often, the assertions embodied in rights involve complexes of these positive and negative elements.”<sup>13</sup>

On Scanlon’s analysis all rights limit the discretion of others. No rights entitle the rightholder to act herself. Looking back at our grid, Scanlon’s analysis captures half of the rights there are: only passive rights, and not the active rights. (In Hohfeldian terms, Scanlon’s rights are all claims or immunities.) Because this constraint definition only recognizes passive rights, it is vulnerable to large numbers of counterexamples.<sup>14</sup>

Some of these counterexamples concern the bottom left quadrant: the active rights of conduct. So Hobbes says:<sup>15</sup>

The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto.

Constraints on others’ conduct are no part of Hobbes’s description of the right of nature – quite the opposite. Were Scanlon’s analysis correct, we would not be able even to understand what Hobbes is asserting in this famous passage.

<sup>13</sup> *DT*, pp. 3, 151, 84, 115.

<sup>14</sup> In an early essay, Scanlon seemed to register both active and passive incidents as rights: he wrote: “rights (claim-rights, liberties, etc.)” *DT*, p. 35. But brief passages in this essay also reveal his tendency to assume that all rights are passive: he refers, e.g., to “rights and liberties” and “rights and powers” (*DT*, pp. 28, 43).

<sup>15</sup> Hobbes, *Leviathan*, M.C.A. Gaskin (ed.) (Oxford: Oxford University Press, 1996), p. 86.



To take another type of counterexample, for centuries philosophers have been debating God's rights: God's right to allow evil to occur, his right to punish sinners, and so on.<sup>16</sup> A modern contribution to this debate is Richard Swinburn's *Providence and the Problem of Evil*. In Chapter 12 ("God's Right") Swinburn's thesis is "that it is morally permissible for God to bring about ... bad states for the sake of good states which they make possible, i.e. that he has the right to do so."<sup>17</sup> On Scanlon's analysis, theses such as Swinburn's would have to be interpreted as concerned with constraints on governments and individuals not to interfere with God when he brings about bad states for the sake of good, or when he punishes sinners, and so on. Yet that is not what any philosopher engaged in such discussions could mean.<sup>18</sup>

The main fault of a constraint analysis like Scanlon's, however, is not its inability to include active first-order rights. The main fault is that it cannot capture the many rights in the upper-left hand quadrant: the active rights of authority. On a constraint definition, second-order rights can only be constraints on the authority of others (immunities). Yet very many rights mark the rightholder's own authority (powers).

For example, Article I Section 8 of the US constitution sets out the powers of Congress. Congress has the right to regulate interstate commerce, to borrow money on the credit of the United States, to establish a uniform law of bankruptcy, and so on. All of these Congressional rights are capacities to change the state of normative affairs in some way. None of these rights is a constraint on others. One could try to rig up a constraint interpretation of Congressional rights by saying that, for example, the British Prime Minister is constrained from regulating American interstate commerce, or that all persons are constrained from interfering with Congress when it votes on bankruptcy legislation. Yet even were all these constraints granted, there would remain important additional facts: Congress has the right to regulate interstate commerce, and Congress has the right to establish a uniform law

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<sup>16</sup> Debates over God's rights have been significant in the history of our discipline. See, e.g., Terence Irwin's sustained treatment of the long historical debate over God's (second-order) right to rule, in *The Development of Ethics: A Historical and Critical Study*, vol. II: *From Suarez to Rousseau* (Oxford: Oxford University Press, 2008).

<sup>17</sup> Richard Swinburn, *Providence and the Problem of Evil* (Oxford: Oxford University Press, 1998), p. 229.

<sup>18</sup> Swinburn is explicit about what he means in ascribing a right to God: "I am using 'a right' in the sense that someone has a right to do an action, if and only if it is morally permissible for them to do it, that is they do no wrong, i.e. do no one else a wrong by doing it. God has a right to do something if and only if he does no wrong to anyone else by doing it." Ibid.

of bankruptcy. Like all rights of authority these are active powers, not captured by any set of constraints on others.

I'll give a few more examples to hammer this point in, since authority and its role in contractualism will attract our attention again at the conclusion. The president's right to nominate candidates for the Supreme Court, and a general's right to relieve a captain of his command, and a defendant's right to call witnesses, and a judge's right to sentence a criminal, and your right to allow someone to touch your body, and a parent's right to send a naughty child to his room are all active rights of authority, not constraints on others. There are very many of these active rights of authority, and they are vital to our understanding of politics, law, and morality.

Now as I say the inadequacy of Scanlon's characterizations of rights is entirely harmless for his substantive work on basic rights. Scanlon could replace his analysis of rights with a broader one without it making any difference to the content of his arguments about freedom of expression or toleration and so on; and also without it making any difference to his discussions of the stringency of rights and conflicts among rights. Nothing in this material turns on the thesis that all rights are important, or on the thesis that all rights are constraints, so it would be possible to substitute an analysis that captures more rights and leave everything else the same.

However, turning now to the second part of our study, the search for rights within Scanlon's contractualism leads into predicaments from which there seem no easy exits.

### 3. Rights, Wronging, and *What We Owe to Each Other*

Where are the rights within contractualism? If we knew all the valid contractualist principles, stated in non-rights terms, how could we tell which of these principles ascribe rights and to whom? Again we are not concerned with determining what the normative content of contractualism is, but only with discovering how to locate the rights within that normative content, whatever it is.

Scanlon seems to go out of his way in *What We Owe to Each Other* to avoid explicating contractualist principles in terms of rights. His fleshed-out examples of contractualist principles are phrased instead in terms of permissions and requirements. For instance, look at the modal terms in Principles *M*, *D* and *F* from the chapter on promising:<sup>19</sup>

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<sup>19</sup> T.M. Scanlon, *What We Owe to Each Other* [WWOTEO] (Cambridge: Harvard University Press, 1998), pp. 298, 300, 304; emphases added.

*Principle M:* In the absence of special justification, it is *not permissible* for one person A in order to get another person B to do some act X ...

*Principle D:* One *must* exercise due care not to lead others to form reasonable but false expectations ...

*Principle F:* If (1) A voluntary and intentionally leads B to expect that A will do X ... then, in the absence of special justification, A *must* do X unless B consents to X's not being done.

A rights-theorist will notice right away that these principles do not commit to any rights. Principle *F*, for instance, states that a promisor must (under certain conditions) keep her promise. It does not state that a promisee has a right that the promisor keep her promise. The principle says that a promisor has an obligation, but it does not say that this is an obligation *owed* to the promisee, an obligation *directed toward* the promisee, an obligation that corresponds to a *right* in the promisee. As Gilbert says:<sup>20</sup>

Let us assume that a given promisor will have an obligation – indeed, a moral obligation – that derives from Scanlon's Principle *F*. It is not at all obvious that this obligation corresponds to a right of the promisor to performance of the promise. In order for it to do so, it will have to be not just an obligation, but an obligation towards the promisee, an obligation that is the other side of the coin from the promisee's right against the promisor to performance. An obligation ... is not, or not necessarily, a directed obligation.

Principles like *F* describe what it would be wrong to do. But they do not reveal whether this wrongness is the wrongness of *wronging someone*. All of Scanlon's fleshed-out examples of contractualist principles are principles of *wrongness*, not of *wronging*.

Now Scanlon clearly does want contractualism to contain directed obligations: obligations that are owed to specific others, obligations whose non-fulfillment is (absent special justification) a *wronging* of a person. His objection to Rawls on promising, for instance, is exactly that Rawls's account is not sensitive to this individually-directed, "A owes to B" aspect of promising. Scanlon says that on Rawls's account:<sup>21</sup>

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<sup>20</sup> Margaret Gilbert, "Scanlon on Promissory Obligation: The Problem of Promisees' Rights," *The Journal of Philosophy* 101 (2004), p. 91. Many thanks to Margaret Gilbert for drawing my attention to her careful discussion of Scanlon on promissory rights. Much of what I say in this section goes over ground that Gilbert already covers in this article. For an exploration of the direction of duties, see also Gopal Sreenivasan, "Duties and their Direction," *Ethics* 120.3 (2010): 465–94.

<sup>21</sup> *WWOTEO*, p. 316; emphasis added. Darwall is clear that Principle *F* contains a "directed" obligation. As he puts it, if I promise you to do something, then "you would warrantably expect this *of* me, and not just justifiably expect that I would do so." Stephen Darwall,

The obligation to keep a promise would be derived from a general obligation owed to the members of the group who have contributed to and benefit from the practice ... But the obligation to keep a promise does not seem to have this character. Unlike an obligation to comply with a just institution that provides some of the public goods, the obligation to keep a promise is *owed to a specific individual* who may or may not have contributed to the practice of promising.

And in distinguishing the narrow domain of morality that contractualism covers from a broader area of morality, Scanlon explicitly uses the language of ‘directed’ requirements (“obligation to B” and “duty to B”) to mark out his narrow, contractualist domain:<sup>22</sup>

[Many people] use the term ‘morality’ to cover much more than is included in the account presented here. Many would say, for example, that someone can be open to moral criticism for failing to have special concern for the interests of his friends or his children. One can, of course, argue that these obligations can be accounted for within the contractualist framework when the special features of our relations with these people are taken into account. *Obligations to* our friends, for example, might be explained by arguing that in treating people as friends we invite them to form expectations about our concern for them and that it is wrong to disappoint such expectations, and *obligations to* one’s children might be explained by the fact that they are particularly dependent on us for support and protection. No doubt there are obligations of both these kinds, but they do not seem to cover all we expect of friends and parents .... Many also believe that they can be properly subject to moral criticism for not striving to meet high standards in their profession or for not developing their talents, even when failing to do these things does not violate any *duty to* others.

Indeed, in his first description of what contractualism is about, Scanlon says that contractualism *just is* a theory of duties to others:<sup>23</sup>

What I have presented is thus most plausibly seen as an account not of morality in [the] broad sense in which most people understand it, but rather of a narrower domain of morality having to do with our *duties to* other people,

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*The Second-Person Standpoint* (Cambridge: Harvard University Press, 2009), p. 205 (emphasis in original). By contrast, although Kumar praises contractualism as a theory that can capture not just wrongness but wrongdoing, his own explications of contractualist principles (of promising, and of rescue) are like Scanlon’s in specifying only ‘undirected’ requirements. See Rahul Kumar, “Defending the Moral Moderate: Contractualism and Common Sense,” *Philosophy and Public Affairs* 28 (1999), pp. 275–309; “Who Can be Wronged?” *Philosophy and Public Affairs* 31 (2003), pp. 99–118.

<sup>22</sup> *WWOTEO*, p. 172; emphases added. I follow Scanlon in using “duty” to refer to a moral requirement, and “obligation” to refer to a type of moral requirement mainly “arising from specific actions or undertakings.” (pp. 5–6)

<sup>23</sup> *WWOTEO*, pp. 6–7; emphasis added.

including such things are requirements to aid them, and prohibitions against harming, killing, coercion, and deception ... It is not clear that this domain has a name ... I have taken the phrase “what we owe to each other” as the name for this part of morality and as the title of this book, which has this domain as its main topic. I believe that this part of morality comprises a distinct subject matter, unified by a single manner of reasoning and by a common motivational basis.

So while Scanlon never uses the “owes to B,” “obligation to B,” “duty to B” language in his contractualist principles, he holds that contractualist principles constitute a domain of morality that is defined by these directed requirements.

Why this mismatch? Why, in particular does Scanlon avoid rights when explicating contractualist principles? Scanlon says that relations of “owes to B,” “obligation to B,” and “duty to B” characterize the domain that he believes he is theorizing. And these relations are equivalent to a “right against” relation – or at least, it has commonly been said so since Hohfeld published his analysis in the early 20<sup>th</sup> century.<sup>24</sup> The standard formula is: A owes it to (has an obligation to, has a duty to) B to  $\phi$ , if B has a right against A that A will  $\phi$ .

The type of right in play here is the first-order passive right in the grid above: what Hohfeld called a “claim-right.” The claim-right is a paradigm of a right; in fact some (including Hohfeld) say that claim-rights are “in the strictest sense” the only rights.<sup>25</sup> Moreover, the claim-right is paradigmatic even within Scanlon’s own “constraint” analysis of what rights are. Let me emphasize that the following is absolutely standard in rights theory: “A owes it to/has a duty to/has an obligation to B” is equivalent to “B has a (claim-) right against A”. This equivalence is something that law students and advanced undergraduates are taught.

Kamm notices this peculiarity: “Scanlon never says that [‘narrow’ morality], which is all about what we owe to each other, has anything to do with rights. This may be because he thinks we should not equate ‘something’s

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<sup>24</sup> “If X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.” Wesley Hohfeld, *Fundamental Legal Conceptions* ed. W.W. Cook (New Haven: Yale University Press, 1919), p. 38.

<sup>25</sup> Hohfeld, *Fundamental Legal Conceptions*, p. 36. Scanlon of course knows the Hohfeldian system: he described what he called its “common” distinctions, and deployed these distinctions himself, as far back as 1978 (*DT*, p. 28). (Though it may be worth noting that when presenting the Hohfeldian distinctions here Scanlon characterizes the duty corresponding to a claim-right only as a duty, not as a “duty to.”)

being owed to someone' with his having a right to it."<sup>26</sup> Perhaps this is correct: perhaps Scanlon rejects the standard correlativity thesis between directed requirements and rights. Yet even if this is correct, what can we make of Scanlon's remarking of contractualism's narrow subject-matter: "It is not clear that this domain has a name"? Even if one rejects the standard usage, how could one fail to mention it here? After all, well-trained readers of Scanlon's book will naturally assume that the book's domain does indeed have a name. They will think that *What We Owe to Each Other* might equally have been called *Claim-Rights*.

The mystery in interpretation here is aligning: 1) Scanlon's setting out contractualist principles without mentioning directed requirements or rights; 2) Scanlon saying that the domain of contractualist principles is defined by directed requirements; and 3) Directed requirements (standardly) correlating with rights.

I can hazard a guess at what has happened – but this is only a guess, and what I really want to underscore is the mystery. My guess is that Kamm is correct: Scanlon thinks we should not equate directed requirements with rights, as is standardly done. He does believe that all fully-stated contractualist principles are defined by directed requirements. But he believes that only some – not all – contractualist principles ascribe rights. And he did not, in his major book, want to devote space to disputing the standard correlativity thesis, which lies deep within the conceptual analysis of rights (a notorious monkey-puzzle). So he kept directed requirements, and rights, out of the statement of principles like *M*, *D*, and *F* – even though he believes a fuller statement of these principles would include both directed requirements and (at least for some principles, like *F*) rights. This guess cannot explain the passage where Scanlon says, "It is not clear that this domain has a name." And it is neutral as to whether the "wronging" relation attaches to all contractualist principles, or only to the principles that ascribe rights.<sup>27</sup> But it's the most charitable reading that I can see.

<sup>26</sup> Frances Kamm, "Owing, Justifying, and Rejecting," *Mind* 111 (2002), p. 333.

<sup>27</sup> My inclination here is again to go along with Kamm, who suggests that it would be plausible for Scanlon to say that *wronging* (as opposed to merely doing something wrong): "is doing an act to someone that is contrary to a principle that he could reasonably reject." Kamm's suggestion makes sense of much of what Scanlon says in the book, including the passage where he uses the (interestingly unusual) locution of "guilty to": "Torturing an animal may seem wrong in a sense that goes beyond the idea that its pain is a bad thing: it is something for which we should feel guilty *to* the animal itself, just as we can feel guilty to a human being." *WWOTE*, p. 183. (emphasis in the original)

#### 4. Contractualist Principles and Rights

Let's put aside for the moment the relationship between directed requirements and rights, and return to the question of which contractualist principles ascribe rights.

In *Difficulty of Tolerance* Scanlon is explicit that the domain of contractualist morality contains rights, but is not exhausted by them:<sup>28</sup>

On [my contractualist] view, defensible institutions must promote the well-being of their citizens in certain ways because this is something citizens can reasonably demand, not because doing so will yield a more valuable state of affairs. But the direct promotion of their well-being is not the only thing that individuals can reasonably demand from their institutions. They also have reason to insist on being treated fairly, and on basic rights, which give them important forms of protection and control over their own lives. Contractualism thus provides a common framework within which these diverse moral claims can be understood ....

Claims about rights, like other claims about what we owe to each other, are claims about the constraints on individual action, and on social institutions, that people can reasonably insist on. In order to decide what rights people have, we need to consider both the costs of being constrained in certain ways and what things would be like in the absence of such constraints, and we need to ask what objections people could reasonably raise on either of these grounds ... Claims about rights, like other moral claims, need to be justified in this way.

Scanlon refers, for example, to “principles defining my distinctive rights over my own body – rights to say who can even touch it, let alone claim its parts for other purposes.”<sup>29</sup> And Scanlon's objection to Rawls would lead us to think (although Scanlon does not say so) that Principle *F* ascribes rights too – that promisees have rights that promisors keep their promises. Yet how can we tell *which* contractualist principles ascribe rights, as these two do?

For example, does Scanlon's *Rescue Principle* ascribe a right – a right to be rescued?<sup>30</sup>

<sup>28</sup> *DT*, pp. 3–4.

<sup>29</sup> *WWOTEO*, p. 204.

<sup>30</sup> *WWOTEO*, p. 224. There is circumstantial evidence of Scanlon's view on this, although what position the evidence supports depends on resolving the questions about directed requirements from the previous section. Recall that in setting out the domain of contractualism Scanlon said that it is a, “narrower domain of morality having to do with *our duties to other people, including such things as requirements to aid them.*” (p. 6, emphasis added) On the other hand, when describing his reaction to Peter Singer's article on the duty to aid,



If you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone's dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so.

My impression is that philosophers will be divided on the question of whether the *Rescue Principle* ascribes a right to be rescued. What then about Scanlon's *Principle of Helpfulness*? The *Principle of Helpfulness* requires one to help a person not in desperate need (e.g., giving them a piece of information that will save them a great deal of time and effort) when there is no compelling reason not to do so.<sup>31</sup> Does the *Principle of Helpfulness* ascribe a right to be helped? I imagine that again there will be different views, although fewer will defend a right here. What method should we use for determining whether these contractualist principles ascribe rights, or not?

Within rights theory there are two methods, broadly speaking, for locating rights within principles expressed in non-rights language. One method is to look at the *form* of the principle itself, to see whether it contains a certain tell-tale concept, or relation, or proviso. The other method is to look for some distinctive feature within the principle's *justification*.<sup>32</sup>

As an example of the first method, rights-ascribing principles might be identified as those which give some party control over the normative situation of another party. For instance, recall that Principle *F* says that if A leads B to believe that A will do X, then (omitting the details) A must do X *unless* B *consents to X's not being done*. Many rights theorists (called 'will theorists') believe that this power that B has to waive A's obligation is what makes B a rightholder. Similarly, part of what makes you a property-right holder in this house is that you have the power to waive others' duties not to enter the house. Rights-ascribing principles are those principles that confer the power to change what some person may rightly do (or not do).

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Scanlon only uses the non-committal language of wrongness, not of wrongdoing: "When, for example, I first read Peter Singer's famous article on famine and felt the condemning force of his arguments, what I was moved by was not just the sense of how bad it was that people were starving in Bangladesh. What I felt, overwhelmingly, was the quite different sense that it was *wrong* for me not to aid them, given how easily I could do so. It is the particular reason giving force of this idea of moral wrongness that we need to account for." (p. 152, emphasis in original)

<sup>31</sup> *WWOTE*, p. 224.

<sup>32</sup> For discussions of the will and interest theories, see Wenar, "Nature" and "Analysis." My short description of the interest theory will not catch, e.g., Kramer's version of it; but this will not matter for our purposes.



There is no evidence that Scanlon would favor this ‘will theory’ method of identifying the principles that ascribe rights. And there are good reasons for him not to, for doing so would only burden him with another overly-restrictive view of what rights there can be. I will not go into the familiar objections to the will theory. Suffice to say that if rights are found only where there is normative control, then there can be neither unwaivable rights (like rights against torture or enslavement), or rights held by beings not competent to exercise normative control (like the comatose, young children, and animals).<sup>33</sup>

Scanlon almost certainly favors the second method of locating rights. Rights in contractualism must be found by looking at the justification of contractualist principles, not at their form. I’ll quote some passages where Scanlon appears to take this second method for granted – but which also show signs of discomfort. I believe that this second method for locating rights, which Scanlon assumes, led him into a problem he could not solve.

## 5. The Right Rightholder

Let’s go back to some principles that clearly assign rights, for example Scanlon’s principles “defining my distinctive rights over my own body – rights to say who can even touch it, let alone claim its parts for other purposes.”<sup>34</sup>

It is very likely that Scanlon would, like an ‘interest theorist,’ point to the justification of such principles in explaining why they do indeed ascribe rights. One explanation in this style might say that each person’s interests in not being touched (or dismantled) is *stronger than* the interests of potential touchers (or dismantlers). Another explanation of this kind might say that the interests that each person has regarding his body are *sufficient to ground a duty* in others not to touch him non-consensually or to claim his body parts.<sup>35</sup> An explanation of this kind, adapted specifically to contractualism, would state that these principles ascribe rights to B because B *has the strongest complaint* to principles that allow the touching or dismantling of B’s body. B can reasonably reject any principle that would allow unconsented contact with or division of his body, so B is the bearer of these

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<sup>33</sup> Wenar, “Nature,” pp. 238–40.

<sup>34</sup> *WWOTEO*, p. 204.

<sup>35</sup> Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), p. 166.

distinctive rights over his body. Contractualist principles ascribe rights to the strongest complainants.

This is the natural path of ideas to follow to find rights in contractualism. Yet there are two significant difficulties in reaching an answer by this route. The first difficulty is that every contractualist principle will have a strongest complainant, yet only some contractualist principles ascribe rights. That is: for each contractualist principle there will always be some person (or class of persons) whose complaint makes it reasonable for everyone to accept that principle. Yet, as we have seen, not all contractualist principles ascribe rights. So we will still need to know how to tell which out of all of contractualism's strongest complainants are also rightholders.

Let's say we solved that first difficulty. The second difficulty is even harder, and it is here, I believe, that Scanlon ran into his insoluble problem. Recall that our guiding question is: If we knew all the valid contractualist principles, stated in non-rights terms, how could we tell which of these principles ascribe rights *and to whom*? It might have seemed that this conjunct was absently tacked on, but in fact it marks a crucial problem within the method that looks to the justification of principles to find rights. Within the justification of many principles, the party whose interests or complaints are weightiest is *not* the party we believe to be the rightholder.

Scanlon's investigations into the shape and justification of particular rights are remarkable for their sensitivity to the spectrum of interests at stake. When considering a principle that would endow a certain type of actor with a particular kind of discretion, Scanlon considers not only the value of that discretion for the actor, but also the interests of those who would be directly affected *and* the interests of those who would be indirectly affected were such discretion allowed. For example, in evaluating the permissibility of publishing pornography Scanlon acknowledges that, "the availability, enjoyment and even the legality of pornography will contribute to undesirable changes in our attitudes towards sex and in our sexual mores. We all care deeply about the character of the society in which we will live and raise our children. This interest cannot be simply dismissed as trivial or illegitimate."<sup>36</sup> And regarding rules of the market, he says:<sup>37</sup>

I think that transactions "between consenting adults" can sometimes legitimately be restricted on the ground that, were such transactions to take place freely, social expectations would change, people's motives would be altered and valued social practices would as a result become unstable and

<sup>36</sup> *DT*, p. 106.

<sup>37</sup> *DT*, p. 107.

decline. I think, for example, that some commercial transactions might legitimately be restricted on such grounds.

In these examples the interests of parties “far from the action” are entering into the evaluation of rights, and in the case of commercial transactions these interests are decisive in limiting what rights are said to be justified. Scanlon’s sensitivity to diverse interests yields compelling analyses, but it also reveals his difficulty in locating rights.

For instance, in discussing the rights of journalistic freedom, Scanlon says, “It might be argued that journalists have [such] rights, reflecting the ways in which the authority not only of the government but also of editors and publishers must be limited if ‘the press’ is to fulfill its function in society.”<sup>38</sup> Let’s notice the structure of justification here: journalists must be given certain protections *if the press is to fulfill its function in society*. If it is really the interests of society that are doing the justificatory work here, why should we not ascribe the rights in question to society? Why should we say that *journalists* have a right that journalists are protected – instead of saying that *society* has a right that journalists are protected? How can we defend locating the relevant right in the journalists?

Those who have not seen this problem before may have a hard time taking it seriously: of course journalists have the right that journalists are protected. Yet locating the ‘right rightholder’ is, in the literature, a major challenge to all explanations that look into justifications to find rights. Raz’s interest theory, for instance, has attracted sharp criticism on this score (as it happens, over the same example of rights regarding interference with journalists).<sup>39</sup> There is no conceptual problem in saying that B has a right that A (not) do something to C. We see that schema all the time: say, in contexts of contracts or agency. So if society is the strongest complainant to any principle allowing interference with journalists, why don’t we say that society has a right that journalists not be interfered with?

Scanlon detected this difficulty, I believe, while working on the right he spent the most time with: the right of free expression. Scanlon’s investigations into this right are exceptional, even by his own standards, for their sensitivity to the wide range of interests at stake. Scanlon discusses not only the many different interests of “speakers” (whom he calls *participants*) and

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<sup>38</sup> *DT*, p. 158. Scanlon does not end up endorsing this particular argument, because of uncertainty about what the function of the press in society actually is. But he does accept the justificatory structure of the argument.

<sup>39</sup> See, e.g., Frances Kamm, “Rights,” *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), p. 485.

“hearers” (*audiences*), but also to “third parties” (*bystanders*) who do not speak or hear but who are affected by expression indirectly. (Third parties are, for example, those who have to wade through the trash left by a protest rally, or those who use the technology that is the end result of discussions among scientists.) For example, after describing participant interests in speaking on political and commercial matters, Scanlon says:<sup>40</sup>

The categories of participant interests I have been discussing are naturally identified with familiar categories of expression: political speech, commercial speech, etc. But we should not be too quick to make this identification. The type of protection that a given kind of expression requires is not determined by participant values alone. It also depends on such factors as the costs and benefits to nonparticipants ...

Again, this attention to the interests of both participants and nonparticipants makes for subtle, insightful theorizing. Yet it also makes it very difficult to explain the ordinary thought that *free speech rights are the rights of speakers*. Suppose, to take a simplified case, we found that the main reason for permitting a certain kind of advertising (on billboards, say) is that it allows audiences to learn more about the products available to them – and *not* that it allows businesses to make more money. How then do we redeem the ordinary thought that such a principle ascribes to *businesses* the right to advertise on billboards – instead of being forced to say that the principle ascribes to audiences the right that businesses be allowed to advertise on billboards? It is the potential viewers who have the strongest interest in the expression, so how could we locate the relevant right in the businesses? Further, if the justifications for certain specific rights to free expression are based primarily on audience interests, while others are based primarily on participant (or bystander) interests, must we say that these different specific expressive rights are held by the different parties respectively?

Notice how Scanlon frames the following passage from ‘Freedom of Expression and Categories of Expression’: “Most of us believe that freedom of expression is *a right*. That is, we believe that limits on the power of government to regulate expression are necessary to protect our central interests *as audiences and participants*.”<sup>41</sup> Here Scanlon appeals to both audience and participant interests in explaining the right to freedom of expression. And he only says that this is “a right” – he does not say whose right it is.

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<sup>40</sup> DT, p. 88.

<sup>41</sup> DT, pp. 99–100; emphases added.

This difficulty in locating the ‘right rightholder’ is particularly acute for expressive rights. As Scanlon notes, the best-known defenses of speech rights (such as Mill’s and Meiklejohn’s and his own “Theory of Freedom of Expression”) turn not on speakers’ interests, but rather on the interests of non-speakers. Scanlon’s discomfort with the implications of this fact is evident in this passage: “*Although freedom of expression seems to refer to a right of participants* not to be prevented from expressing themselves, theoretical defenses of freedom expression have been concerned chiefly with the interests of audiences and, to a lesser extent, those of bystanders.”<sup>42</sup> Scanlon’s method for locating rights within contractualist principles is to look inside the justification of those principles. But when he follows this method, he finds it hard to explain how things “seem”: that the rights of free speech are the rights of speakers.<sup>43</sup>

Scanlon, I think, saw this difficulty in locating the ‘right rightholder’; as far as I know he never addressed it explicitly.<sup>44</sup> And, bringing directed requirements back into the discussion, the structure of the problem is exactly the same regarding directed requirements (and regardless of whether they correlate with rights). Indeed this difficulty transfers with full force to locating the direct object in the phrase “what we owe *to each other*.” Given what Scanlon says about the inclusive nature of contractualist justification, how exactly do we support the thought that we owe it *to speakers* not to interfere with their speech? Perhaps we owe this to “society,” or even to all beings within the scope of contractualist justification. Indeed, how should we support the thought that promisors have an obligation *to promisees* to keep their promises, or that others owe it *to you* not to claim your body parts? Perhaps these obligations are owed not only to promisees, or to you – but to everyone there is.

These are real difficulties, and I am going to use them to supplement my guess on the interpretative mystery regarding *What We Owe to Each Other*.

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<sup>42</sup> *DT*, p. 93, emphasis added.

<sup>43</sup> Cf. Raz: “Politicians, journalists, writers, etc., excepted, their rights of free expression means little in the life of most people. It rightly means less to them than success in their chosen occupation, the fortunes of their marriages, or the state of repair of their homes.” Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), p. 39.

<sup>44</sup> Look again at some of Scanlon’s own characterizations of rights: “Rights purport to place limits on what individuals or the state may do”; yet this does not point to any particular rightholder. “Rights are constraints on discretion to act that we believe to be important means for avoiding morally unacceptable consequences”; this does not specify on whom these unacceptable consequences fall. “Rights concern the alleviation of certain major problems” is similarly unspecific. *DT*, pp. 84, 36, 151.

My guess is that Scanlon did not include rights or directed requirements in principles like Principle *F both* because he did not want to dispute the standard correlativity thesis *and* because he sensed the difficulty of explaining how directed requirements could point to (what seem to be) the correct parties. It is easy to say that acting on contractualist principles is what we owe to each other. It is quite hard for Scanlon to say exactly what we owe *to whom*.

Let me now pause for two paragraphs to make a point in different language, which some may find useful but which is not meant as a substitute for the main discussion. In *What We Owe to Each Other*, contractualism has a deontological structure: it is a theory of how one person should act toward another person so as to respond correctly to the value of that person's rational agency. Contractualism here is a "patient-focused" theory of respectful interpersonal relationships, and some of its principles will specify constraints on action that allow patients important forms of control over their own lives (rights).

In *Difficulty of Tolerance* Scanlon presents contractualist principles whose justification emerges from surveying the interests of all of the parties who would be affected by the principle's being in effect. That is, justification turns on considering the interests not only of patients – indeed not only of patients and agents – but also the interests of third parties quite far from the action regulated by the principles, whose interests are impacted through indirect routes and cumulative effects, and about whose existence the agents and patients may be blamelessly unaware. In *Difficulty of Tolerance*, that is, contractualism also has a consequentialist (though not aggregative) structure. The deontological style of justification in the first book pulls toward a theory of what actions *one person owes to another person*. The consequentialist style of justification in the second book pulls toward a theory of what actions *we each owe to all other persons considered together*. The phrase "what we owe to each other" is equivocal between the two styles of justification, and Scanlon's difficulties in placing rights within contractualism result from their contrary pulls.<sup>45</sup>

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<sup>45</sup> Let me again draw attention to the passages from *DT* quoted at the start of section 4 above, where Scanlon is explicit that contractualism is meant to explain both basic rights and what social institutions are defensible. *DT* is a contractualist book: contractualism is both a moral and a political theory. A summary of the two paragraphs above is that Scanlon's interpersonal theory is deontological, while his institutional theory is consequentialist—and both are said to be contractualism.

My own view, which I will not argue for here, is that locating rights, and explaining “who owes what to whom,” within any theory is impossible using only the resources that Scanlon relies on. An understanding of normative directionality requires different conceptual tools. This is an assertion that needs to be made good by presenting a successful theory of how to locate directed requirements within any given set of principles, which will show why Scanlon’s equipment is insufficient.<sup>46</sup> Until I or someone else presents an adequate account of directed moral requirements, locating rights within contractualism will remain a standing challenge.

## 6. Can Contractualism Be a Theory of What We Owe to Each Other?

Up to now we have been guided by the question of where rights are within contractualism. I want to finish by reversing the question and asking where contractualism is within the space of rights. This question takes us back to the analysis of rights with which we began, and we can pursue it without relying on any of the points about contractualism made so far. This investigation may be the most important one of all, because it suggests that Scanlon has not correctly identified what his theory is about.

Recall the grid that divided rights into first- and second-order, active and passive. The active second-order rights in the upper left of that grid are rights of authority. Some examples of these rights are the right of Congress to establish uniform bankruptcy laws, the president’s right to nominate candidates for the Supreme Court, a general’s right to relieve a captain of his command, a defendant’s right to call witnesses, a judge’s right to sentence a criminal, your right to allow someone to touch your body, a parent’s right to send a naughty child to his room, and so on. We saw that Scanlon’s official characterization of rights, which analyzes rights as constraints, could not capture these rights of authority. We also saw that this is a relatively inconsequential matter, which can be resolved by substituting a more capacious account of rights.

Does contractualism itself extend into the domain of rights of authority? Scanlon sometimes writes as though it does. For example, in “Due Process” he presents an argument “for the rights to call witnesses and cross-examine opposing witnesses” within court proceedings. These are rights of authority: powers to change what people (here, witnesses) are required to do.

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<sup>46</sup> I try in a forthcoming article, “The Nature of the Claim.”



In the same essay, Scanlon asserts that: “Employers have the right (absent specific contractual bars) to fire workers when this is required by considerations of economic efficiency, and perhaps also when it is necessary as a means of discipline within the firm.” Again the right is a power: this time, one that confers the authority to change the normative situation of workers. These kinds of rights are, it would appear, firmly within contractualist morality: they are rights, as Scanlon says, “that individuals can reasonably demand from their institutions.”<sup>47</sup>

And so they should be. Authority, along with justice and stability, is one of the three main concepts of political morality. Authority has been a primary subject of political theory for centuries. If rights of authority were not within the domain of contractualism, then these rights would have to be part of what Scanlon calls morality “in a broader sense.” Yet this would put rights of authority into a class with norms that they are quite unlike: prohibitions on masturbation or sodomy between consenting adults; admonitions to meet high professional standards and to develop one’s talents; proscription of the wanton destruction of nature.<sup>48</sup>

Moreover, it would be quite strange if contractualism was only concerned with permissions and requirements to act, while not being concerned at all with *how*, *when* and *by whom* changes to those permissions and requirements can rightly be made. Contractualism cannot plausibly be only a “first-order” theory that explains the duties and obligations that exist at one moment – and that re-theorizes whenever changes to these duties and obligations are helicoptered in from a different domain.

This is especially clear since the scope of contractualism includes not only institutional morality, but also the aspects of interpersonal morality that involve authority. When you permit another person to touch your body, you exercise a right: a right to release that person from a requirement not to touch you. When you make a promise, you exercise a right: a right to impose on yourself a requirement to perform some act. In exercising these rights, you exercise authority over other people, or authority over yourself. Contractualism must contain an account of why you have these rights of moral authority. If there is a “part of morality [that] comprises a distinct subject matter, unified by a single manner of reasoning and by a common motivational basis,” it must encompass rights of authority as well.<sup>49</sup>

<sup>47</sup> *DT*, pp. 47, 44, 3.

<sup>48</sup> *WWOTEO*, pp. 171–72.

<sup>49</sup> *WWOTEO*, p. 7. Kumar, for example, discusses the rejection of principles because they ascribe insufficient authority to individuals regarding the use of their own bodies, in “Moral Moderate,” pp. 306–08.



Yet notice that if that is correct we will be losing our grip on Scanlon's idea that the domain of contractualism is defined by what we owe to each other – for rights of authority do not explain what we owe to each other. Rights of authority explain *who can change* what we owe to each other and how. Rights of authority do not specify what is owed to others; these rights specify *who can alter* what is owed to others, and in what ways.

Focus on the phrase “what we owe to each other.” It's natural to say that a promisor owes it to the promisee to do what he promised (first-order). But would we say: “We owe it to employers to give them the authority to fire employees when required by economic efficiency or the requirements of discipline”? Or: “We owe it to Congress to give it the authority to establish uniform bankruptcy laws”? Or: “We owe it to judges to give them the authority to sentence criminals”? Or try the phrase with the right to promise itself: “We owe it to each other to recognize in each other the power to change requirements on our own actions by promising”? No phrasing around here is comfortable – unless we give up the game and say that “What we owe to each other ...” is just a colloquial way of pointing to a justified contractualist principle. “What we owe to each other” is a one-level concept; contractualism must be a multi-level theory.

The analysis of rights shows that we should take another look at whether contractualism really is a theory of what we owe to each other. It now seems that contractualism must be more than that. It must be a theory not only of *owing to*, but also a theory of *authority over*.

In our lives we often assert and we robustly affirm our active and passive rights, our interpersonal and institutional rights, our rights of conduct and our rights of authority. Becoming attuned to the depth and the pervasiveness of rights in our reasoning intensifies the urgency for contractualism to produce a defensible account of rights. Explaining rights within contractualism is much more urgent than, say, explaining double effect. Rights are the distinctive, even the dominant, normative concept in our world. A theory allergic to rights will not see much of our world, and our world will in turn not favor it.