

Nonlegislative Justification: Against Legalist Moral Theory¹

Liam Murphy

If moral theorists who otherwise disagree all approach moral theorizing as a search for a set of desirable moral principles for the general regulation of behavior, then there is a sense in which they are all, as Parfit says, climbing the same mountain. But it is the wrong mountain. Morality should not be understood as hypothetical legislation; it is a mistake to set about constructing morality as if we were making law. Real legislators evaluate possible legal rules by considering the effects they would have. They can do this because enforcement and acceptance of law ensure a high level of compliance. Moral legislators have no reason to assume any particular level of acceptance; the effects of counterfactual acceptance of a principle are not morally relevant. The argument targets rule consequentialism and Scanlon's official version of contractualism. The paper begins in a positive mode by arguing that a nonlegalist version of Scanlon's approach, that seeks justification for conduct of such and such a kind in such and such circumstances by comparing the reasons in favor and the reasons others have to object, is a very attractive way to think about nonconsequentialist constraints on how we may treat one another.

1. Reductionist Nonconsequentialism

If we take for granted that familiar moral constraints on the treatment of other people cannot be explained away in terms of the beneficial consequences of adopting certain standing dispositions and deliberative rules of thumb, the question remains of what kind of explanation and justification of them is available. Can more can be said than that it is self-evident to “thoughtful and well-educated people” that certain ways of treating people are wrong?² As

1

² W. D. Ross, *The Right and the Good* (Oxford: Oxford University Press, 1930), 41.

most moral philosophers are in this respect Rawlsians now, most answer yes. Moral theory starts but does not end with a statement of considered judgments; it aims to provide a set of principles or a moral conception that matches our considered judgments in reflective equilibrium. Even philosophers such as Judith Jarvis Thomson and F. M. Kamm, who, unlike Rawls, insist that some considered judgments about particular cases must be treated as fixed, nonetheless see the point of moral theory as providing explanation and justification for those beliefs. Thomson writes, invoking Socrates, that “while a cluster of beliefs may be a cluster of true beliefs . . . , *knowledge* that they are true requires knowledge of what makes them true.”³ And Kamm, who insists that the first step in moral theory is the formulation of intricate moral principles as generalizations of “as many case-based judgments ... as prove necessary,” holds that we cannot conclude that any principle is correct unless we find that it “expresses some plausible value or conception of the person or relations between persons.”⁴ Thomas Nagel well expresses the standard view: “Common sense doesn’t have the last word in ethics or anywhere else, but it has, as J. L. Austin said about ordinary language, the first word: it should be examined before it is discarded.”⁵

A rather different approach has been explored by T. M. Scanlon since “Rights, Goals, and Fairness,” in 1975.⁶ His “reductive” strategy does not start from considered judgments about particular cases or proposed principles as data. The project has been to find an intuitively compelling unified account of the domain of nonconsequentialist principles a whole, reasoning

³ *The Realm of Rights* (Harvard UP, 1990), 31.

⁴ F. M. Kamm, *Intricate Ethics* (OUP, 2007), 5, 469.

⁵ *The View from Nowhere* (OUP, 1986), 166.

⁶ Reprinted in *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003), 26-41.

to particular conclusions about moral principles from within the terms of that account. In a recent paper, Scanlon writes:

In developing my contractualist view, I was following Aristotle's model. I was using the method of reflective equilibrium to identify the contractualist procedure of justification, which I thought gave the best account of (at least a portion of) morality, and then taking this procedure to be a way of reasoning "*from first principles*" about what the content of this morality is and why.⁷

Scanlon does indicate that the overall plausibility of his contractualist method will depend not just on its appeal—in reflective equilibrium—as a general account of what makes certain ways of treating people wrong, but also on the intuitive acceptability of its outputs. Some principles may just seem obviously reasonably rejectable, and the task would then be to figure out what the grounds for this could be. Moreover, in some instances the structure of the contractualist method itself might have to be tweaked if it is the only way to block unacceptable results for particular cases.⁸ Still, the primary direction of argument is to judgements of right and wrong rather than from them.

One advantage of this direction of argument is that a moral theory that shows how principles of right and wrong—"deontic" principles—can be derived from normative considerations that are not themselves deontic will potentially explain more, be more illuminating. The more familiar approach, seeking principles together with considered

⁷ "Contractualism and Justification," presented at the 2016 Lauener Conference, 5.

⁸ See, e.g., *What We Owe To Each Other* (Cambridge, Mass.: Harvard University Press, 1998), pp.242-6. An example of changing the structure of the contractualist framework would be moving from an ex-post to an ex-ante perspective on the rejectability of principles. Such a revision is argued for in Johann Frick, "Contractualism and Social Risk," *Philosophy & Public Affairs* 43 (2015): 175-223; Scanlon indicates his openness to the revision in "Contractualism and Justification," 31.

judgments about particular cases in reflective equilibrium, may in the end suggest to us a compelling nondeontic normative account of why those are the right principles, but it also may not.

The reductive approach starts with such an account: there needs to be a master idea to identify and organize the non-deontic considerations that lead us to deontic conclusions. This is the sense in which the account is reductive, explaining all deontic principles by appeal to the same core considerations. In Scanlon's contractualism, the master idea is justifiability of our actions to those they affect.⁹ If the idea that wrongness is best understood and explained in terms of justifiability is not appealing, some other master idea is required for a reductive approach to be viable. A plausible master idea will have to navigate what Scanlon calls Pritchard's Dilemma:¹⁰ the idea must not be too external to morality, for example reducing it to enlightened self-interest, but nor must it simply state deontic principles seriatim, thus not producing a reductive account at all. Scanlon has long used the example of welfarist consequentialism as a possible competing master idea: the idea that wrongness of action must always in the end be explained in terms of the impact on people's welfare.

Scanlon mentions a second important appeal of a reductive approach: it provides "a way of explaining and interpreting incompletely specified exceptions"¹¹ to familiar nonconsequentialist principles. This certainly would be good to have. Especially the most important nonconsequentialist commitments, such as a right not to be killed, turn out to be

⁹ Rainer Forst plausibly suggests that (at least as a moral theorist) Scanlon is better characterized as a "justification fundamentalist" rather than a "reasons fundamentalist"—as Scanlon characterized himself in *Being Realistic about Reasons* (OUP, 2014); see Forst, "Justification Fundamentalism: A Discourse-Theoretical Interpretation of Scanlon's Contractualism" forthcoming in the Lauener volume.

¹⁰ *What We Owe to Each Other*, 150.

¹¹ "Contractualism and Justification," 8.

extremely difficult to pin down at the level of casuistry. Kamm's method of as many case-based judgments as prove necessary leaves many of us feeling that our ability to judge or even consider has reached its limit and that the only way to continue is to appeal to some principle or general method for thinking about such cases.

On the face it, then, Scanlon's reductive strategy is very appealing. It would be good to have something more to say than that treating someone in such and such a way is obviously wrong, and it would be good to have a method for resolving puzzling cases other than by appeal to "intuitions" about cases and principles that, for many of us, either don't exist or can only be understood as the outputs of some imperfectly understood theory. I find Scanlon's master reductive idea appealing as well: with justification as the core idea, we reason to nonconsequentialist moral principles by thinking about what kinds of reasons we could offer others in justification for our actions, taking into account our recognition of the reasons they also have to "object to being affected in certain ways."¹² By contrast, the consequentialist reduction seems dogmatic and too substantive to serve as a starting point for thinking about how we may treat each other. And, looking in the other direction, Kant's ambition in the *Groundwork* to derive the content of the moral law from nothing more substantive than the conditions of rational agency seems clearly hopeless.¹³

So the thought is that treating people rightly means being able to justify my actions to them, by appeal to the reasons I have for acting in that way and taking into account the reasons they have to object. But it is a crucial part of Scanlon's contractualism that this justification

¹² "Contractualism and Justification," 7.

¹³ On this, see Scanlon, "How I am Not a Kantian," in Parfit, *On What Matters* vol. 2, (OUP, 2011), 166-39.

must not just be interpersonal or relational, a conversation between the affected parties only. Justification requires that there is a principle covering my act that can be reasonably rejected by no one, not even those not immediately affected by a particular action. The reason for this wide field of justification, as I will call it, is that we are not looking for a principle for this case only, or cases like this in circumstances like these, but one “for the general regulation of behavior.” If that is what we need before my treatment of someone can be justified, then of course I have to consider in addition all the third parties in the world and their reasons to object to my proposed principle.

But why exactly should justification run *via* a principle for the general regulation of behavior? After all, as Scanlon explains, any answer to the question of how I may treat you now will, in a sense, take the form of a principle:

To justify an action to others is to offer reasons supporting it and to claim that they are sufficient to defeat any objections that others may have. To do this, however, is also to defend a principle, namely one claiming that such reasons are sufficient grounds for so acting under the prevailing circumstances.¹⁴

A principle in this sense, however, is not yet a principle for the general regulation of behavior, and defending it does not require a wide field of justification. The wide field of justification is forced upon us only if we accept that we are looking for principles for the general regulation of behavior *rather than* the reasons that are sufficient grounds for acting in a certain way in the current circumstances. The following remarks of Scanlon make sense only if we are considering principles for the general regulation of behavior:

¹⁴ *What We Owe to Each Other*, 197.

[W]hen we are considering the acceptability or rejectability of a principle, we must take into account not only the consequences of particular actions, but also the consequences of general performance or nonperformance of such actions and of the other implications (for both agents and others) of having agents be licensed and directed to think in the way that that principle requires.¹⁵

That we must think about the implications of “having agents be licensed and directed to think in the way that that principle requires” means that what Scanlon has in mind are principles for the general regulation of behavior, generally accepted. Those more distant implications would include, for instance, the anxiety that would be caused if behavior were regulated by a principle that allowed one to be sacrificed, by force, for the sake of many others, even if anyone’s chances of being the one were very low.¹⁶ Derek Parfit brings out the dramatic significance of this feature of contractualism. “[I]n the thought-experiment to which the Kantian Formula appeals, I would have the power to choose which principles everyone would accept, both now and in all future centuries. The principles I chose would be accepted by many billions of people.”¹⁷

Principles for the general regulation of behavior require a wide field of justification, principles for cases like this in circumstances like these do not. Principles for the general regulation of behavior are also subject to design constraints that do not apply in the same way to principles for cases like this in circumstances like these. For the latter, my principle can be as complex as the case requires in the circumstances. Not so principles that can serve for the

¹⁵ *What We Owe to Each Other*, 203.

¹⁶ See Parfit, *On What Matters*, vol. 2, 210.

¹⁷ Parfit, *On What Matters*, vol. 1 (Oxford: Oxford University Press, 2011), 382.

general regulation of behavior. These have to be tractable and thus suitably broad. “[F]iner-grained principles will create more uncertainty and require those in other positions to gather more information in order to know what a principle gives to and requires of them.”¹⁸

A principle for cases like this in circumstances like these *just is* a statement of my justification for treating you in a certain way.¹⁹ By contrast, it is not immediately clear why a defense of a principle for the general regulation of behavior which allows me to treat you in that way should be thought of as a justification for my treatment of you at all. When thinking about principles for the general regulation of behavior we are thinking as legislators do, about what would, on balance, be the best rule for everyone to follow. We take into account all possible effects of general compliance, and we fashion the norms in such a way that they can efficiently guide behavior. None of that seems to be relevant when one person is trying to justify treating another in a particular way in particular circumstances. Scanlon writes that “[a]ccording to contractualism, thinking about right and wrong is in one respect like thinking about the civil and criminal law: it involves thinking about how there is reason to want people in general to go about deciding what to do.”²⁰ This is precisely the aspect of Scanlon’s contractualism that I am against.²¹

¹⁸ *What We Owe to Each Other*, 205.

¹⁹ The description of the circumstances might include information about me, such as my strength or wealth, so that a person with different strength or wealth might be subject to a different principle. These facts about me might affect the reasons I can offer another for or against being required or permitted to act in a certain way.

²⁰ *What We Owe to Each Other* 153.

²¹ After noting, in the passage quoted above, that a justification of an act will ipso facto be the defense of a principle, Scanlon goes on to say: “There is a question (corresponding to the debate between act and rule utilitarianism) as to whether the justification for an action should appeal only to consequences of that act ... or whether other considerations are also relevant. I will address that question in the next section.” *What We Owe to Each Other* 197. In the next section he discusses what I have called the wide field of justification which is clearly necessary if we are working out principles for the general regulation of behavior. But that section appears to assume that any principle successfully defended by me in my justification of my act to you will ipso facto be one that everyone will follow. Otherwise there would be no need to consider, as a general matter, “the consequences

For my case, then, the appeal of Scanlon’s master idea—as the core of a reductionist way of reasoning about nonconsequentialist constraints about how people may be treated—depends on us thinking about principles for cases like this in circumstances like these. The introduction of a mediating level of principles for the general regulation of behavior changes the subject and introduces factors that seem on the face of it to be irrelevant to the issue of how one person may treat another in given circumstances.²²

The same point applies to R. Jay Wallace’s embrace of Scanlon’s contractualism as a good way of illuminating Wallace’s own relational conception of morality.²³ Wallace’s relational conception has it that we should understand morality, or at least the morality of right and wrong, in terms of directed duties, the violation of which wrongs persons who have moral claims not to be treated in certain ways. I myself strongly doubt that the morality of right and wrong can all be accounted for in relational terms. But the relational account does seem to be appealing for the specific case of nonconsequentialist constraints on how people may be treated.

The affinity between the relational account and Scanlon’s view turns on (and enriches) Scanlon’s master idea, that of justifiability. In Wallace’s account, relational moral norms identify situations where people have claims as against others to be treated in certain ways. The process of contractualist justification seems precisely tailored to the identification of such

of general performance or nonperformance of such actions and of the other implications (for both agents and others) of having agents be licensed and directed to think in the way that that principle requires.”

²² Here, as elsewhere in this paper, I am largely in agreement with Adam Hosein, “Contractualism, Politics, and Morality,” *Acta Analytica* 28 (2012): 495-508 and Hanoch Sheinman, “Act and Principle Contractualism,” *Utilitas* 23 (2011): 288-315; many of the themes in this paper were also raised in Thomas Pogge, “What We Can Reasonably Reject,” *Philosophical Issues* 11 (2001): 118-47.

²³ *The Moral Nexus* (Princeton UP, 2019), pp. 178-89.

claims: “An individual has a claim against the agent that the agent should comply with a candidate moral principle, just in case the personal interests of that individual make it reasonable for someone in his or her position to reject alternative principles for the general regulation of behavior.”²⁴ Wallace remarks that, in responding to Parfit’s insistence that Scanlon should drop his requirement that principles can be rejected only by appealing to personal reasons, Scanlon seems “surprisingly open” to the idea of allowing aggregation and appeal to impersonal reasons. Even Scanlon’s recent idea²⁵ that while the number of people affected by a principle cannot itself be a reason for rejecting a principle, it might be relevant to whether rejection is reasonable, seems to Wallace to weaken contractualism’s appeal:

We were looking for an interpretation of moral reasoning that would elucidate the idea that moral obligations are owed to particular individuals, who have claims against the agent to compliance with the principles that determine them. Those elements are most firmly in place if what resolves the question of whether a given individual can reasonably reject a principle are the comprehensive implications of the principle for the life of that very individual, as compared to the similar effects of the alternative principles on the lives of other individuals.²⁶

But if that is what we were looking for, then we surely do not want what resolves the question of what someone can reasonably reject to include considerations of how general compliance with the principle would shape the social world, or considerations of (as it were) moral drafting,

²⁴ 180.

²⁵ In “Contractualism and Justification.”

²⁶ *The Moral Nexus*, 180.

having to do with limits to how fine-grained a principle for the general regulation of behavior can usefully be.

The appeal of contractualism, I agree with Wallace, is that it focuses our thinking, when we are thinking about the directed obligations we have to others in virtue of their rights or claims to be treated in certain ways, to what seems to be at stake—a comparison of my reasons for acting in a certain way and their reasons to object. But if we are told that what we are doing is engaging in hypothetical moral legislation, that appeal is lost.²⁷

Consider this striking statement of Scanlon, connecting the contractualist idea to the value of human life:

respecting the value of human (rational) life requires us to treat rational creatures only in ways that would be allowed by principles that they could not reasonably reject insofar as they, too, were seeking principles of mutual governance which other rational creatures could not reasonably reject.²⁸

As Kamm notes, this is Scanlon at his most Kantian.²⁹ Scanlon later aligns himself with Kant's claim that the first and second formulations of the categorical imperative come to the same thing. Interpreting the "universal law formula" along contractualist lines ("What general principles of action could we all will?"), treating others as ends in themselves must be

²⁷ Clara Lingle, "Generic Objections, Actual Claims: A Problem for Contractualism as Wronging," (unpublished ms. 2020) points out that if what I am calling a wide-field of justification is used in a theory such as Wallace's, which appeals to contractualism to provide an account of wrongdoing, or relational morality, it has the consequence that failing to follow certain principles wrongs everyone, not just the particular victim. As Lingle notes, Wallace acknowledges this consequence (at 207 and 219) but feels that it is compatible with the relational account. I agree with Lingle that if we accept that consequence the distinctive explanatory potential of the relational account is lost. If anyone who might benefit from compliance by others with a principle has a relational claim against those who fail to comply, then utilitarianism can be given a relational characterization.

²⁸ *What We Owe to Each Other*, 106.

²⁹ "Owing, Justifying, and Rejecting," *Mind* 111 (2002): 325-54, 327.

understood to be just the same thing as justifying our actions by appeal to general principles of action. It seems very plausible that to treat rational agents with proper respect, as ends in themselves, just is to recognize what Rainer Forst calls their right to justification.³⁰ But to require that that justification take the form of figuring out a legislative code of moral rules for all of humanity to live by, taking into account all kinds of secondary effects and drafting issues—that, I think, drains the association between human value and the claim to justification of all its plausibility.

It might be thought, on the other hand, that principles for cases like this in circumstances like these are of no explanatory power; that they offer us little help in our quest to say more about nonconsequentialist constraints than that they seem clearly correct. For perhaps no two cases and sets of circumstances are alike and this approach is no different from particularism, which, by design, does not explain much at the general level.³¹ But it is extravagant to claim that for the purposes of justification—the consideration of reasons for and against the permissibility of acting in some way—no two cases and sets of circumstances are relevantly alike. Just as in common law reasoning about the application of precedent, some differences in cases and circumstances do justify distinguishing the cases and thus not applying a principle, but other differences in cases and circumstances are not relevant.

It is therefore appropriate, when offering reasons for and against a principle to consider the possible cumulative “intrapersonal” burdens it would entail.³² After all, if I am to accept the

³⁰ *The Right to Justification* (Columbia UP, 2012).

³¹ See Jonathan Dancy, *Ethics without Principles* (OUP, 2004). I do agree with Dancy, however, that it is a mistake to “think of morality as a sort of social device, a human institution that has got set up for a purpose” (133) and that “the model of an antecedently accepted legal system . . . should not be applied to ethics” (134).

³² See Scanlon, *What We Owe to Each Other*, 237; “Contractualism and Justification.”

principle for this case and circumstances, I should be prepared to follow it when relevantly similar cases and circumstances arise in the future. It is also relevant to consider hypothetical variations on the case and the circumstances to see how a suggested principle would fare in such a situation. This is not because we are looking for a principle to cover both situations—a principle of sufficient breadth to be workable, teachable, and enforceable that will necessarily have to smooth over some relevant differences. The point of considering hypothetical variations, once again akin to common-law reasoning, is to help us sharpen our understanding of the reasons we are bringing to bear in the actual case and circumstances. What is not relevant is the impact of the principle in counterfactual circumstances of its general acceptance.

Principles for acts like this in circumstances like this do have explanatory power. They help us identify the reasons that people may reasonably advance in favor of treating others in some way, and the reasons the others may reasonably advance in objection. As an example, take the issue of responsibility for reliance that one has invited or encouraged. A possible principle, R, is that if one person invites another to rely on their stated intentions, and the other person does rely, then the first person must do what they can to prevent that reliance coming at a loss.³³ We could just eyeball this principle and see if it seems plausible. But approaching it via Scanlon's reductionist method seems much more illuminating. The relying person has obvious grounds to reject a principle permitting the reliance-inviter to walk away from the induced losses. And rejection of R by the inviter would not be appear to reasonable: Yes, it is now inconvenient and perhaps costly for the inviter to take responsibility for the losses, but the

³³ This is a more restrictive, and I think, more plausible principle than Scanlon's Principle L, *What We Owe to Each Other*, 300-301.

relier has the losses just because of what the inviter did, and the inviter got themselves into this by doing something they didn't have to do.³⁴

The great merit of Scanlon's reductionist project is to have us focus on this kind of comparative evaluation of reasons, rather than going directly—blindly—to a verdict on the wrongness or not of the action or the soundness of the principle.³⁵ Removing the factor of the impact of general acceptance of a principle on the social world will likely mean that thicker or more moralized reasons than those having just to do with relative burdens will have to be invoked.³⁶ But this appears likely to be necessary even under the model of hypothetical legislation.³⁷ This is not the place to try to establish the fruitfulness of the method of nonlegislative justification across the board, but it is not obvious that it will fail. What I do believe to be clear is that the appeal of the method of justification is lost if it is understood to involve hypothetical legislation.

In embracing a nonlegislative form of Scanlon's method of justification, I have been discussing throughout deontological constraints, or what Thomson calls the realm of rights. In *What We Owe To Each Other*, Scanlon clearly has in mind a theory with broader scope, something like an account of impartial moral rules governing interactions among humans; some morally significant matters such as friendship and the treatment of animals and nature are

³⁴ Wallace, 181, goes through this argument, but wrongly takes it as explaining why promises bind. It cannot do this, as promises bind even in the absence of reliance.

³⁵ As indicated above (ms. 3) there is room in Scanlon's method for taking intuitive plausibility judgments into account as a kind of secondary check on possible principles.

³⁶ For example, Rahul Kumar offers as a reason someone might reject a principle requiring sacrifice whenever this will benefit another more, the reason that this will greatly reduce the control people have over their lives. "Defending the Moral Moderate," *Philosophy & Public Affairs* 28 (1999): 275-309, 298. Lingle argues that if appeal to what the social world would be like under full compliance is blocked, the contractualist method of justification will simply rehearse existing deontological intuitions. I am not as pessimistic as Lingle, but the danger is clearly real.

³⁷ See Scanlon, "Contractualism and Justification."

excluded, but the domain of imperfect impartial duties, such as beneficence, is included.³⁸ I believe that the strategy of interpersonal justification is appropriate only in the domain of perfect right and directed duty; I agree with Kamm that it is best taken as an account of wrongdoing.³⁹ I would not, therefore, appeal to the strategy of justification to those affected by my conduct to figure out the content of a duty of beneficence, or rescue. It is hard to see how this imperfect and agent-neutral duty can be derived from a nonlegislative process of justification. In discussing his limited principle of rescue, Scanlon writes that “we have to consider the general costs (and benefits) of its acceptance.”⁴⁰ By this he clearly has in mind intrapersonal aggregation, since he believes that the principle that you should prevent dire harm to others if it can be done for only slight or moderate sacrifice would have to take into account previous contributions to block unlimited sacrifice over time.⁴¹ But he might also have in mind general acceptance of the principle as well. In a world in which, as he notes, “hardly any of us lives up to what it requires,”⁴² the number of persons in desperate need that a complying person could help is limitless. It is hard to see how the complying person, even once the total aggregate required personal burden has been reached, can justify not helping the next person just by comparing burdens—unless the limit to the aggregate required personal burden is set very high.⁴³

³⁸ See *What We Owe to Each Other* 171-187, 218-223.

³⁹ “Owing, Justifying, and Rejecting,” 333-336.

⁴⁰ *What We Owe To Each Other*, 225.

⁴¹ *What We Owe To Each Other*, 224.

⁴² *What We Owe To Each Other*, 225.

⁴³ See Elizabeth Ashford, “The Demandingness of Scanlon’s Contractualism,” *Ethics* 113 (2003): 273-302; Kamm, “Owing, Justifying and Rejecting,” 338-9. Rahul Kumar defends a moderate contractualist duty of aid in part by insisting on the fact that we are discussing principles for the general regulation of behavior that will shape our social world, in “Defending the Moral Moderate: Contractualism and Common Sense,” *Philosophy & Public Affairs* (1999) 28: 275,309, 296.

The deeper issue is that the domain of impartial responsibility for the welfare of others is distinctive and distinct from the domain of deontology,⁴⁴ and is simply not apt for the method of justification. A full discussion is not possible here, but two features of principles of beneficence are worth emphasizing. First, they are principles of imperfect duty. A person in need cannot complain if I exhaust my resources helping another person in similar need. And if I do nothing, though both people could rightly say that I am acting wrongly, neither of them could complain that my treatment of them as individuals is unjustified. Second, principles of beneficence are agent-neutral. Agent-neutral principles are best understood as applying to us collectively.⁴⁵ The method of justification by each to each is out of place.

2. *The Wrong Mountain: Legislation, Real and Imagined*

Scanlon's contractualism is of course not the only moral theory that employs the model of morality as hypothetical legislation; the other main example is rule consequentialism. Defenders of that view are comfortable, vocal even, about the legislative analogy: we are asking what *moral code* would be best.⁴⁶ What Parfit calls Kantian contractualism, a view based on Scanlon's contractualist reading of the universal law formula of Kant's categorical imperative, also fits the bill.⁴⁷ And of course, whether or not that is the right way to interpret the universal law formula, Kant's language would seem to cast him as the philosophical father of the whole school: always moral *law* (*Gesetz*—a statutory provision) rather than principle or rule or norm;

⁴⁴ See Thomas Nagel, *The View From Nowhere*, chap. IX.

⁴⁵ See Murphy, *Moral Demands in Nonideal Theory* (OUP, 2000).

⁴⁶ See Richard Brandt, *A Theory of the Good and the Right* (Oxford: Oxford University Press, 1979), Brad Hooker *Ideal Code, Real World* (Oxford: Oxford University Press, 2000).

⁴⁷ *On What Matters* vol. 1, § 52.

legislating for a kingdom of ends. The Kant-inspired discourse-theoretic theories of Habermas and Forst work with the same model. Habermas’s discourse principle is a general principle for the justification of all norms, be they legal or moral: “Only those norms of action are valid to which all possibly affected persons could assent as participants in rational discourses.”⁴⁸ As Forst elaborates, norms from different “contexts of justification”—ethical, moral, political, legal—will require different kinds of justification, but the result is the same: valid general norms.⁴⁹ Nicholas Southwood’s Habermas-inspired “deliberative” contractualism is cast as method for determining a “common code” to live by, thus appropriating the explicitly legalist language of rule-consequentialists.⁵⁰

Not all these legalist theorists are offering constructivist or reductive theories in Scanlon’s sense. Brad Hooker, for example, falls in the more traditional camp of offering rule consequentialism as a moral conception that matches our considered judgments in reflective equilibrium.⁵¹ And on the level of substantive detail too there will be considerable divergence. But in so far as they all share a conception of moral theorizing as a search for an ideal set of moral principles or rules for the general regulation of behavior, then there is a sense in which they are all, as Parfit says, climbing the same mountain.⁵²

In my view, all of these legalist moral theories are fundamentally flawed. The model of morality as hypothetical legislation should be rejected wherever it is found.

⁴⁸ *Between Facts and Norms*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996), 459.

⁴⁹ *Contexts of Justice* (Univ. of California Press, 2002), *The Right to Justification*.

⁵⁰ *Contractualism and The Foundations of Morality* (OUP, 2010) 102.

⁵¹ *Ideal Code, Real World*.

⁵² *On What Matters* vol. 1, § 64.

When a legislature makes law, it should consider the reasons for and against the provisions it enacts. Those reasons relate to the effects of the provisions on people—the benefits and burdens and forms of treatment they involve. Attention needs to be paid not just to direct effects but also to secondary or systemic effects. Legislation obviously requires a wide field of justification. Legislation setting up a scheme of random selection of healthy people for compelled organ donation burdens not just the unlucky few, but all healthy people. Discriminatory treatment of some people on the grounds of membership in some group affects the social standing of all members of the group, even those never treated in that way.

Different kinds of reasons are relevant to different kinds of provision. Often the main issues at stake are social welfare and its distribution. Examples would include legislation concerning public transport or consumer contracting. But sometimes matters of what we might naturally call individual right are involved. Such matters can come before a legislature as ordinary business, or before a legislature or a constitutional convention drafting a bill of rights to serve as a constraint on the permissible content of ordinary legislation. Where legal enshrinement of rights to bodily integrity, liberty of movement, liberty of expression, and so on is the topic, the relevant reasons seem less likely to be social welfare and its distribution. The law-makers may be inclined to appeal directly to their beliefs about natural moral rights. Another option, however, would be to think about the justifiability of the enactment and enforcement of certain legal rights by asking questions about whether anyone could reasonably reject proposed provisions on the grounds of undue relative burdens or unfair treatment. It is clear what law-makers taking the latter approach would be doing. They would be looking at the way society would be if different possible bills of rights, including none at all, were adopted and

enforced, and checking to see whether anyone in each society would have personal grounds for rejecting the relevant list of rights. The legal rules or principles that enshrine the rights need to be well drafted, of course, with an eye to ease of use by their intended audiences (legislatures, courts, officials). The wide field of justification and the importance of drafting are obvious in this case. It is arguable that the legislative approach is very well suited to the task of figuring out how to put rights into law—how to figure out what legal rights there should be. Scanlon notes that his reductionist approach to moral rights developed out of his reflection on the right to freedom of expression, a political-legal right.⁵³

The crucial point is that when considering both direct and systemic effects law-makers can assume a high level of compliance with rules they enact. Most of the time, and for most people, both private citizens and state officials, the existence of sanctions for noncompliance will incentivize compliance. In some cases, where the person involved is an official high up in the executive branch of government, direct coercive enforcement may not be present; but even then, if institutions are well-structured, there will be other pressures encouraging compliance. When thinking about direct and systemic effects, then, legislators have good reason to assume a high level of general compliance. The systemic effects must be considered because those effects will be real.

Now consider the hypothetical legislation of moral principles or rules. We must think about what the world would be like if everyone followed or accepted a certain principle or rule and consider how well off people would be, or the grounds individuals would have to reject

⁵³ *The Difficulty of Tolerance*, xx; "Contractualism and Justification," 9.

principles.⁵⁴ It is not obvious what the relevance of the effects of compliance with or acceptance of a principle is if people will not, in fact, comply with or accept the principle.

Thompson asks, during a discussion of property rights:

Is it so much as within reason to suppose that the fact that adopting a certain set of rules would be efficient in one or another of the ways I indicated, or in any way at all, makes it the case that those rules among them that govern property rights are *already* in force?⁵⁵

Let us start with an even more extreme example. It is obvious that zoning law in New York City does not enforce independently existing moral rules. You can't make sense of the rules other than by seeing them as part of a scheme of urban planning that will be good or bad because of its effects—does it make life in the city more affordable, efficient, beautiful, integrated, and so on. Real legislators can reason as follows: It would be good if there were a set of legal rules that required such and such behavior, because such and such behavior would have good effects; therefore, we now enact those rules. They are entitled to reason in that way because they are making law. When you make law you aim to change the world by affecting behavior. Legislators in well-functioning polities have the power to affect behavior because for the most part people generally comply with the rules they make.

Not so the hypothetical moral legislator. Suppose I rightly conclude that a certain zoning code of my devising would be best in terms of consequences, or justification; suppose also that it is compatible with but more restrictive than the existing legal code. It would be mad to point

⁵⁴ Like Scanlon, I will from now on focus on these two possibilities.

⁵⁵ *The Realm of Rights*, 332-3.

out to my neighbors that the modifications they are making to their home, though legal, are morally prohibited.

It is obviously not within reason to think that these best moral zoning rules are already in force in the sense of being generally observed or accepted, since moral legislators have no reason at all to expect that. Hypothetical legislation does not end with the practical acts of enactment, publication, and enforcement. But the idea that that they are in force in the sense of being valid, binding moral rules seems just as mad.

This is not just because we think that morality does not speak to such matters as zoning—perhaps because the issues involved are too local. Thomson’s incredulous reaction to the idea that the best property rules are ipso facto already in force—in the sense of being valid moral rules—seems equally warranted and morality does speak to property. But is it perhaps significant that no one believes that there are natural property rights, binding independently of social convention—any more than that there are natural rules of zoning? Perhaps legalist moral theorizing is plausible only for the natural, and not the artificial or convention-parasitic parts of morality?

It is noteworthy in this connection that Scanlon’s illustration of his contractualist method for the case of promising is at the same time an argument *against* conventionalist theories of promising.⁵⁶ For one might have thought that there is a rather straightforward contractualist case for a principle of promissory fidelity: a rule requiring that promises be kept would, if generally accepted, be beneficial to individuals in creating new opportunities for cooperative behavior, and would not impose greater burdens on anyone than would a principle

⁵⁶ *What we Owe to Each Other*, chap. 7.

of promissory permissiveness. But that straightforward argument, like familiar rule consequentialist arguments about promising, relies entirely on the systemic effects of general acceptance of the fidelity principle. The benefits—greater opportunities for cooperation—are prospective; no particular broken promise affects those benefits. There may be reliance losses in a particular case, but that is a different matter. The trouble with the straightforward argument is that it is not within reason to think that if good effects would flow if the principle of fidelity were generally accepted, then I have reason to reject a principle of promissory permissiveness whether or not the fidelity principle is in fact generally accepted.⁵⁷ Scanlon's own argument for a principle of promissory fidelity attempts to show that promisees have reason, based in the value of assurance, to reject promissory permissiveness even without considering the systemic benefits that would flow from general acceptance of the fidelity principle.⁵⁸

There is something slightly paradoxical about the idea that the legalist method can only be employed to account for aspects of morality that are not parasitic on actual social convention; conventionalism and reductionism would seem to go hand in hand. But what consideration of moral phenomena parasitic on actual social convention brings home is the oddness of appealing in moral argument to the effects of counterfactual compliance. If the *only* thing that can be said in favor of a principle is that general acceptance would bring benefits, the fact that we have no reason to expect general acceptance seems immediately fatal to the

⁵⁷ The example of a conventionalist account of promising shows that the reason why the legalist method seems absurd in the case of property cannot be explained by noting that there are multiple justifiable property schemes.

⁵⁸ As it happens, I do not believe that the value of assurance can be explained without reference to systemic effects of general compliance with the fidelity principle; see Murphy "The Artificial Morality of Private Law: The Persistence of an Illusion," *University of Toronto Law Journal* 70 (2020): 453-88.

argument. Where, on the other hand, reference is made to systemic effects merely to supplement strong reasons individuals have to reject a principle whatever the level of compliance, the objection does not seem so important since it does not undermine the entire case for the principle.

But the appeal to the effects of counterfactual levels of acceptance is no more justified when it is only part of the case for a rule or principle. Take a principle permitting forcible but not (in the normal case) fatal harvesting of organs (one kidney, say) to save another's life. A comparison of burdens on the two people most affected seems to favor this principle, but consideration of the systemic effects of general acceptance changes the calculus dramatically.⁵⁹ With such a principle generally accepted, we would all be anxious and mistrustful all the time; no one would prefer, at least not ex ante, a world in which that principle were generally accepted.⁶⁰ But the question is just how that fact is at all relevant to assessment of the rightness or wrongness of forcible organ harvesting in a world where most people do not accept the principle allowing this.⁶¹ And if the appeal to what things would be like in a counterfactual world where the principle is accepted is valid in this case, why is it not in the case of property, (convention-dependent) promise, or zoning?

⁵⁹ See discussion in Parfit, *On What Matters*, vol. 2, pp. 209-10.

⁶⁰ For a rule consequentialist, the systemic bad effects are obviously decisive. For Scanlon's contractualism to reach the intuitively right result, it would perhaps have to adopt either an ex ante perspective, or allow the numbers to count. Parfit, *On What Matters*, vol. 2, §76, discusses aggregation. A nonlegislative Scanlonian justification could be this: "It is not unreasonable to refuse to regard one's own life and body as "on call" to be sacrificed whenever it is needed to save others who are at risk"; Scanlon, "Thomson on Self-Defense," in *Fact and Value*, Alexander Byrne, Robert Stalnaker, and Ralph Wedgewood (MIT Press, 2001), discussed in Parfit, *On What Matters*, vol. 2, 209.

⁶¹ Parfit goes so far as to imagine legal enforcement, invoking the reasons we all have "to want not to live in a world in which the police hunt some people down and take their organs by force," *On What Matters* vol. 2, 211.

At this point it might be wondered why I am so sure that the effect of counterfactual general acceptance or compliance is not relevant to the soundness of a principle. After all, isn't "What if Everyone Did That?" a very familiar question in moral argument? It is, but that question generally has force precisely in a context where most people are not doing that. If your child wants to throw the paper out the car window onto generally unlitteed streets, the question "What if Everyone Did That?" is meant to get them to consider the unfairness of free-riding on others' beneficial compliance with the no-littering principle. Compare a situation in which everyone is littering. We could point to the benefits that general acceptance of the no-littering principle would bring, but not by asking "What if Everyone Did That?". Everyone already does do that and considerations of fair play offer no support to the principle.⁶²

The objection I am raising is related to but distinct from the problem of partial compliance as traditionally discussed by rule consequentialists. Rule consequentialists note that it won't do to have rules optimific only in circumstances of general acceptance. We need principles for the nonideal case as well. A general prohibition on the use of force would work well in the ideal case of universal acceptance, but rules are clearly needed to deal with the legitimate use of force in cases of self-defense, and so on. So canonical rule consequentialists will favor a code that includes rules that are only relevant in situations of less than full compliance or acceptance.

⁶² In Parfit's terms, the question What if Everybody Did That? is most appropriate in cases where an each-we dilemma has been solved by a social practice. If the each-we dilemma is unsolved—everyone is littering—we can't ask What if Everyone Did That?, since they are doing that. See *On What Matters* vol. 1, 306.

One well-known approach assesses moral codes on the assumption of acceptance by “the overwhelming majority of everyone,” which turns out to be 90 percent.⁶³ The eligible codes will include rules governing interactions with the 10%. A familiar objection to this approach is that the chosen level of acceptance is arbitrary. A more important objection is that such a code will not necessarily provide the right rules for situations of less than, or more than, 90% acceptance; at 60% acceptance the rules designed for the 90% case may require pointless or harmful actions.⁶⁴ But the fundamental objection, the one I have been raising, is this: Whatever level of counterfactual acceptance is chosen, the effects of that level of acceptance are of no relevance whatsoever to the question of what would be the right way to act in the actual world.

Michael Ridge suggests that we adopt the code with the highest average welfare score across all possible acceptance levels.⁶⁵ This proposal too has been criticized as arbitrary (why not the median?) and for not taking into account the likelihood of particular levels of acceptance. A flurry of further proposals have recently been made to address these issues.⁶⁶ But the objection to moral reasoning that appeals to the effects of counterfactual levels of compliance will remain unless rule consequentialism offers rules tailored to each possible level of compliance. Parfit suggests the following formulation: “Everyone ought to follow the rules whose being followed by any number of people rather than by no one would make things go best.” As he indicates, such a set of rules would include ones that tell us to “act in the ways that

⁶³ Hooker, 80-85.

⁶⁴ See Michael Ridge, “Introducing Variable-Rate Rule-Utilitarianism,” *The Philosophical Quarterly* 56 (2006): 242-53, 245-6.

⁶⁵ Ibid.

⁶⁶ For a helpful overview, and defense of what might be the best response to the traditional question of partial compliance, see Kevin P. Tobia, “Rule-Consequentialism’s Assumptions,” *Utilitas* 30 (2018): 458-71.

would make thing go best, given the number or proportion of people who are following these rules.”⁶⁷

Until recently, the partial compliance problem as it applies to contractualism was largely ignored.⁶⁸ It is clear enough that Scanlon envisages the need for principles appropriate for situations of less than full compliance.⁶⁹ Beyond that, however, the same issues that face rule consequentialism arise, and the only option that does not involve thinking about what reasons people would have to object to principles under counterfactual levels of compliance would be, again, to consider what principles would be reasonably rejectable, “given the number or proportion of people who are following” these principles.

It seems, then, that legalist moral theories have to offer a rule or principle for every possible level of acceptance. For some moral issues, the rules or principles may be the same for many or even all levels of acceptance. But for many issues, this will not be the case. The resulting complexity is obviously in itself a ground for skepticism about the overall approach.

⁶⁷ *On What Matters* vol. 1, p. 319. For discussion, see Michael Ridge, “Climb Every Mountain?”, *Ratio* XXII (2009): 59-77.

⁶⁸ The exception, among early commentators, is Pogge. More recently, see Jussi Suikkanen, “Contractualism and the Conditional Fallacy,” *Oxford Studies in Normative Ethics* 4 (2014): 113–37, and “Contractualism and the Counter-Culture Challenge,” *Oxford Studies in Normative Ethics* 7 (2017): 184- 206; Nicholas Southwood, “Contractualism for Us as We Are,” *Philosophy and Phenomenological Research* 99 (2019): 529-47. The problem has long been acknowledged in the context of Kant’s categorical imperative. See Thomas E. Hill, “The Kingdom of Ends,” *Proceedings of the Third International Kant Congress: Held at the University of Rochester, March 30–April 4, 1970*, (Dordrecht: Springer Netherlands, 1972) 307–15, reprinted in *Dignity and Practical Reason in Kant’s Moral Theory* (Ithaca: Cornell University Press, 1992), 58–66; Christine Korsgaard, “The Right to Lie: Kant on Dealing with Evil,” *Philosophy & Public Affairs* 15 (1986): 325-49, reprinted in *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), 133-58.

⁶⁹ See “Contractualism and Utilitarianism,” in Amartya Sen and Bernard Williams, *Utilitarianism and Beyond* (Cambridge University Press, 1982), 111, cited in Pogge, 144-5. See also Scanlon, “Contractualism and Justification.”

But there are more serious problems.⁷⁰ If we are to offer a rule or principle for every level of acceptance, we will need to imagine what the world will be like at that level. But the effect on people of some level of acceptance of a rule or principle is entirely indeterminate unless we know what the non-accepters accept.⁷¹ There is no nonarbitrary way to fix the moral outlook of the nonaccepters—are they partial accepters, crazed psychopaths, act utilitarians, Kantians, or utterly without moral compass?⁷² So it seems we are limited to considering our actual world and actual rules or principles that we can determine are to some degree accepted. We have to ask, for example: Given the actual level of acceptance of principle P, is it a principle that no one could reasonably reject for that level of acceptance in these circumstances? To answer this question, we will have to consider how things would be different in the actual world if the people who accept P accepted different principles. P may or may not turn out to be justified by this test. Suppose that it is not: some people could reasonably reject P on the ground that Q would impose lesser burdens on them and not burden anyone else more. Would this justify Q? It would not, because we do not know whether all the current P-accepters will in

⁷⁰ For general discussion of the problems of assessing the effects of differing levels of acceptance of different moral theories, see Murphy, *Moral Demands in Nonideal Theory*, chap. 3.

⁷¹ See Holly Smith, "Measuring the Consequences of Rules," *Utilitas* 22 (2010): 413-33.

⁷² In "Contractualism and the Counter-Culture Challenge" Jussi Suikkanen suggests the following solution. We look to our actual world and sort it into sheep (those who accept "conventional morality") and goats (those who do not). Now we take a close look at the goats and see what they are like; they will fall into several categories. For all possible compliance worlds, we assume that the noncompliers are just like the actual goats, with numbers adjusted to keep the proportions of different types of goats fixed. In other words, in each possible compliance world, the noncompliers are just like the noncompliers with conventional morality are now. But why should we assume that if someone complying with conventional morality in the actual world were not to comply with some proposed code, they would become a goat, rather than stick with conventional morality or choose some third option? Moreover, what moral view a person takes is affected by the moral outlook of others around them.

fact convert to Q. Q may simply not be a feasible principle at the level of acceptance current for P.⁷³

There is a further problem. I have said we are limited to considering our actual world and actual rules or principles that we can determine are to some degree accepted. But this is in fact an impossible task.⁷⁴ If we are comparing entire moral codes, it seems unlikely that any of them are fully accepted by more than a few theorists, if that. As different moral views overlap considerably in their content we could say that many of the codes are partly accepted by many people. But this leaves us unable to say anything non-arbitrary about the acceptance level of particular codes. This problem is alleviated somewhat if we work at the level of principles, but not entirely, since not many people actually accept carefully formulated moral principles. There will again be much overlap, and we may be able to say that there is a certain level of acceptance of some broad and vague principle. But the reductive approach is attractive in part for allowing us to test more refined principles, for the promise of offering, as Scanlon says, “a way of explaining and interpreting incompletely specified exceptions.”

It seems that the only way we can talk sensibly about the effects of compliance with rules or principles is, after all, to stipulate some level of compliance and stipulate also what the noncompliers will be doing. But this is to bring us back face to face with the fundamental objection to legalist moral theory: that the effects on people of counterfactual levels of compliance with some principle seems to tell us nothing about the merits of that principle for us now.

⁷³ This point is related to the issue of circularity mentioned by Ridge, “Introducing Variable-Rate Rule-Utilitarianism,” 247-8.

⁷⁴ Murphy, *Moral Demands in Nonideal Theory*, 50-59.

3. Political Legalism

The fundamental objection to legalist moral theory does not carry over to contractualist or consequentialist theories of justice or legitimacy, or contractualist or consequentialist accounts of what the law should be. Rawls's contractualism concerns the best justified principles of justice. His theory of justice is not a moral theory, providing rules for individuals. Rawls did flirt with the idea of rightness as fairness, the possibility that all of morality could be modelled as principles chosen behind a veil of ignorance.⁷⁵ But he dropped that idea, and his theory of justice is a set of principles for use by constitution-framers and legislators.⁷⁶ Those principles are not morally fundamental, they are shaped or constructed out of fundamental moral considerations for use in a particular task, the task of making just law.⁷⁷ They are carefully drafted for that purpose. Rawls counts in favor of the difference principle that it is easier to interpret and apply than some other possible principles.⁷⁸ The element of drafting is entirely appropriate, given the purpose.

⁷⁵ *A Theory of Justice*, rev. ed., 1999 (Cambridge, Mass.: Harvard University Press), 95.

⁷⁶ This is evident from his account of the four-stage sequence for the implementation of the theory of justice: the original position, the constitutional stage, the legislative stage, and the judicial and administrative stage. See *Theory*, section 31. Another strand in Rawls suggests that the "basic structure" includes non-legal institutions. For discussion, see G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, Mass.: Harvard University Press, 2008) chap. 3.

⁷⁷ Since the principles of justice are not morally fundamental, but constructed for a particular task, there is no special puzzle about why they apply only to the basic structure, and not to individual choice. This understanding is compatible with both Liam Murphy, "Institutions and the Demands of Justice," *Philosophy & Public Affairs* 27 (1991): 251-91, and Seana Shiffrin, "Incentives, Motives, and Talents," *Philosophy & Public Affairs* 38 (2010): 111-142.

⁷⁸ *Theory*, 281.

So Rawls's theory of justice and contractualism as a political theory generally—including Nagel's application of Scanlon's contractualism to the political realm⁷⁹—is not to be faulted for appealing to counterfactual circumstances in order to determine what is to be done.⁸⁰ The theory provides a blueprint for constitutional design and legislation, it proposes that we do something—build these institutions and write these codes. Of course, one might criticize Rawls for presenting us with a theory for the ideal case, rather than a theory of how to make things incrementally better, given where we are now.⁸¹ It might be thought that knowing what the ideal is doesn't help us that much when we are trying to make things better. Whether or not that objection is well-founded, it has nothing to do with the objection that I have been making to legalist moral theory. It is clear that there is no justice, for Rawls, other than in virtue of the actual operations of actual legal and political institutions.⁸²

In this respect the social contract tradition in political theory is relevantly similar to classical utilitarianism. Bentham was deeply interested in legislation—real legislation.⁸³ He did not assimilate the question of how people should act to the question of what would be required by ideal hypothetical legislation. He didn't actually have much to say about how people should act, morally speaking, since he was a psychological hedonist who thought that all

⁷⁹ *Equality and Partiality* (OUP, 1991). There is also no objection to Scanlon's use of the reasonable rejection test to think about what legal rights there should be (discussed above) or to evaluate whether certain principles can justifiably be legally enforced—see "Promises and Contracts," in *The Theory of Contract Law: New Essays*, ed. Peter Benson (CUP, 2001).

⁸⁰ See Hosein, "Contractualism, Politics, and Morality."

⁸¹ See, e.g., Amartya Sen, *The Idea of Justice* (Harvard UP, 2009).

⁸² Cohen's argument in *Rescuing Justice and Equality* that Rawls goes astray in offering as an account of justice a theory of how to choose principles for social regulation has structurally a lot in common with my argument that we should not confuse interpersonal right with ideal legislation. But Cohen is motivated by a view about the content of the concept of justice, and my argument is not at all concerned with conceptual content. Once we leave conceptual issues aside, moreover, the substance of my argument against legalist moral theory does not apply to Rawls's political theory, which, as indicated, just is a theory of institutional design.

⁸³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1781).

of us were hard-wired to pursue our own pleasure. So Bentham, the moralist, was concerned with actual legislation, since legislation could lead people to act in ways that make things go better. Mill was not a psychological hedonist, but he too was mostly concerned with the moral evaluation of law and customary practices, since he thought it would be rare for a good utilitarian to be able to calculate the consequences of particular actions.⁸⁴

Chapter Five of Mill's *Utilitarianism* is often interpreted as defending a rule-utilitarian account of rights. I do not read it that way. Rather, the doctrine that rights are things that society ought to defend me in the possession of is very much of a piece with Bentham's account of legal rights, extended to take into account non-legal normative practices, in particular that of socially-enforced conventional morality.

Taking up this suggestion from Mill, might we understand contractualism and rule consequentialism as proposals for the actual inculcation of a code of conventional morality, one that would be best justified or optimific?⁸⁵ If we did, the objection of the previous sections would not apply, just as they do not apply to Mill. But that is not the aim of these theories. Scanlon does indicate that if there is a social practice already in effect, and its norms are among those that could not be reasonably rejected, then, under the Principle of Established Practices, it would be wrong to violate those norms.⁸⁶ But it is not a condition of a non-reasonably rejectable principle identifying what acts are wrong that the principle is already generally accepted. And though Scanlon's account of moral motivation stresses the value of living in a relation of mutual recognition with others—living, in Mill's words, "in unity with our fellow

⁸⁴ John Stuart Mill, *Utilitarianism* (1863), *On Liberty* (1859).

⁸⁵ See Pogge, 135-8, for discussion of this "political" interpretation of Scanlon.

⁸⁶ *What We Owe to Each Other*, 339.

creatures”—he also makes it clear that he does not have in mind actual social harmony in the sense that everyone accepts the same principles as justified and for the same reasons.⁸⁷

Rule consequentialists are a little less clear on this point. Hooker often seems to be arguing that acts are wrong if they violate an ideal code that may not be actual. On the other hand, a chapter of *Ideal Code, Real World* is titled “What are the Rules to Promote?” and his canonical statement of what makes acts wrong uses the indicative rather than the subjunctive mood.⁸⁸ Moreover Hooker, like other defenders of rule consequentialism, takes into account the “cost” of inculcating or internalizing the ideal moral code, which makes most sense if what is on offer is a blueprint for reform of actual social practices. I suspect the solution to this question of interpretation is that Hooker has in mind a case where the actual code generally accepted —“conventional morality”—happens to coincide to at least a good extent with the ideal code. This is supported by his embrace of “wary rule-consequentialism,” which implies that attempts “at moral reform should begin with existing practices.”⁸⁹

4. *The Justification and Reform of Existing Social Practices*

This way of thinking about legalist moral theory gives it a purpose entirely different to that of reductive nonconsequentialism. We are now looking not for greater depth and detail in our understanding of limits to how we can treat each other, but for an evaluation of existing social practices. This different project is certainly worthwhile. As Gerald Gaus has compellingly argued, the legitimacy of informal social enforcement of what he calls “social morality” is an

⁸⁷ *What We Owe To Each Other*, 154, 162-3.

⁸⁸ p. 32.

⁸⁹ p. 114. Here Hooker follows Brandt, e.g. *A Theory of the Good and the Right* (OUP, 1978), 290.

important and neglected issue.⁹⁰ And even beyond legitimacy, there is a question worth asking whether these practices are as good, or well-justified, as they might be, and if not how they might be improved. So if the model of hypothetical moral legislation were investigating the good consequences, or reasonableness from each person's point of view, of possible reforms to conventional normative orders, there would be no objection.

But we have to remember that to argue that a normative social practice of following and informally enforcing conventional moral norms is legitimate or even best justified is not to give an account of right and wrong at all; it is to give an account of the justification or otherwise of a practice.

Rawls once argued to the contrary. His starting point in "Two Concepts of Rules" is act utilitarianism, which, as he points out, implies that the conventional moral rules of promising and punishment are not moral rules at all; they are simply positive rules of a conventional social practice that it may or may not make good moral sense to comply with in particular cases depending on whether that does any good. To get to a duty to follow the rules of the practice, Rawls did not offer the rule utilitarian idea that since it is or would be better if all follow those rules, they are binding on each. His response, instead, was that the proper object of utilitarian assessment was the overall practice, and that if somebody raised the question of whether a good utilitarian should comply in a particular case with the rules of the practice,

⁹⁰ *The Order of Public Reason* (Cambridge: Cambridge University Press, 2011). In Gaus's language, the issue is the authority of social morality.

he would simply show that he didn't understand the situation in which he was acting. If one wants to perform an action specified by a practice, the only legitimate question concerns the nature of the practice itself ("How do I go about making a will?").⁹¹

It's interesting that the example Rawls gives here is a legal one. Of course, if I want to make a will, I want to make a legally valid will; so I have to follow the formal legal requirements to the letter. But what is the moral analogy? "If one wants to perform an action specified by a practice," Rawls writes, "the only legitimate question concerns the nature of the practice itself"—which we must take to mean: if I want to participate in a fully compliant way with the practice, I must follow the rules. But the question always remains whether there are good moral reasons to participate in a fully compliant way with any given social practice.

The goodness or justifiability of a social practice, such as informally enforced conventional morality, does not in itself establish that the norms of that practice are valid or true moral principles. Scanlon, of course, never suggests anything to the contrary. The satisfaction of the test of reasonable rejectability would give conventional norms the status of principles of right and wrong only to the extent that that test is generally successful as an account of what makes acts wrong. A view which holds that acts are wrong if they are held to be so by norms of an actual social practice that could, as a practice, be justified, would be a very different view. There may be arguments to support such a position, turning on the normative significance of convention, but they are not provided by legalist moral theory.

5. Conclusion

⁹¹ "Two Concepts of Rules" (1955) in *Collected Papers* (Cambridge, Mass.: Harvard University Press, 1999) 38.

I have argued that a version of Scanlon's reductive approach that seeks justification for conduct of such and such a kind in such and such circumstances by comparing the reasons in favor and the reasons others have to object is a very attractive way to think about moral constraints on how we may treat one another. Of course, as decades of discussion of Scanlon's contractualism have shown, there is much to think about when considering the kinds of reasons that are appropriately appealed to in this thought process. I have not begun to investigate that here. I repeat only that nonconsequentialist constraints constitute a narrower domain than what Scanlon means by the morality of what we owe to each other, and that, unlike Scanlon, I believe that morality includes a robust requirement of impartial beneficence; so for me the reductive method has less work to do.

But the main argument of this paper has been negative. It is that Scanlon's reductive method should not be oriented to justification by way of principles for the general regulation of behavior. This model of hypothetical legislation, which is embraced also by rule consequentialism, is unmotivated at its foundation. The natural law tradition, extending back for millennia, and of course also Kant's explicit invocation of the moral law, have made the association between morality and law seem natural. But it is just a mistake to set about constructing morality as if we were making law.