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A Battle for Rights Justification: Millian Utilitarianism vs. Scanlonian Contractualism

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Introduction

What rights are, where they come from, and who is to be included within the moral community upon which they are bestowed are areas of contention within philosophy: past, present, and for the foreseeable future. The aim of this project is to give plausible answers to questions of the sort raised above. This project will commence with an exposition of two prominent ethical theories which, seemingly, have the potential to provide such plausible answers. Thereafter, I will consider three account of rights to inform my view of how the most plausible account of rights might look. Lastly, I will aim to explain which of the two ethical theories chosen – Mill’s utilitarianism and Scanlon’s contractualism – provides a more plausible justification for, and understanding of, these rights.

I will begin Section I with an examination of the ethical theory of utilitarianism as argued for by John Stuart Mill in *Utilitarianism*. I chose this ethical theory because of its prominence in ethical thought and for its prima facie strength. Quite a few philosophers, when defending normative claims, feel the need, if their views are at odds with the implications of utilitarianism, to defend their views against it. Such prominence leads to a plausible prima facie belief that if one is going to attempt to give a plausible account of rights, then utilitarianism is an excellent place to begin looking for the relevant justification.

Next, I will examine the pervasive ethical theory of contractualism as advocated by T.M. Scanlon, as espoused in “Contractualism and Utilitarianism”. This examination will likewise begin with a thorough exposition of Scanlon's contractualist theory. My

reasons for choosing contractualism as the other ethical theory from which to approach the issue of rights are similar to my aforementioned reasons for having chosen utilitarianism. In addition to its prominence within ethical discussions among philosophers, contractualism's influence can be seen in the social and political institutions of some contemporary nations. The United States, for example, was founded by individuals who derived much justificatory power for their ideologies from social contract theorists, such as John Locke. Given the pervasiveness of contractualist schools of thought since the nascent stage of the development of some nations, such as the United States, contractualism seems to be another excellent place to look for the relevant justification of rights which this project hopes to uncover.

Section I: Explication of Utilitarianism and Contractualism

In *Utilitarianism*, John Stuart Mill posits the namesake ethical theory – utilitarianism – in order to give a satisfactory theoretical account of what it is about the nature of certain actions that makes them *right*. To this effect, he asserts that: “The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure” (Mill 7).

What is it that makes a right action right, or conversely, that makes a wrong action wrong? For a moral theory to be taken seriously, it must at the very least provide a plausible answer to this fundamental question. The above quote by Mill provides a

scheme within which we can assess actions to this effect; namely, it is the promotion of pleasure – or the absence of pain – which makes an action partake in moral rightness, and contrarily, it is the promotion of pain – or the privation of pleasure – which makes an action partake in moral wrongness (Mill 7).

Furthermore, this ethical theory makes a claim about that which is extrinsically good – good as an instrument or means to obtain something else – and that which is intrinsically good – good because it is desirable for its own nature or its own inherent characteristics. Mill posits that the only things which are good on account of their own intrinsic nature, and thus deservedly categorized as intrinsically good, are pleasure and the privation of pain; all other things, he continues, are desirable insofar as they increase pleasure and decrease pain (Mill 7).

Given the emphasis placed upon pleasure and the evasion of pain within this moral theory, at least as argued for by Mill, as the only things which are good or desirable in and of themselves, the temptation may arise to say that this theory is degrading to human beings because it paints a picture of humankind as brute creatures whose ultimate end is nothing over and above seeking pleasure and avoiding pain (Mill 7). This need not be worrisome, reassures Mill, because such an accusation would be false. This falsehood stems from the fact that we are not comparable to brute creatures in the sense that certain skeptics of utilitarianism would have us believe; rather, we have the capacity for certain desires and pleasures, stemming from our higher faculties, which brute creatures do not. Furthermore, on Mill's view not only do we possess higher faculties than brute creatures, but nothing is regarded “as happiness which does not include their gratification” (Mill 8).

Having dispelled the objection that utilitarianism likens human beings to impulsive brute creatures, or beasts, Mill proceeds to discuss the importance of the concepts of quality and quantity in understanding pleasure. Utilitarianism, in assessing the rightness of actions, takes both the quality as well as quantity of pleasure produced to be of significance; it would be absurd, thinks Mill, that such judgments should depend solely upon the quantity of pleasure produced. Such an understanding would be absurd because not all pleasures are of the same quality, but rather some are thought of as higher quality pleasures in that they are more desirable or valuable than others (Mill 8).

By what criterion can one justifiably say that a particular pleasure is of greater quality than another? The only way to plausibly say that one pleasure is of higher quality than another is when individuals who have experienced both decidedly prefer one to the other. For if an individual is not capable of experiencing both of the relevant pleasures, or has not in actuality experienced both of the relevant pleasures, then he is not qualified to say which one is of higher quality (Mill 8).

The ideas of the quality of a pleasure and of the methodology to be employed for determining variations therein offer a nice segue to the argument that those pleasures which engage the higher faculties are of a higher quality than those which engage the lower faculties. By the higher faculties, are meant such things as intelligence, conscientiousness, feeling, and being a learned person. These higher faculties are more difficult to satisfy than are the lower – or bodily – faculties; yet, Mill contends, no one capable of adequately experiencing ways of existence which engage both the higher and lower faculties would choose that way which only engages the lower faculties. (Mill 9).

The natural objection here is to ask: what about individuals who choose to eat

poorly even though they understand that it will lead to poor health, or individuals who in other ways intellectually comprehend the negative ramifications of indulging certain appetites of the lower faculties yet nevertheless choose to do so? Mill too recognizes the occurrence of such actions, yet he is not convinced that they suffice to undermine the supremacy of the higher faculties. Such individuals, he contends, who choose to overwhelmingly pursue the lower pleasures in lieu of the higher pleasures do so out of necessity, or put another way, because these are the only pleasures they are any longer capable of enjoying. The inability to exercise the higher faculties and enjoy the pleasures which engage them comes from an individual's employment and society being arranged in such a way that they are not amenable to the exercise of the higher faculties, such that reiterated neglect causes them to wither away and perish (Mill 11).

Utilitarianism's chief concern when performing the relevant utility calculus is not the happiness of any particular agent, but rather the greatest amount of happiness altogether. Thus, that which is most fundamental on this ethical theory – or put another way, what is ultimately desirable for its intrinsic goodness – is the promulgation of lives which, to the greatest possible extent, are filled with bountiful and high quality pleasures, and are as free as possible from pain or the privation of pleasure. It is particularly noteworthy that Mill thinks that his ethical theory applies to all sentient life forms, not just humankind, such that all sentient life forms should enjoy a life as full as possible of pleasures and as free as possible of pains (Mill 12).

One might be skeptical of the possibility of actually attaining happiness, especially in light of Mill's earlier concession that those who are capable of exercising the higher faculties will find happiness much harder to come by; thus, a criticism may arise

that it seems odd for the ultimate end of morality to be the pursuit of something unattainable. However, such an objection is misleading, for it only focuses on one of the two fundamental tenets of utilitarianism. Not only does utilitarianism call for the pursuit of happiness, but in addition the evasion of pain. Moreover, even if happiness is unattainable, Mill further argues, this just makes the task of avoiding pain all the more important. If we cannot hope to obtain happiness, then the next best thing we can hope for, seemingly, is to avoid pain.

However, Mill does not believe it to be the case that happiness is unattainable, because of what it is to have a reasonably happy life. If one takes a life to be happy if and only if there are continuous and frequent states of intense pleasure present within that life, then it is evident enough that happiness would indeed be unattainable, for such states are generally short lived and infrequent. This is not happiness in the sense that Mill understands the term; rather, by a happy life he makes reference to the shortness of existence in which an individual is realistic about which pleasures are possible, and to what extent, and during which said individual experiences a few, quickly-passing pains, and markedly more pleasures of the aforementioned realistic sort. A being who has significantly more pleasures than pains, and who is realistic about both which pleasures he can hope to obtain as well as the quantity of said pleasures, is one that Mill would thus categorize as leading a happy life in accordance with utilitarianism (Mill 13).

Certain social, political, and economic realities, imprudence, and poorly-regulated desires can help to explain instances in which a happy life of this sort is not actualized. A malfunctioning education system, uncultivated minds – minds which have not been taught to exercise certain faculties such that pleasure can be derived from such areas as

nature, art, poetry, and history – bad laws, and being subjected to the will of others are some of the examples given of realities which can, and often do, hinder the realization of the utilitarian understanding of a happy life. What's more, Mill argues that many of these “great positive evils” are eradicable, or at the very least greatly reducible, by human beings if enough of us were properly informed, empirically as well as morally (Mill 15).

An important tenet of utilitarianism is its impartiality. The happiness with which utilitarianism is concerned is that of all persons affected by the particular action in question, and not just that of any particular moral agent. In fact, to be faithful to the requirements of this ethical theory, when assessing the rightness of an action through the lens of utilitarianism an agent must be impartial about his own happiness when doing the utilitarian calculus. This amounts to viewing one's own happiness as being of equal value to any other human being's happiness. Such impartiality, Mill contends, is embodied in certain Christian proverbs, such as do unto others as you would have them do unto you (otherwise known as the golden rule) and love your neighbor (or others in general) as you love yourself, and the ideal utilitarian moral community would be founded upon individuals who have these impartial beliefs deeply engrained within them (Mill 17).

How does one go about actualizing, to the greatest extent possible, the sort of moral community espoused above, in which moral agents are willingly impartial about within which human beings happiness is aroused and the evasion of pain is sought after? Fear not, Mill has an answer to this, too. His two proposals toward this end are: a) maintaining laws and social institutions which work to bring it about that the interests of every individual resembles, as closely as is conceivably possible, the interests of the whole society, and b) given that education and opinion are well-accepted as being

formative of human character and belief structures, they should be used to promote throughout society the belief that the each individual's happiness is integrally tied to the flourishing of society itself, such that more individuals being happy has causal influence over the increased well-being of society itself. These two proposals work to develop certain beliefs and desires within individuals such that their natural, non-coerced choices will work to promote the general good, and thus work toward achieving the utilitarian end (Mill 18).

Cultivation of certain sentiments and belief systems such as those enumerated above will lead to a constituency of individuals who place high value in truth and who recognize the dangers of untruthfulness with regard to human solidarity. That utilitarianism, like most ethical theories, calls for the perpetual adherence to truthfulness is not itself contentious. What is contentious, however, is the question of when an individual is justified in departing from the truth. A general case in which departing from the truth is seemingly justified is when it serves to prevent a much greater harm than is created by the lie itself; consider, for example, the case of a violent criminal who comes to your door with a bloody knife and asks if Bob, who is indeed there, is home.

While there do appear to be cases, such as the one above, in which purposeful lying is likely justified, the issue quickly arises of how to narrow such instances down to when they are absolutely necessary, such that one can still reasonably trust his fellow man to tell the truth. In this endeavor, Mill asserts that utilitarianism is at least equally as helpful as any other moral theory; for a major aim of utilitarianism is to provide a basis for comparing different utilities and giving an intelligible way of discerning which among them is preferable (Mill 23).

Rather than being deontological, or duty based, utilitarianism is a consequentialist moral theory. By this is meant that the motive of an action is not of moral relevance when assessing the moral rightness of that action. Rather, what is of moral relevance are the consequences of the action; namely, the happiness promulgated and the pain evaded. Furthermore, the pleasures and pains of relevance need not be those of each and every single individual within a given society. For this, Mill thinks, would be supererogatory as well as unreasonable. Rather, to act morally on the utilitarian line of thought, one only need consider the happiness of those few people whom he comes across in his ordinary everyday life.

When an individual is indeed able to affect the happiness of the vast majority of society, then on this ethical theory he is to do so; but, this is not to be confused with the existence of such an obligation for those who lead daily lives which do not impact a vast segment of society. In this way, when each individual is attentive to the happiness of those individuals with whom he has reiterated interactions, then utilitarianism is at work at the societal level without placing a supererogatory burden upon any particular individual.

After giving a detailed exposition of what utilitarianism is and responding to prevalent objections, Mill sees fit to address the issue of what the source is of the obligation to follow the dictates of this ethical theory. Why is it, he asks, that an individual must be bound to the general theory which calls for promoting happiness rather than to those particulars from which happiness actually arises for him? Reluctance to adhere to utilitarianism as the standard by which actions must be justified will remain, thinks Mill, until human beings are educated in such a way that a felt deep connection

between them, which serves as an integral part of their character, is cultivated. It should also be recognized that this difficulty of convincing people why they should abstract away from particular actions and instead evaluate morality in accordance with a general theory, is not just an issue faced by utilitarianism; indeed, this issue must be addressed by any moral theory if it is to be taken seriously (Mill 28).

When discussing sanctions which encourage adherence to a moral theory, there is a distinction to be drawn between external and internal sanctions. By external sanctions, are meant something like coercive mechanisms outside of the agent himself. Seeking the approval of others, either for moral reasons or to avoid physical punishment, as well as wanting to do well by those we care about are external sanctions, or motives, which, argues Mill, apply to utilitarianism as much so as any other moral theory (Mill 28).

Whether of divine or human implication, the desire to escape the criticism and elicit the positive sentiments of others toward us, both morally and physically, are the external sanctions which work to enforce utilitarianism (Mill 29).

By internal sanction is meant something like an inner sense of duty which tends to lead an individual to hold certain beliefs, and thus to ultimately act in certain sorts of ways. In particular, insofar as duty is concerned, Mill thinks that the internal sanction by which one is led to perform his duty is the feeling he has by which he feels some sort of pain when he does not perform his duty; furthermore, as one's morality becomes more cultivated, it is thought that not performing one's duty will become less possible. Mill believes internal sanctions, or the subjective feelings present within our minds, are the ultimate sanction of all morality. In this way, to the question of why is utility the standard by which we should assess the morality of actions, one can answer because of the

conscientious sentiments of human beings (Mill 29).

It bears noticing that this sort of answer will appear unsatisfactory to those who do not possess the sentiments which are appealed to by utilitarianism. However, this is not a detriment to this ethical theory alone. Rather, Mill wants to say that an individual who lacks the sentiments described above will find implausible not just utilitarianism, but every other conceivable moral theory. For individuals who have not had their minds properly cultivated through education and other means of socialization, and thus do not harbor feelings of inner-connectedness with fellow human beings, internal sanctions will not suffice to convince them to adhere to moral theory. Rather, for such individuals, only external sanctions will obtain compliance to morality (Mill 30).

The objection may arise upon considering the justification of moral theory: what obligation can morality command if it is seen not as an objective reality, but rather as an artifice or as something only present in human consciousness? Mill responds by positing that sanctions, or reasons for acting in a certain way, always find their origin in the human mind. Take for example conduct which is explained by particular religious beliefs. Even though this individual believes it to be an objective fact that there exists a deity, the conduct associated with this belief has its sanction in the mind of the believer via the belief in this deity. Similarly, to the question at the beginning of this paragraph, it may be responded that beliefs in objective facts only affect conduct through the subjective feelings that arise within individuals. Thus, whether there is some objective fact in which morality inheres or it is a transcendental fact, either way insofar as conduct is concerned, what is of significance are subjective feelings within individuals which in turn elicit actions (Mill 30).

At this point I have given, for the purposes of this project, an adequate exposition of Mill's utilitarianism. I have also enumerated some potential objections which Mill himself recognized may be raised against the theory, and I have provided some of his responses to such objections. Moreover, I have provided an overview of Mill's conversation on sanctions for adhering to morality. I now wish to, for the remainder of section I, turn to the ethical theory of contractualism by turning to Scanlon.

In "Contractualism and Utilitarianism", T.M. Scanlon wants to argue that the ethical theory of contractualism is a viable alternative to utilitarianism. While utilitarianism is a very prominent theory within the field of ethics, Scanlon thinks this is due to the widespread belief that rival ethical theories have foundational difficulties. He wants to draw notice to that fact that the two most prevalent variations of utilitarianism are not themselves problem free; act utilitarianism, he asserts, leads to outcomes which contradict widely held moral intuitions, whereas rule utilitarianism is seemingly unstable (Scanlon, "Contractualism" 103).

Scanlon does not believe it to necessarily be the case that an ethical theory must serve one's current desires or advance one's interests. Indeed, he deems it plausible that one may have certain moral obligations even if he were not to benefit in either of the above ways. However, one thing an ethical theory must do, insofar as one can be certain of such things, is elucidate the reasons to act in certain ways, reasons provided by morality (Scanlon, "Contractualism" 105).

Furthermore, these reasons must extend to all persons. A satisfactory moral theory, on Scanlon's view, must give an account of why the moral reasons it gives for a certain kind of conduct are to be taken seriously. In addition, it should explain why it is

that those who are convinced by the moral theory are indeed convinced. Even once this has been done, one might object: is it actually in one's interest, or good for one, that one is susceptible to the reasons provided by moral theory (Scanlon, "Contractualism" 106)? While Scanlon does not address the latter issue in this work, it does bear mentioning that the contractualist, or a proponent of any moral theory for that matter, if he hopes to convince another to adopt a particular theoretical normative outlook, should first be able to explain why it is that adherence to any moral theory is for one's own good.

At this point, it is fitting to explicitly state what Scanlon means when he references contractualism. His contractualist view is approximately given by the following: "an act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced general agreement" (Scanlon, "Contractualism" 110). Whereas Mill's formulation of utilitarianism states what it is for an action to be morally right, Scanlon's formulation of contractualism states what it is for an action to be morally wrong.

By "informed agreement", Scanlon understands those agreements which do not have their origin in superstition or in false beliefs about the consequences of actions. This holds true even if it may be argued that it is reasonable to hold these beliefs. The purpose of the term "reasonably," says Scanlon, is to disallow rejections during the contracting process that would be unreasonable in light of the fundamental objective of the contract process, which is to find principles to serve as the basis of informed, unforced general agreement. The "unforced" clause of the theory is meant to rule out two possibilities: a) coercion, and b) being forced to agree because of a weak bargaining position, such as not

being able to hold out for as long as other parties involved in the contracting process (Scanlon, "Contractualism" 111).

Given this understanding of certain ideas within Scanlon's contractualist account, it follows that the only acceptable, relevant pressure at play during the contracting process is the desire of all parties involved to "find and agree on principles which no one who had this desire could reasonably reject" (Scanlon, "Contractualism" 111). Scanlon draws attention to the careful wording of the contractualist account of moral wrongness, noting that it does not call for principles which everyone could reasonably accept, but rather for principles which no one could reasonably reject. The reason for this wording, he argues, is that some self-sacrificing individuals may choose to agree to a principle which burdens them more than others for the overall good, however it would not seem unreasonable, alternatively, for these same people to reject this principle for imposing an unnecessary, unjustifiably unequal burden upon them. In this way, Scanlon thinks that it should be the reasonableness of *rejecting* a principle which serves as the main criterion of contractualism, rather than the reasonableness of *accepting* a principle (Scanlon, "Contractualism" 112).

Principles may also be considered morally wrong on Scanlon's account if they violate a duty which needs to be established by convention. Examples given to illustrate this idea include the duty to keep one's covenants and the duty of mutual aid. Duties which are important for us to have are established by convention, and once they have been established actions which go against them will be considered wrong for that very reason. Thus, Scanlon admits a certain level of dependence on convention, with the effect that since such conventions are a product of cultural relativism this admits a certain level

of cultural relativism into the contracting process itself. It then follows that what a person can reasonably reject will be influenced by both his personal psychology and preferences as well as by the society which he inhabits (Scanlon, "Contractualism" 112).

A seeming issue at this point is that, given the above understanding, it is not so obvious which principles would actually be agreed to, or even if there are principles which can serve as the basis of informed, unforced general agreement. Methods discussed by Scanlon to try and avoid this issue and establish meaningful normative claims are: a) to specify the parameters within which agreement is to be reached, b) to specify which people will serve as parties in the contracting process, and c) to suggest some standard by which one can assess if the rejection of some given principle is reasonable (Scanlon, "Contractualism" 112).

To the question of who is to be included in the contracting process, Scanlon offers the following reply: "morality applies to a being if the notion of justification to a being of that kind makes sense" (Scanlon, "Contractualism" 113). Therefore, in order for an individual to be in the scope of morality, the following conditions must hold: a) there must be some way to distinguish when things are going well or not well, better or worse, for that being, and b) the way in which things can be said to be better or worse for an individual must be comparable to the way in which things can be said to be better or worse for other contracting parties (Scanlon, "Contractualism" 113).

The first condition is pretty straightforward. When an individual is deciding whether it is reasonable to reject a principle he will obviously need to make considerations of how this principle will affect him. The second condition gets at the idea that when deciding how reasonable it is to reject a principle, another relevant

consideration is how the loss imposed upon one by this principle compares to the loss which will be imposed upon the other contracting parties. Thus, if it cannot be determined how a being is made better or worse off, then the ability to compare the losses that will be incurred by different parties is inhibited, and consequently there is insufficient information for this being to be admitted into the moral community (Scanlon, "Contractualism" 113).

The idea of what a trustee would accept on a being's behalf follows naturally from the above conditions. This is to say that when the two conditions above are satisfied, a trustee could reliably make decisions in the contracting process on behalf of the being who satisfies these conditions. But from this follows an objection of the following sort: how are we to decide who is to be included within the possible range of trusteeship? Put another way, what argument can we give for why we should not represent objects such as guitars or baseball bats in the contracting process? Scanlon's response is to say that such entities do not satisfy the second condition of having a sense of good which is comparable to our own. A further condition which Scanlon posits in response to such concerns is that the being in question must possess a point of view, or put another way, the being must have some conception of the world. If this third condition is not satisfied, then our relation to that being is so disparate that its inclusion in the contracting process is utterly inconceivable (Scanlon, "Contractualism" 114).

Ethical views such as that argued for by Peter Singer in his discussion of the moral status of animals – which views the ability to feel pain as a compelling reason to include the feeler of pain within moral considerations – are compatible with, if not supported by, Scanlon's above understanding of morality. For one could plausibly argue

that when a being feels pain this is evidence of consciousness, and thus evidence of satisfaction of the first two conditions which specify which kinds of beings are to be included, or represented, in the contracting process (Scanlon, "Contractualism" 114).

On contractualist theory, the source of moral motivation is the desire to be able to justify one's actions to others on grounds that they could not reasonably reject. The strength of this aspect of contractualism, argues Scanlon, is that it allows us not just to conform to what others around us think, but rather, so long as adequate justification can be given for our actions, the grounds for which one could not reasonably reject, then we can be confident that it is not morally wrong (Scanlon, "Contractualism" 116).

Like Mill, Scanlon also believes moral education to be of great importance in cultivating the necessary sentiments for individuals to act in ways that adhere to morality. Scanlon recognizes that the desire to justify one's actions to others on grounds that they could not reasonably reject is, most likely, not innate. Moral education, as Scanlon understands it, involves cultivating this desire and learning both which justifications others will accept and which justifications you yourself are likely to accept, and ultimately using the different justifications one encounters through various experiences for the purposes of expanding upon one's moral education (Scanlon, "Contractualism" 117).

While the above desire may not be innate, Scanlon argues that it is nonetheless within most of us. Evidence for this claim includes the observation that some individuals expend copious amounts of effort to try and escape the burden of having to admit that an action or institution is unjustifiable. The inability of moral motivation to get people to act in accordance with morality does not inhere in a lack of the motive itself, but rather it

inheres in the fact that moral motivation is easily overridden by self-interest and self-deception (Scanlon, “Contractualism” 117).

The objection may be raised that this sort of moral motivation is not necessarily unique to contractualism. For it is conceivable that there could be some other ethical theory, on which there still exists the desire to justify one's actions on grounds that others could not reasonably reject. A non-contractualist theory, however, would have to say something to the effect that some moral properties are justifiable independent of their being agreed upon in an informed, unforced general way. Thus, part of the force of contractualism is its ability to appeal to those who look upon such views as “intrinsic to-be-doneness” with skepticism. Contractualism is able to justify moral properties and their motivational force not through an appeal to some mysterious intrinsic nature of the properties themselves, but rather through a system of agreement. This is not to say that there are not morally relevant properties independent of contractualist moral theory, but rather that the wrong-making features of certain actions, such as unjustified killing, are justifiably categorized as wrong through appeal to what would be reasonably rejected through a process of informed, unforced general agreement (Scanlon, “Contractualism” 118).

Contractualism, Scanlon argues, also offers a plausible account of the relevance of individual well-being. On this view, individual well-being is morally significant for no reason over and above the fact that an individual can reasonably reject what is contrary to his well-being or what gives his well-being inadequate weight; thus in this way there is no need for an appeal to notions such as intrinsic value (Scanlon, “Contractualism” 119).

Through the contractualist perspective, when a particular principle is under

consideration, it makes sense to first direct one's attention towards those who would be worst-off under it; for if there is anyone who has a justification for reasonably rejecting some proposed principle, it is most plausibly those who would be worst-off under its actualization. However, this is not to be confused with the claim that a maximin principle – under which we choose the principle which makes the worst-off as well off as possible – is justified. Rather, one must weigh the grievances of those who are made worse-off under some principle A against the grievances of those who are made worse-off under some principle B. Unlike utilitarianism, the gains, losses, and levels of welfare which matter for contractualism, insofar as the ethical theory has been espoused by Scanlon, are those which occur at the individual level (Scanlon, “Contractualism” 123).

Scanlon concludes his paper by admitting that there is more to be said about the normative implications of the sort of contractualism he has espoused, or put another way, about which principles would be agreed to as a result of the contractual process. Even so, he believes that he has provided a good enough account to show that contractualism can be taken as a serious competitor to utilitarianism, both as a theoretical ethical theory and as a practical explanation of moral motivation (Scanlon, “Contractualism” 128).

In section I, I have provided an overview of Mill's utilitarianism as well as Scanlon's contractualism. Given the fundamental aim of this project – to elucidate the extent to which each ethical theory can offer a plausible, convincing justification for the existence of rights – it is imperative that a fundamental, thorough understanding of these ethical theories be well-established at the outset. Section II of this project will focus on the literature surrounding the topic of rights. By analyzing different accounts of rights, I hope to, in Section III, arrive upon an informed conception of rights as well as answers to

fundamental questions about their scope and origin.

Section II: Explication of Utilitarian and Contractualist Rights Accounts

Before beginning an examination of various accounts of rights, it would be wise to first discuss the Hohfeldian Analytical System of rights. This system discusses the different forms which rights can take on, and this will be useful later on as we sift through various accounts. The Hohfeldian Analytical System of rights, as founded by legal theorist Wesley Hohfeld, identifies four basic elements of rights which are referred to as *Hohfeldian incidents*: privileges, claims, powers, and immunities. For the purposes of this project, privilege-rights and claim-rights are relevant. On the aforementioned Hohfeldian system, a privilege-right is defined in the following manner:

X has a privilege to Ω *if and only if* X has no duty not to Ω (Wenar, "Rights")

Rights of this form emphasize the notion of duty; specifically, they state that one has the right to do something just in case there is no duty prohibiting one from doing that thing (Wenar, "Rights"). A privilege-right can be thought of as a sort of right by default, in which one has a right to do those things which do not appear on some abstract list of "actions which one has a duty not to perform." As we evaluate utilitarian and contractualist privilege-rights accounts, it will be important in gauging their plausibility to examine how confident we are in asserting that the duties they appeal to are actual, justifiable duties. The other sort of rights with which this project will be concerned are

claim-rights. On the Hohfeldian Analytical System, a claim-right is defined as follows:

X has a claim that Y Ω *if and only if* Y has a duty to X to Ω (Wenar, “Rights”)

Whereas privilege-rights have to do with not violating negative duties, claim-rights have to do with carrying out positive duties. A claim-right can be thought of as an entitlement, in which one is entitled to have another perform some action in virtue of that other person having a duty to perform that action. A proper evaluation of utilitarian and contractualist claim-rights accounts will include an examination of the plausibility of such duties. These two forms of rights – privilege-rights and claim-rights – comprise what are referred to as *primary rules*, because they dictate which actions people are, or are not, morally required to perform (Wenar, “Rights”).

For the remainder of Section II, I will consider two utilitarian rights accounts and then one contractualist rights account. It is important to note that as I present each account for the remainder of this section, I am merely reporting objectively each position. It is in Section III, after having laid a sufficient foundation of the positions to come in Section II, that I will begin to present my own arguments.

Account #1: Rights as Character Cultivating

In *Cultivating Character: John Stuart Mill and the Subject of Rights*, Karen Zivi argues for a different understanding of rights. Rather than accept Dworkin’s understanding of rights as “trumps” or understand rights as a disciplinary discourse, Zivi proposes that we understand rights as “political claims” and furthermore that we should understand “rights claiming as a practice of a participatory but nonetheless agonistic

democratic politics” (Zivi 49). While others have previously viewed rights as trumps, in that they bring debates to a halt and separate individuals, or as disciplinary, in that they exclude and regulate others, Zivi's view is that rights can be thought of like opinions which we aim to convince others to also endorse. Since each individual has his or her own particular perspective, rights in Zivi's sense are contingent claims which can possibly gain the support of others, thus “open[ing] up the space for the democratic creation and contestation of community and identity (Zivi 49).

Mill is often read as supporting rights that are grounded in a set of ontological commitments, which presupposes that people are best off when they are not bothered by, or subjected to, interference from others. This view is well elucidated through Mill's prominent harm principle, which roughly states that when an individual performs an action which affects himself and only himself, then society is not justified in interfering and compelling him to do otherwise. Mill can be understood as endorsing the view that the individual has a right to do to his own body, so long as no harm is done to others, whatever he sees fit, as evidenced by his assertion that: “independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign” (Zivi 51). On Mill's view, not only does one have a right to do with and to one's body whatever one sees fit, provided said action does not affect others, but this is an *absolute right*, or a *trump* to use Zivi's language.

Individuals should be free from state interference to pursue their own ends, Mill argues, precisely because this freedom is what enables progress, at the individual and societal level, to occur. In order for progress to take place, he continues, human capacities must flourish and this only happens when individuals are free of arbitrary, undue

interference. Mill's view leads to the position that unjustified interference in one's affairs risks the well-being of not only the individual, but of society as a whole. Rights, for Mill, are justified not through appeal to human nature or through appeal to some other inherent feature of humanity, but rather through consideration of their instrumental value in helping to promote the utilitarian end of advancing the welfare of all mankind. Consequently, on Mill's account one has a valid rights claim just in case it contributes to individual and social welfare and the exercising of said right does not harm others (Zivi 51).

An objection which Zivi points out as having been levied by others in the past against the rights in Mill's ontology is that their nature runs counter to democratic principles. Mary Glendon, for example, is openly suspicious of Anglo-American rights discourse for presenting the right to privacy as, arguably, the most important fundamental right of political society. This view, Glendon asserts, came to be prevalent in Anglo-American rights discourse because of the treatise *The Right to Privacy* by Samuel Warren and Louis Brandeis, a treatise which was heavily inspired by Mill's characterization of the nature and supremacy of privacy. However, Glendon further argues, in espousing the view that privacy is necessary for human progress, or human flourishing, Warren and Brandeis furthered a conception of people as “atomistic and unencumbered, as 'lone rights-bearers'” (Zivi 52).

This Anglo-American Millian view of rights perpetuated by Warren and Brandeis, argues Glendon, is quite problematic. The severe individualism inherent to this view is politically destructive, because on the view that people are “lone rights-bearers” responsibility becomes less valuable and society as a whole will begin to ignore the needs

of the community, thereby impeding the foundations of democratic society through the devaluation of social interdependence. The reason for this troubling result, on Glendon's view, is that Mill's ontology, from which the view of the individual as a "lone rights-bearer" emerges, is mistaken; it fails to sufficiently appreciate the facets of our intersubjectivity and it does not give an accurate depiction of the evolution of the self as occurring through interaction with others; rather, on Mill's view the evolution of the self is viewed as occurring in isolation, away from the interferences of others (Zivi 52).

This worry had by Glendon, however, is not completely shared by Zivi. Zivi emphasizes that it would be a mistake to attribute to Mill the view that the individual is capable of existing in complete isolation from society; rather, Mill acknowledges that individuals are constituted through social networks and are thereby amenable to social influences (Zivi 52). In fact, on Mill's view a person's identity is indubitably shaped to some extent by social forces, for Mill deems it unimaginable for one's character to emerge from some unshaped conscious or will (Zivi 53).

Mill is somewhat a proponent of the doctrine of necessity, which argues that any given action has a nameable cause. Just as physical actions are thought to have physical causes, Mill believes that human behavior can be understood as the consequent of an antecedent state of mental affairs, or as the consequent of one's character (Zivi 53). Our mental states and character are determined by a plurality of factors, such as education, upbringing, and work experiences. Mill holds this view because he takes our beliefs about what men and women are naturally like to just be the result of certain experiences: our educational experiences, our experiences of how our parents treat one another, and so on. Furthermore, for Mill our mental states and character are not inherent to us, or

developed in isolation from others, because as our educational experiences change and our experiences of how men and women treat one another change, so too changes our character (Zivi 53).

Mill's modified version of the doctrine of necessity, which might be better called the doctrine of causation, draws attention to the fact that “simply because something will happen if nothing is done to prevent it does not mean that it will certainly happen whatever may be done to prevent it” (Zivi 53). Mill thus rejects the idea that what comes to be must be and cannot be otherwise, for he asserts that with respect to almost any given situation there are factors which could possibly alter the outcome of the prior causes (Zivi 53). Given this understanding, Zivi posits, Mill's aim is not to argue that individuals use rights to isolate themselves from society, but rather to distinguish between those social forces which impede individual character development and those which are favorable to individual character development. Rights, then, on Zivi's interpretation of Mill, are to be used as a means of both: a) identifying where social arrangements fall in this divide of character developing vs. character impeding, and b) correcting those social arrangements which impede, or hinder, the proper cultivation of human character (Zivi 54).

Society as a whole is not what Mill takes to be the cause of hindrances to the development of human character, but rather such hindrances are the result of only certain “wretched arrangements” (Zivi 54). It are the wretched arrangements of education and social relations which Mill specifically names as quite plausibly leading to the cultivation of bad characters, and therefore these are precisely what the individual needs to be protected against. Furthermore, as previously stated by Zivi, Mill does not take

interpersonal barriers to be the solution to hindrances of character development; rather, he proposes as a solution careful cultivation (Zivi 54).

Rights are not meant, on Mill's view, to abstract the individual from society; instead, when properly understood they actually entail an appreciation of how the individual is integrally involved in social relations. Rights, he posits, or at least their idea, bring to the fore certain feelings, beliefs, and demands commonly associated with the notion of justice. Rights have the ability of bundling together our ideas of justice as well as our sentiments of justice. Mill explains ideas of justice as our intellectual understanding of justice, associated with our rational faculty, and sentiments of justice as how we feel about justice, associated with our animal instincts. When we assert that a right has been violated, what we are doing is: a) calling attention to a violation of a rule of conduct, via our intellectual understanding, and b) demanding punishment for this violation to satiate our need for revenge, a need indicative of our animal instincts (Zivi 56).

This desire for revenge, held by all sentient beings, is thought by Mill to have its roots in a common need for security. The sense of absoluteness which we take rights claims to have, he furthers, stems from this need. However, this absoluteness is rooted in one's desire for revenge rather than in anything rational or intellectual. This sense of absoluteness alone does not suffice to make a rights claim a moral claim. For Mill, a rights claim is also a moral claim only if this desire for retaliation exists in conjunction with what he refers to as "superior intelligence" (Zivi 56). Put another way, for a rights claim to be moral it must consider the interests of the society as a whole and it must recognize the individual as a part of that society. This "superior intelligence" is what

takes us from purely animalistic, revenge-seeking individuals to beings who hold as fundamental thought, discussion, and debate (Zivi 56).

In *On Liberty*, Mill defends freedom of thought and expression because their exercise is an important means of cultivation; individual capacities for perception and judgment develop via dialogue and discussion, as does one's sense of affection and care toward the community (Zivi 57). Accompanying these freedoms, the likelihood for what Mill refers to as “ethical confrontation” increases (Zivi 58). However, this not need be a negative thing on the whole. While having one's beliefs and practices questioned might initially be painful, consistently debating the merits of one's own and others' ideals, opinions, and practices leads to the development of open-minded individuals who are willing and able to tolerate differences, listen to other points of view, and ultimately persuade or be persuaded (Zivi 58).

The idea of a society without contention is undesirable for Mill, because he holds that without the right to protest, as well as a need or avenue for actually doing so, it would be incoherent to speak of justice and there would be no worthwhile ends to pursue. The right to protest is seen by Mill as a sort of safeguard to prevent against beliefs, whether true or false, becoming set in stone as prejudice. Furthermore, this right guards against the development of individuals who are passive and uncreative; passivity, Mill warns, is not desirable if understood to be synonymous with a society completely homogenous in opinion and action, because such passivity rots the “moral courage of the mind” (Zivi 58).

The freedom of thought espoused above by Mill is not to be mistaken as an elitist doctrine, for he asserts that it is equally important that it be held by individuals of average

and higher intellect. One might say it is actually a right which is more important for those of average intellect, for it empowers average persons to cultivate as strong and vivacious of a mental faculty as possible. It is important to note, however, that Mill does not consider the right of expression as being absolute, or incapable of being curbed whatsoever. He posits that “vituperative language”, as well as other vicious methods of stymieing certain opinions should be rejected (Zivi 58). As long as such pejorative language and methods are not employed and discussion happens in a temperate manner which does not exceed the bounds of fair discussion, then, on Mill’s view “the free expression of all opinions should be permitted” (Zivi 58).

Mill's reason for imposing the above bounds on discourse is not some sort of altruism or desire to curb emotion from discussion; rather, his underlying motive is to ensure that those who possess ideas and beliefs which could challenge social norms and customs are not bullied into remaining silent. Consequently, Mill's defense of certain fundamental rights is not an attack on society as a whole, but on those aforementioned wretched arrangements which stifle ethical confrontation. Ethical confrontation, for Mill, is desirable because “intellectual passification” via uncontested acceptance of the status quo and a lack of avenues for political participation – both of which result from a lack of ethical confrontation – undermine what he takes to be the ultimate end: the general well-being of individuals in society (Zivi 58).

Account #2: Rights as Derived from the Optimal Moral Code

In “Utilitarianism and Moral Rights”, R.B. Brandt sets out to address a critique which has been raised by various philosophers; namely, that utilitarianism is incompatible with the position that there exist moral rights (Brandt 1). His method is to

explore the reasons often given in support of the existence of this incompatibility, and thereafter explain why these reasons fail to do the job for which they are intended. To begin, he wants to draw attention to the fact that utilitarianism is “a general normative theory *either* about what is *desirable*, or about what conduct is *morally right*, but in the first instance not a theory of rights at all, except by implication” (Brandt 1-2).

Brandt holds that it is consistent for one to be a utilitarian while not explicitly offering a way of defining or understanding the notion of a *right*. With that said, he conveys that there are *some* conceptions of a right which are indeed incompatible with the utilitarian position. The first example is the absolute right, by which Brandt understands a right which one has for the duration of his life and which cannot be revoked or alienated in any circumstance whatsoever. Second, the Hobbesian natural right also fits into this category; this sort of right refers to the liberty of every individual to “pursue his own good according to this own judgment” (Brandt 2).

However, within contemporary rights discourse rights of the above sort are not generally espoused. The views which are predominantly argued for in modern rights discussions – such as the rights accounts of H.L.A. Hart, David Lyons, and Joel Feinberg – contain nothing which would make it inconsistent to advocate for both their truth and the truth of utilitarianism. An issue at hand is which account of rights we want to espouse when evaluating the claim that rights and utilitarianism are incompatible. When we claim that one person, X, has a moral right against another person, Z, to do, have, or enjoy some thing, Y, Brandt suggests that what we mean is the following:

Some Z – either individual or individuals or sovereign body – has a strong moral

obligation *not overridable by marginal or even substantial but only by extreme demands of welfare*, both to refrain from interfering with X's having or doing or enjoying Y, and to *enable* X to do, have, or enjoy Y; and it is not wrong for X to feel resentment if he is hurt or deprived because of the failure of Z to discharge the obligation, and for him to be unashamed to protest, and there is some obligation for X to take reasonable steps of protest, calculated to encourage persons to discharge that obligation in this and similar situations (Brandt 2).

The above demonstrates Brandt's way of explicating how we are to understand the notion of a "right" when examining the strength of claims which assert an incompatibility between rights and utilitarianism. For Brandt, what is integral to the notion of a right is that one has a duty to enable, or not hinder, another's enjoyment or attainment of something, thus making this an example of a claim-right. But, of course, similar explication, to ensure that debate on this issue is informed, should be had regarding what is meant by "utilitarianism". Although some define utilitarianism as a general normative theory which attempts to establish boundaries of moral permissibility and impermissibility, Brandt suggests that we understand utilitarianism in the way that Mill describes it: "the utilitarian doctrine is that happiness is *desirable*, and the only thing, desirable, as an end; all other things being desirable as means to that end..." (Brandt 3).

On Brandt's interpretation of Mill, utilitarianism is to be understood as establishing a criterion of *instrumental desirability*, wherein an action, or institution, is more instrumentally desirable as it tends to bring about more happiness, including both

actual and expected happiness (Brandt 3). There is disagreement among utilitarians, however, about what exactly is meant by the notion of *happiness* – or *utility*, to use Millian language. Among various utilitarians, different things are often regarded as the bearers of happiness: some claim that only states of mind contain happiness, others assert that states of affairs desired for their own sake are what contain happiness, and further still there are utilitarians who posit that given two states of affairs one will be preferable to the other if a person prefers it (Brandt 3).

It is inevitable in contemporary moral discussion, Brandt thinks, that utilitarians will invoke the notions of *moral rightness* and *moral wrongness*. As this comes to be the case, distinctions become drawn between *act-utilitarianism* and *rule-utilitarianism*. Act-utilitarianism asserts that the moral status of an action is dependent upon the utility – actual or expected – of its consequences. Rule-utilitarianism posits that a moral code is most desirable for a society just in case there exists no other moral code whose acceptance (by the vast majority of the society's adults) would have greater expected utility, accounting for the total effects of the moral code as well as the costs associated with its acceptance and maintenance (Brandt 4). Thus, on rule-utilitarianism the moral status of an action within a society rests on whether or not that action is permissible, or obligatory, under the most desirable moral code for that society (Brandt 4).

Brandt offers four necessary conditions for when something, “A” to use Brandt's example, is *permitted* or *required* by a moral code. They are as follows: “(1) a person has a strong, normally overriding, motivation to perform acts of the type A for no further reason and especially reason of self-interest, (2) a person tends to feel guilt if he fails to do A without justification or excuse, (3) a person tends to think less of others not

motivated to preform acts of the type A up to a standard level, and (4) a person thinks all the foregoing dispositions on his part are justified in some appropriate way” (Brandt 4). It bears mentioning that condition (1) implies that for something to be the most desirable moral code for a society, then you have a reason for doing what it requires solely in virtue of its being required by the morally optimal code, and not due to self-interest.

Thus, by utilitarianism, Brandt understands the rule-utilitarian standard espoused above, by which an action's morality is determined by whether or not it is permitted or required by the most desirable moral code of the society within which the action is committed. Given this understanding of utilitarianism, along with the aforementioned view of rights, Brandt holds that there is no seeming incompatibility between being a utilitarian and a rights advocate. In fact, one can logically do so by stating that the most desirable moral code for a society requires that “one refrain from interfering with others' doing certain things, and positively to *enable* them to do them, sometimes when doing so will not maximize [expected] utility in a particular situation” (Brandt 4-5). Interestingly, Brandt posits that the rule-utilitarian can argue that not only do people enjoy moral rights of the aforementioned sort, but animals enjoy them as well (Brandt 5). I will have more to say about this claim as I give my own analysis toward the end of Section II.

An advantage of rule-utilitarianism, Brandt argues, is how it assists us in arriving upon knowledge of what our rights are. Such knowledge can be attained through contemplation of the following question: “would it maximize long-range expected utility to include recognition of certain rights in the moral code of a society, or to include a certain right with a certain degree of stringency as compared with other rights” (Brandt 5)? Such an inquiry into what the most desirable moral code will require will lead us to

discover not only which rights we have, but also what the scope of these rights are and the strength of a right relative to another right (Brandt 5).

Given Brandt's explanation of how rule-utilitarianism and rights are indeed compatible, the question remains of why their incompatibility is still so frequently asserted. The deeper problem which underlies this prevalent objection is as follows. A utilitarian will agree that there are certain *legal* rights which are justified by their being desirable – that is to say, the legal system which entails these legal rights maximizes expected utility. However, is it the case that these legal rights carry over as *moral* rights? To get at the crux of the issue, Brandt uses the following example. Suppose that Mary has a legal right to enjoy unobstructed use of her driveway (such that for another person to park his car in front of her driveway would be to violate her legal right and to thus to be worthy of legal punishment). Does it then follow that she also has a moral right, to the effect that others are morally obligated not to obstruct her driveway (Brandt 7)?

Brandt offers as a potential response the opinion of David Lyons, author of recent papers which address this very question and who rejects the proposition that legal rights carry over as moral rights as with the above case of Mary. The act-utilitarian, Lyons points out, will treat legal rights as serving to make constant the utilities associated with different potential actions, *even though* for the act-utilitarian one's *moral* obligation is to simply maximize utility in a given situation. Furthermore, for the act-utilitarian, violating Mary's legal right to unobstructed driveway use may sometimes be the action which serves to maximize utility in a certain situation, thereby imposing a moral obligation to violate a legal right (Brandt 7).

The rule-utilitarian, Lyons argues, does not have to assert that legal rights which

maximize utility automatically carry over as moral rights. Brandt claims that for it to be true on rule-utilitarianism that legal rights carry over as moral rights, it would need to be the case that a *moral system* which requires such behavior would maximize expected utility. It thus follows that for Mary to have a moral right to unobstructed use of her driveway, it must be the case that the moral system which will maximize expected utility is one which requires others to enable Mary to enjoy unobstructed access to her driveway. Brandt's above suggestion, however, does not convince skeptics such as Lyons who would put forward the following question: why does it follow from the mere fact that a *moral system* maximizes utility, and is therefore desirable, that one therefore has a *moral obligation* to comply with that moral system, particularly when there exists another possible action which if performed will generate even more utility (Brandt 7-8)? Put another way, what is so special about moral systems that makes it the case that anything which is desirable under a moral system becomes morally required?

Lyons argues that it is not inconsistent for a utilitarian to view *both* actions and moral systems as being desirable for their ability to maximize expected utility. Consequently, on his view it follows that it is consistent for a utilitarian to recommend a particular action which will maximize expected utility, even if the same utilitarian also endorses a moral system as maximizing expected utility which would prohibit this particular action. That the utilitarian can endorse violating a moral right even though he endorses a moral system which entails this moral right, is taken by Lyons to illustrate why it is that "legal and moral rights... have no moral force for the utilitarian" (Brandt 8).

How one is to reply to such an objection depends upon how it is that he defines *utilitarianism*. Lyons would be right, Brandt responds, if one were to define utilitarianism

in such a way as to link utility maximization with moral obligation. However, Brandt's conception of utilitarianism makes no such move; recall that for Brandt utilitarianism is to be understood as the claim that an action or institution is *desirable* just in case it maximizes utility, either actual or expected (Brandt 8). Hence, Brandt's formulation of utilitarianism does not *require* that actions which maximize utility be performed. Instead, it simply affixes to such actions a predicate; namely, it says of them that they are desirable (Brandt 8).

But, given Brandt's understanding of utilitarianism, how are we to make sense of notions such as the morally right and the morally wrong? Brandt argues that for some, such as John Stuart Mill, linking desirability and morality is a conceptual matter. He refers to a quote by Mill in which Mill describes the notion of the *wrong* as that which we view as meriting punishment – be it legal punishment, disapprobation, or punishment via one's own conscience (Brandt 8-9). Hence, on Mill's view for something to be *morally wrong* is to say that its being punished is *desirable*. However, Brandt posits that Mill's way of trying to connect desirability and moral obligation is not very persuasive.

There is another way of connecting desirability and moral obligation which Brandt finds more convincing. This alternative way is formulated as follows. Given that the ultimate aim of the utilitarian is to promote as much societal welfare – or happiness – as possible, human action is of vital importance to helping achieve this end. Thus, the utilitarian will desire the performance of those actions which create – and ideally, maximize – welfare. Furthermore, a thoughtful utilitarian will wonder how he can make it be the case that people are *actually* inclined to perform those actions which in the aggregate maximize happiness (Brandt 9).

Prima facie, moral education will be a good way of bringing this about; more specifically, moral education in the sense of cultivating the characteristics of sympathy and altruism such that individuals will tend to act in ways which produce happiness. However, moral education alone is not enough to get people to act in the desired way, because most individuals will not be sufficiently knowledgeable about the consequences of their actions. Since motivation alone does not appear to be enough to get people to act in ways which actually promote happiness, Brandt furthers that it will then occur to the thoughtful utilitarian that a legal system will do well in this endeavor. A legal system will be beneficial to the utilitarian end in that it will, through its sanctions and implicit directives, both aid people in determining what to do as well as motivate people to act in such a way as to not violate the dictates of the legal system (Brandt 9). The aforementioned thoughtful utilitarian will desire the legal system which maximizes happiness, which will be that legal system which produces as much social welfare as possible at the least possible cost (Brandt 9).

In addition to this legal system, Brandt's thoughtful utilitarian will also envision the creation of a moral system. Through conditioning, children can be educated in such a way as to be repulsed by certain classes of actions and to feel guilty when they act in ways which are forbidden by the moral system, except in exigent or special circumstances. Furthermore, children can be given a moral education which will teach them to express disapprobation toward others who act in ways forbidden by the moral system, except in exigent or special circumstances. Similar to the above legal system, the thoughtful utilitarian will want a moral system which maximizes happiness, which will be that moral system which produces the most possible social welfare at the least possible

cost. Both the legal system and moral system which this utilitarian will ultimately desire will be desired by him not for their own natures, but for their instrumental value in bringing about that which is intrinsically valuable, happiness (Brandt 10).

In the earlier example of Mary, a question was proposed as to how we can arrive at a moral obligation to not obstruct Mary's driveway. Before trying to answer this question, Brandt assumes that the moral system envisioned by the thoughtful utilitarian will roughly support the legal system which maximizes expected utility. Then, Brandt invites us to consider the cases of a driver who knows that utility will be maximized if he obstructs Mary's driveway and of a police officer who knows that utility will be maximized if this driver is not punished.

If a moral code has been thoughtfully constructed, then there should not be a huge disconnect between what the moral code requires and the conduct which will actually maximize welfare. To avoid such a disconnect, Brandt asserts that the optimal rule-utilitarian moral code will contain what he refers to as *escape clauses*. In exigent circumstances, this rule-utilitarian moral code will allow for rules to be suspended; for instance, in an emergency one may park in front of Mary's driveway. But what of non-emergency cases, in which breaking a dictate of the moral code will do *a little bit* more good than will following the rule? Rule-utilitarianism of the sort espoused by Brandt directs people *not* to maximize expected utility in a certain situation, but *rather* to follow certain rules which are "amended where long-range utility" requires (Brandt 11). It then follows that for the sake of consistency the rule-utilitarian of this sort will not advise someone to park in front of Mary's driveway *simply because* it will maximize utility in a particular situation, barring exigent circumstances. Thus, it seems that the consistent rule-

utilitarian will conclude that there is indeed a moral obligation not to obstruct Mary's driveway, because one should follow the principles of the moral code, to the effect that one is following his conscience, except when long-range utility demands amendment to these principles (Brandt 11).

Why does Lyons conclude that it is not the case that we have a moral obligation not to obstruct Mary's driveway? For Lyons, acts and institutions are *means* to be used in achieving the utilitarian's ultimate end of maximizing welfare. Thus, for him the moral system is nothing over and above a means to happiness. Lyons then asks the following: if one knows that he can maximize his current happiness by obstructing Mary's driveway, and the moral code is only a means to maximizing happiness, then why should he not obstruct Mary's driveway since it will achieve the same end which the moral code purports to aim for? In response to Lyons, Brandt offers two points (Brandt 11).

First, Brandt argues that Lyons' above objection does not show that there does not exist a moral obligation not to obstruct Mary's driveway. *Moral obligation* refers to when the optimal moral code requires something, and *moral wrongness* refers to when the optimal moral code prohibits something. Given this understanding of moral obligation, Brandt argues, when Lyons claims that there is not a moral obligation to obstruct Mary's driveway, he is confusing *moral obligation* with *desirable* or *expedient* (Brandt 12).

Second, Brandt points out an inconsistency in Lyons' position. Seemingly, Lyons assumes that a utilitarian can consistently both: (a) “preach” generally about avoiding certain sorts of actions, to the effect that people feel guilty when acting in the prohibited ways, and (b) recommend to others to do that which they determine will maximize expected utility in a certain situation, regardless of what is required by the moral code

about which he “preaches” (Brandt 12). It thus appears that what Lyons is endorsing is a sort of combined strategy, whereby one preaches one thing publicly yet does another privately – or at the very least, claims to believe one thing publicly while privately believing another. Brandt's contention is that to do this is to be insincere when engaging in ethical discourse with others, with the effect of cutting one's self off from the most important source of ethical knowledge, sincere conversation with others (Brandt 12).

Given these negative consequences of Lyons' combined strategy, Brandt thinks that the pure strategy of rule-utilitarianism, whereby one preaches a moral code and actually obeys it except for in exigent circumstances, would be a more effective one in achieving the utilitarian end of maximizing welfare. The pure strategy of honest rule-utilitarianism, on Brandt's view, does not suffer from the distrust and insincerity which will plague the combined strategy which Lyons espouses. Consequently, Brandt concludes that one should not be persuaded by Lyons' objection, and that there is no incompatibility between being a utilitarian and asserting the existence of moral rights (Brandt 12).

I will now turn to an examination of contractualist rights theories. I should reiterate that at present, I am simply conveying rights theories to the reader. Once I have given an adequate exposition of the following contractualist rights theories, I will then go on, in Section III, to offer my own analysis of the merits and weaknesses of the utilitarian and contractualist views that I will have presented in Section II. The analysis in Section III will culminate in a claim concerning the account of rights I take to be the most plausible, and why I hold this to be the case.

Account #3: Rights within Scanlon's Contractualism: Leif Wenar's Take (Plus Scanlon's Reply)

Leif Wenar, in *Rights and What We Owe to Each Other*, sets out to investigate how *rights* can be accounted for in Scanlon's contractualism. Before this investigation gets underway, Wenar proposes to explicate, with brevity, the structure of rights. Within different realms, such as the legal and the moral, rights tend to be divided into two ways: (a) first-order vs. second-order rights, and (b) active vs. passive rights (Wenar, *RWWOEO* 376). First-order rights articulate what is permissible or obligatory conduct (Wenar, *RWWOEO* 376). The rights contained in the first amendment of the U.S. Constitution are examples of first-order rights, for they illustrate ways in which citizens may choose to conduct themselves. A second-order right defines authority; these rights articulate who has, and does not have, the power to change the rules about what is permissible or obligatory conduct (Wenar, *RWWOEO* 376). Congress' right to pass laws which dictate what is and is not acceptable citizen behavior is an example of a second-order right. As Wenar concisely puts it, "first-order rights define requirements on conduct; second-order rights assign authority to change requirements on conduct" (Wenar, *RWWOEO* 376).

Active rights, Wenar says, are rights to engage in, or not engage in, some activity; thus, active rights have to do with one's permissions and powers (Wenar, *RWWOEO* 376). The right to play basketball at the gym with friends is an example of such a right. Passive rights, Wenar furthers, are rights that *others*, as opposed to yourself, do or not do some activity; whereas active rights concern our own permissions and powers, passive rights have to do with the permissions and powers of others (Wenar, *RWWOEO* 376).

Furthermore, these two distinctions – first-order vs. second-order rights and active

vs. passive rights – overlap, such that there are: (a) first-order active rights, (b) second-order active rights, (c) first-order passive rights, and (d) second-order passive rights (Wenar, *RWWOEO* 377). First-order active rights concern your own conduct, second-order active rights concern your own authority, first-order passive rights concern others' conduct, and second-order passive rights concern others' authority (Wenar, *RWWOEO* 377).

Upon laying this foundational understanding, Wenar goes on to continue of looking for the rights within Scanlon's contractualist framework. The obvious move, to see what Scanlon thinks rights are then look for them in his theory, is not a good one, thinks Wenar, because Scanlon defines rights in a way which is too restrictive. It is not just Scanlon who has done this, but almost every rights theorist characterizes rights in a way which is too constricted. Rights discourse in general, thinks Wenar, has suffered from various theorists postulating theories which are incompatible and too narrow to account for all that is understood to be in “the range of rights-assertions” (Wenar, *RWWOEO* 378).

Wenar proposes two explanations for why it is that philosophers posit restrictive accounts of rights. The first explanation is *occupational hazard*. On this source of error, through studying a subclass of some Y for many years philosophers come to think that the features of this subclass are definitive of all Y's (Wenar, *RWWOEO* 380). The second, and for Wenar the more dangerous, explanation is *insidious theorizing*. On this source of error, philosophers posit a restrictive account purposefully to dodge potential objections to their rights accounts (Wenar, *RWWOEO* 380).

Wenar thinks that the overly restrictive account of rights which Scanlon posits is

due to occupational hazard; after having spent years studying constitutional rights, Scanlon developed the belief that *all rights* are like the subclass of rights which he studied (Wenar, *RWWOEO* 380). One example of how Scanlon has done this is his assertion that all rights are important. Wenar rejects this view; he argues that there do exist non-important rights, such as your right to tie your shoelaces. In *Rights, Goals, and Fairness*, Scanlon 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 of certain major problems...” (Wenar, *RWWOEO* 381).

However, Wenar points out the case of a right currently had in Texas which enables people to smoke inside of restaurants. This, he argues, *does not* serve to alleviate any major problems. There are several other examples one could consider which fit this general theme of rights which do not serve to alleviate major problems. In response, Scanlon may wish to say that he was not talking about those kinds of rights which Wenar alludes to here. Additionally, one might attempt to defend Scanlon by positing that these trivial rights, such as the right to tie your shoelace or to sharpen your pencil, are not really rights in the meaningful sense of the word. However, Wenar does not think that these moves are as advisable as is the move to bear in mind all rights, including the aforementioned category of trivial rights, and that instead we should do away with the position that all rights are important and concern the alleviation of major problems (Wenar, *RWWOEO* 381).

In bearing in mind the full range of rights, Scanlon's view that all rights are important and concern the alleviation of major problems is overly restrictive; that is to say, it does not account for what is referred to as trivial rights. Wenar refers to Scanlon's

account of rights as a *constraint* analysis, which holds that a right *constrains* what others can do with respect to the bearer of that right (Wenar, *RWWOEO* 381). To support his claim that Scanlon's view on rights can correctly be interpreted as a constraint account, Wenar offers the following quotes by Scanlon, in various works, on what rights are.

In the introduction to *The Difficulty of Tolerance*, Scanlon says that rights “are constraints on the discretion of individuals or institutions to act” (Wenar, *RWWOEO* 382). In *Content Regulation Reconsidered*, he posits that rights “are constraints on discretion to act that we believe to be important means for avoiding morally unacceptable consequences” (Wenar, *RWWOEO* 382). In *Freedom of Expression and Categories of Expression*, he holds that “rights purport to place limits on what individuals or the state may do” (Wenar, *RWWOEO* 382). Lastly, in the essay on human rights, Scanlon offers the following understanding: “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 individuals or governments 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” (Wenar, *RWWOEO*, 382).

What holds across these statements is that all rights limit *others'* discretion. Scanlon's account, however, does not entitle a right-bearer to act *himself*. Thus, Scanlon fails to account for active rights, which recall concern our own powers and permissions rather than those of others. Wenar takes the main deficiency in Scanlon's characterization of rights to be its inability to account for active second-order rights, that is to say, active (one's own) rights of authority. A constraint conception of rights, such as Scanlon's, can

only account for second-order rights as constraints on the authority of *others* (passive second-order rights). However, when considering the full range of rights which are commonly taken to exist, there are within this range many rights which concern one's own authority (Wenar, *RWWOEO* 383).

An example of active first-order rights, to use Wenar's example, is the rights of the United States Congress as established by Article I, Section VIII of the Constitution. Among these are the right to regulate interstate commerce, borrow money, establish bankruptcy law, and so on. Suppose one were to attempt to defend Scanlon by asking the following. Is it not the case that Congress' right to regulate interstate commerce necessarily excludes, for instance, John Stamos from regulating interstate commerce? Thus, Congress' right to regulate interstate commerce can indeed be accounted for by a constraint analysis of the sort which Scanlon espouses. Wenar's reply to such an objection is that Congress' rights of authority, as enumerated in the Constitution, are active powers which *cannot* be adequately captured, or understood, as a set of constraints on others (Wenar, *RWWOEO* 384).

With this said, Wenar acknowledges that Scanlon's overly restrictive characterization of rights is not fatal to his prior work on basic rights. Scanlon could amend, or broaden, his analysis of rights in such a way as to be able to account for active rights, and such an amendment would not cause his prior statements about certain rights – such as freedom of expression – about the stringency of rights and about the conflicts among rights to be inconsistent (Wenar, *RWWOEO* 384). Nothing in Scanlon's prior work on rights requires for its soundness the truth of the view that all rights are important, or that all rights are constraints.

In *Rights and What We Owe to Each Other* Scanlon explicates contractualist principles in such a way that does not draw explicitly upon the notion of rights. Instead, he explicates contractualist principles in terms of permissions and requirements (Wenar, *RWWOEO* 384). Take, for example, the following principle, called *Principle F* by Scanlon: “If... A voluntarily 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” (Wenar, *RWWOEO* 385). Scanlon's principles, such as Principle F, do not commit him to any particular rights. Wenar posits that Principle F shows that a promisor has an obligation, but it does not claim that this is an obligation directed toward, or owed to, the promisee. Scanlon's principles, like Principle F, communicate what it is wrong to do, but they do not explain in what this wrongness is grounded, such as in wronging someone. Hence, Wenar's claim is that Scanlon's principles are claims about wrongness, but not about the act of wronging a nameable subject (Wenar, *RWWOEO* 385).

Scanlon, however, does not want to be guilty of this; rather, he wants his formulation of contractualism to be such that it can provide *directed* obligations. That is to say, obligations whose non-fulfillment constitute the wronging of a nameable individual. Contractualism, for Scanlon, covers a narrow domain, and to convey this point he speaks of directed requirements, as evidenced by his following comment:

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, including such things as requirements to aid them, and prohibitions against harming, killing,

coercion, and deception... I have taken the phrase “what we owe to each other” as the name for this part of morality... 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 (Wenar, *RWWOEO* 386-387).

Hence, although Scanlon does not explicitly use the language of “owes to person X”, or “obligation to person X”, he nonetheless believes that the domain of contractualist morality is defined by directed requirements. Given Scanlon's view here, Wenar questions why it is then that Scanlon avoids rights when expounding contractualist principles. Given that Scanlon takes directed obligations to be the foundation of the contractualism he is espousing, it would seem, Wenar thinks, that he should have something to say about rights, given that these directed obligations essentially amounts to claim-rights (Wenar, *RWWOEO* 387).

The claim-right – recall this is a right of the form *X has a claim that Y Ω if and only if Y has a duty to X to Ω* – is viewed by some, such as Hohfeld, as being in a strict sense the *only* right. Wenar posits that the claim-right is foundational to Scanlon's constraint analysis of rights, because when Scanlon says “A owes it to B to do X”, this is logically equivalent to “B has a claim-right against A that A does X” (Wenar, *RWWOEO* 387). Perhaps Scanlon rejects the correlativity thesis, the aforementioned view that someone's being owed something is logically equivalent with his having a right to that thing (Wenar, *RWWOEO* 388).

Wenar ventures a guess as to what Scanlon had in mind here. Wenar suggests that although Scanlon views all contractualist principles as being defined by directed

requirements, he does not view all of these principles as ascribing rights. Furthermore, Wenar posits, perhaps it is the case that Scanlon did not want to allocate space in his book to the discussing the merits of the correlativity thesis, and thus left the notion of rights out of his book. This guess is what Wenar considers to be the most charitable reading of Scanlon, even though it has nothing to say about whether the notion of *wronging someone* applies to all contractualist principles or only those which ascribe rights (Wenar, *RWWOEO* 388).

One might question which contractualist principles ascribe rights. To provide insight into this issue, Wenar directs the reader to some of Scanlon's comments in *Difficulty of Tolerance*. Therein, Scanlon posits that there are certain things which citizens can demand from their institutions: promotion of citizen welfare, fair treatment, and basic rights which give them important protection in their lives (Wenar, *RWWOEO* 389). In this same section of *The Difficulty of Tolerance*, Scanlon goes on to posit the following about rights:

[they 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... need to be justified in this way (Wenar, *RWWOEO* 389).

On Scanlon's view, then, to determine what rights people have, we need to consider the positives and negatives of being constrained by rights claims, as well as the reasons one might have for reasonably rejecting, or objecting to, the duties which would be imposed upon him through the establishment of certain rights. Still, though, the question lurks of *how* we are supposed to know which principles ascribe rights, and conversely which do not. There are two ways within rights theory, Wenar says, of discovering rights which are embedded in non-rights language: (a) look at the form of the principle in question for a relation, and (b) look for a distinctive feature within the principle's justification (Wenar, *RWWOEO* 390).

On the first way, a principle can be said to be rights-ascribing if it grants someone the power to change what another person may or may not rightly do (Wenar, *RWWOEO* 390). For example, on this view part of what makes one the bearer of the right to be repaid a debt is his power to relieve the person who is indebted to him of his obligation to repay him. It is not likely that Scanlon would favor this method of determining which principles are rights-ascribing, and for good reason Wenar thinks. For Scanlon to endorse this view would be to adopt an overly-restrictive view of which rights exist; this view would not be able to account for, for example, inalienable rights and rights held by the mentally incompetent, because these rights do not pertain to situations in which one person exercises “normative control” over another (Wenar, *RWWOEO* 391).

On the second way, what makes a principle rights-ascribing has to do not with its *form*, but rather with its *justification*. Wenar thinks that this second way is the way favored by Scanlon to find the rights within contractualism (Wenar, *RWWOEO* 391). Which justifications might suffice to make certain principles rights-ascribing?

One might try to answer that contractualist principles ascribe rights to the *strongest complaints* (Wenar, *RWWOEO* 392). To illustrate this, consider the case of a right to not have your healthy liver unwillfully harvested by a deranged doctor. One wishing to use the justificatory way of arriving at this right might say something like this: rights are ascribed to those, such as Bob, who have the strongest complaint to principles that would allow for deranged doctors to harvest healthy livers. Bob can *reasonably reject* any principle which would allow for doctors to unwillfully harvest his healthy liver, and thus Bob is the bearer of distinctive rights over his liver (Wenar, *RWWOEO* 391-392).

While this method of ascribing rights to those with the strongest complaint seems to be a natural way of trying to find rights within contractualism, it runs into two problems. First, for any given contractualist principle there will exist someone, or some group, with the strongest complaint, yet it is not the case that all contractualist principles ascribe rights (Wenar, *RWWOEO* 392). Hence, we would still need a way of discerning which subjects that are the strongest complainants are also the bearers of certain rights.

Second, the issue arises of who exactly the bearer of the relevant right is, because in the justification of many principles the party who is the strongest complainant is not the same party which we generally take to be the relevant right-bearer (Wenar, *RWWOEO* 392). To illustrate this problem, Wenar discusses the right of journalistic freedom. Scanlon holds that one might take journalists to have this right on the grounds the authority of many groups – such as the government, editors, publishers, and so on – must be limited if journalists are to properly perform their role within society (Wenar, *RWWOEO* 393). This journalism example showcases the following problem. If it is the

case that the interest of society is what is doing the justificatory work, and that society is the strongest complainant, then why are journalists, and not society, the bearers of the right of journalistic freedom (Wenar, *RWWOEO* 393)? The challenge present here, of locating the correct right-bearer, is one that befalls all explanations which attempt to follow this path and use justifications of principles to locate rights.

This difficulty is especially pronounced in the case of expressive rights, such as the right to free speech. Widely known defenses of free speech, like the one offered by Mill, have often grounded their position in the interests of non-speakers (or non-participants) rather than in the interests of speakers (or participants). Wenar argues that Scanlon was aware of the consequences which accompany looking to the justifications of a principle for the location of rights, and furthermore, that Scanlon never addressed this issue explicitly (Wenar, *RWWOEO* 395). It is easy, Wenar posits, to say that what we owe to each other is to act on contractualist principles, but it is another thing entirely, and a much harder feat, to say what we owe to whom (Wenar, *RWWOEO* 396).

I would now like to turn to Scanlon's reply to some of Wenar's above criticisms, as voiced in *Reply to Leif Wenar*. In response to Wenar's critique of the view that rights protect important interests, Scanlon posits, as Wenar anticipated, that there are certain sorts of rights which are not meant to be included within this judgment; the rights which Scanlon's view are meant to encompass are those which involve placing limits on the authority of the state (passive second-order rights), such as the right to freedom of expression and the rights of due process. Legal and institutional rights, Scanlon argues, do not fall into the purview of the rights with which he was concerned, because he takes their justification to be much more straightforward than is the justification of moral

rights. Whereas legal and institutional rights gain their legitimacy in a straightforward way from the legal systems and institutions from which they are derived, moral rights make demands as to what the structure of certain laws and institutions should be, thereby requiring additional justification (Scanlon, *Reply* 401).

These moral rights, thinks Scanlon, limit the authority of the state to do things which we are seemingly beneficial, such as banning free speech which is likely to incite violence and invading privacy to combat terrorism, and hence these rights need special justification. If rights are seen as trumps, then there needs to be a compelling explanation for why we should allow for an activity with strong social benefit to be restricted. On Scanlon's view, we have important interests such as being able to speak freely and having our privacy respected, hence he suggests understanding rights as constraints so as to account for the level of authority which the state should have for the purpose of fostering these, and other, important interests (Scanlon, *Reply* 401).

Next, Scanlon takes up Wenar's criticism that his account of rights only covers passive first-order rights. Scanlon argues that the form of a right should be determined by the arguments which are relevant to the right under consideration (Scanlon, *Reply* 401). Referring back to the right to privacy, for instance, this right advocates altering the scope of others' authority to examine one's person and possessions without his permission to do so. Consequently, this amounts to a passive second-order right. (Wenar, *Reply* 401-402).

Another right that Scanlon's rights analysis was devised to account for, the right to free expression, is held by Wenar to be an active right. Scanlon's take this view to be false, instead asserting that when one claims a right to free speech what he is essentially doing is claiming that the state does not have the legitimate authority to constrain speech

in certain ways and situations. On Scanlon's view, it is the result of what would happen – both to participants as well as to non-participants – were the state authorized to restrict expression in broader ways that supports the right to freedom of expression. The right to freedom of expression, then, is to be understood as a second-order passive right which limits the authority of the state to restrict expression to special circumstances (Scanlon, *Reply* 402).

The rights with which Scanlon's characterization was concerned are such that, on Scanlon's view, it is not necessary for his view to encompass all of the Hohfeldian elements. It is the arguments in support of the right in question that will determine which Hohfeldian elements need to be accounted for. What's more, if Scanlon is right that the moral rights whose existence his account was aimed at demonstrating are passive second-order rights, then Wenar's objection becomes unimportant.

In Section II, I have explicated three different rights accounts: two utilitarian accounts and one contractualist account. First, I gave an overview of Zivi's view that rights are political claims which cultivate character, the invocation of which constitutes an opinion which we are encouraging others to adopt. Next, I explicated Brandt's view, on which rights derive from the moral code which, when near optimally adhered to, maximizes expected utility. Finally, I examined Scanlon's view of directed requirements as well as the question of whether or not these amount to rights claims; that is to say, the question of whether or not the correlativity thesis is true.

In Section III below, I will begin by offering my own analysis of each of the three preceding accounts. I will discuss where I think they have merit, and where I think they do not achieve their aim. Thereafter, I will explain the account of rights I take to be the

most compelling and provide my reasons for why I take this to be so.

Section III: Critique of Rights Accounts and Some Necessary Conditions Contained in the Most Plausible Rights Account

Reply to Account #1: Rights as Character Cultivating

Karen Zivi argues for understanding rights as occupying a unique instrumental role within Millian philosophy. I would like to lay out the two characteristics of rights espoused by Zivi which are fundamental to her interpretation of Mill, so that by considering the merits of these major claims I will thereby be able to gauge the plausibility of the total view.

First, rights are not trumps, in the sense of halting discourse and serving as an end-all be-all, but rather they represent the opinions of those who espouse them. Since different individuals will invariably have different ideologies and experiences, they will have different political opinions which they can try and convince others to endorse through democratic interactions.

Second, rights serve to both *identify* which social arrangements adversely affect character development as well as to *correct*, or limit, such arrangements. The ultimate end of utilitarianism, on Mill's view, is the maximization of social welfare – or happiness or utility. Rights then, for Mill, are not valuable, or desirable, in and of themselves, but rather they are instruments whose value is in bringing about the utilitarian end. On Zivi's reading of Mill, the attainment of the utilitarian end of welfare maximization requires a society of individuals with certain characters traits such as altruism and compassion.

On the first point, that rights are opinions which we aim to get others to endorse, I am not sure that this wholly reflects what is generally meant by the notion of a right. When the notion of a right is posited, it is usually done so as to influence conduct in some way. If I were to say, for instance, that I have a right to unvituperative free speech, then what I am generally understood to mean by this is that others must conduct themselves in such a way as to not infringe upon my ability to speak freely, so long as it does not present certain grave safety concerns. But, on Zivi's view that the assertion of a right involves the promotion of one's opinion, we lose at least some of the power of rights to influence the conduct of others, a power that we generally want them to have. It is not the chief aim of a rights claim, in other words, to *convince* others to believe some or other thing, although it is possible that one *can be* convinced that a certain right is justified; rather, the chief aim of a rights claim is to influence the *behavior*, or *conduct*, of others in some way, either via positive or negative action.

It is on her second point, however, that I take Zivi's account to be more plausible. Here, Zivi interprets Mill as contending that rights are valuable instrumentally in bringing about a state of affairs which is as high as possible in social welfare, in the case of utilitarianism. Although the end of utility maximization may not hold as a goal across all societies, it does seem to hold that in most, if not all, societies in which rights are appealed to they serve as a means of promoting some broader state of affairs. The process of the United States coming to be a nation, for instance, began when independence was declared from Great Britain. In the Declaration of Independence, it was asserted that human beings have moral rights to life, liberty, and happiness. Furthermore, when the Declaration it is stated that governments are formed to protect these vital interests.

Hence, although utility maximization was not conveyed as the goal of our government, what was clearly conveyed is that a primary role of government is to protect our vital interests.

The act of protecting something requires a means of doing so, and in the case of protecting the vital interests of citizens, rights seem to be the means of doing so. Consider some of the rights which the U.S. Constitution takes citizens to be the bearers of, such as the right to free speech, the right to not have one's home searched arbitrarily, and so on. Rights such as these are typically justified through their instrumental value in helping to protect citizens' life, liberty, and happiness. It might be argued, for instance, that without the right to free speech, one would have a less flourishing life than he does via the existence of this right.

We do not, by and large, want to say that citizens should have *unlimited* liberty in order for their vital interests to be protected. Recall that on Mill's view, for persons to flourish and develop the characters necessary for social welfare maximization, they must not have their lives unduly interfered with. In *On Liberty*, Mill defends views like the harm principle to get at the idea that except in special circumstances, such as when others will be unduly harmed, individual liberty should be respected and given preference so as to create the conditions necessary for the aforementioned character cultivation.

Rights, on Zivi's interpretation, can thus be thought of as multifaceted constraints, since the way in which they constrain is two-fold. First, they constrain individuals from conducting themselves in ways which would run counter to the harm principle. Second, they constrain social arrangements which hinder character cultivation. While still recognizing the individual as a social creature, rights on Zivi's interpretation create a

space within which the individual can be insulated from those influences of the state and citizenry which would be harmful to the fostering of the utilitarian character.

The strongest contribution of Zivi's interpretation of Mill, for our project of understanding the notion of rights, is that rights are means of influencing conduct which provide the space necessary for the cultivation of a character which is amenable to promoting social welfare. They start as opinions, and through the democratic process of debate and scrutiny, those claims which hold up as legitimate means of promoting social welfare are established as rights. It is my contention that for a rights account to be plausible, it must include at least these features, or understandings. If by *rights* we mean something which does not represent both: (a) a societal perspective on what sort of conduct is, or is not, desirable in achieving some end, and (b) influencing conduct in an attempt to approach this end, then I would submit that such an understanding of rights has strayed quite far from how they have been traditionally understood, such as in the founding of our own government.

Let us now proceed to consider below the plausibility of Brandt's account of rights, as offered in "Utilitarianism and Moral Rights". Once more I will lay out the salient claims made by Brandt, and consider their merit in turn. As I move forward in considering the three rights accounts which we looked at in Section II, it will do well to bear in mind how the strengths of each account contributes to the view of rights which is most plausible.

Reply to Account #2: Rights as Derived from the Optimal Moral Code

Recall that in response to the question of what we mean when we say that one person has a moral right against another, Brandt offered the following view: when one

person (let's call him the debtor) has a moral right against another (let's call him the debtee) to do, have, or enjoy some thing, this is to say that the debtee has a strong moral obligation *both* to refrain from hindering the debtor's enjoyment of that thing as well as to enable his enjoyment of that thing. This moral obligation can only be overridden by *extreme demands of welfare*, and if the debtor of the moral obligation fails to do what is required of him then it is not wrong for the debtee to be angry and protest against the debtor in such a way as to make more likely the fulfillment of similar moral obligations in the future (Brandt 2).

Rights of this sort, Brandt argues, can be accounted for by utilitarianism, *if* we are referring to rule-utilitarianism. Recall that Brandt's understanding of rule-utilitarianism goes like this. The morality of an action is determined not by its consequences as considered in isolation from other actions, but rather by whether or not it is permissible, or required by, the optimal (or most desirable) moral code – that is, the moral code whose acceptance by most of society would generate the greatest amount of expected utility. The reason why rule-utilitarianism can, supposedly, account for rights of the sort Brandt has in mind is that one could say that the optimal moral code includes a mandate that one enables others to do certain things, and that one refrains from inhibiting others' doing certain things, even when this would not maximize utility in a given situation.

First, I would like to evaluate Brandt's claim that to have a moral right against someone is for that person to have a strong moral obligation to enable me to do something, or to refrain from interfering with my doing something. The latter claim, that respecting one's moral right entails refraining from inhibiting his enjoyment of that which he has a right to, seems pretty straightforward. Take a right which most, if not all, ethical

systems hold to exist – the right to life. If one were to take positive action which resulted in the unjustified death of another, then most would want to say that this person who was killed unjustly had his right to life violated. Thus, the assertion of the right to life, in the way we generally think of it, requires that others refrain from unjust killing.

Consider other fundamental rights as espoused in places such as our nation's founding documents like the Declaration of Independence – such as the aforementioned right to life as well as the rights to liberty and the pursuit of happiness. When we speak of such rights, what conduct do we generally think that they require? Let's take first the right to liberty. We would likely think that incarcerating someone without proper justification constitutes a violating of his right to liberty. As for the right to the pursuit of happiness, once more, it seems that respecting this right involves our not taking positive action which would disable one's enjoyment thereof. Hence, I take it to be correct that one feature of a moral right is that it gives its bearer the legitimate expectation that others will not act in certain limiting ways towards him, except in special exigent circumstances.

The view that moral rights require us to *refrain* from interfering with one's doing, having, or enjoying something is quite plausible, because it does not require us to go out of our way and change our daily routines; rather, it only requires inaction on our parts. Hence, the costs associated with this requirement are not, generally, very high. In cases where these costs are very high, then an exigent circumstance might be at hand, such as Brandt's notion of the escape clause, in which this requirement does not hold.

Think back again to the rights of life, liberty, and the pursuit of happiness. If we accept that the main function of our government is to protect citizens' vital interests, as posited in the Declaration of Independence, and that rights are, at least partly, instruments

used by government to do so, then it makes sense that limiting the ability of others to infringe upon one's having, doing, or enjoying something is in line with the government's chief objective. Clearly, making someone refrain from infringing upon my right to life, for instance, is to protect my right to life.

The second clause of Brandt's account of moral rights, that to have a moral right against someone to do, have, or enjoy something is for that person to have a strong moral obligation to *enable* the bearer of the right to do, have, or enjoy that thing, may seem prima facie quite contentious. Why is it, an unconvinced skeptic might ask, that someone's having a moral right, such as a right to the pursuit of happiness, requires me to *enable* his enjoyment of that right? If it is the case, he might argue, that the role of rights is to *protect* citizens' vital interests, then why am I required to *enable* one's enjoyment of a right?

This skeptic may wish to propose that there is an important difference between the acts of *protection* and *promotion*. Protection of a vital interest, he might say, only requires that I refrain from acting in a way which violates this interest, whereas the promotion of a vital interest entails my enabling it and acting positively to further it. But, the stated aim of government, according to respected sources of authority such as the Declaration of Independence, is to protect citizens' vital interests, not necessarily to promote them. If rights are the vehicle used for this aforementioned task of protection, then it would seem to be the case that what rights require me to do is *simply* to refrain from conducting myself in ways which would violate the right in question.

While this may be a prima facie intuition had by many people, this position can be shown not to be as strong as it initially seems. An excellent reply to the above skepticism

is offered by Henry Shue in Chapter 2 of his book *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. He begins by explaining the traditional dichotomy between positive and negative rights. Positive rights have traditionally been viewed as those rights which require us to *do something* – that is, to engage in some positive action. Contrarily, negative rights have traditionally been viewed as those rights which simply require that we *refrain from doing something* – that is, that we do not engage in the relevant action (Shue 36).

The examples of the right to sustenance and the right to physical security used by Shue help to demonstrate how the traditional dichotomy between positive and negative rights is not as clean cut as an advocate of it might have us believe. One who endorses the traditional positive/negative dichotomy would likely say of the right to sustenance that this is a positive right, because in extreme cases such as famine this right would require us to perform a certain positive action; namely, to provide food and other things required for sustenance. Furthermore, an advocate of this dichotomy would likely say of the right to physical security that it is a negative right, because all that it requires is that no one else physically harms the right-bearer. Hence, Shue shows, if there is to be a morally significant difference between positive and negative rights, then it must be shown that there is a morally significant difference between action and non-action (Shue 37).

However, Shue goes on to show that some rights, such as the rights to sustenance and physical security, do not fit neatly into one side of the traditional dichotomy. In the case of the right to physical security, it is indeed true that one can respect, or not violate, another's right by not physically harming the right-bearer. With that said, it is impossible, Shue argues, to *protect* this right, unless a wide range of positive actions are taken, such

as the creation and maintenance of a police force, criminal court system and so on to deter, recognize, and ultimately punish violations of this right (Shue 37).

Although one might take Shue's view to be confounding the right to physical security with the right to be protected from violations of one's physical security, Shue wants to say that this distinction is not meaningful. In an interconnected society such as the one we live and operate in, what citizens demand of their government is not the mere negative right to physical security, but rather the *protection* of this right from various abuses. Hence, when one asserts his right to physical security, for example, what he is doing is conveying his expectation that the government will act positively to punish violators of this right and will act in other ways which effectively protect this right (Shue 38).

Shue, I contend, gives us good reason to believe that rights rarely, if ever, fall neatly into being *purely* positive or negative. I take it to be the case that depending upon the segment of society we are talking about, a right may be either positive or negative. Once more, I would like to bring to the fore the prevalent view, at least in a majority of democratic regimes, that the chief aim of government is to *protect* the vital interests of its citizens. Insofar as government does actually desires to achieve this end, it seems clear that to effectively do so requires positive action to be taken. At the same time, these rights are respected so long as other citizens refrain from acting in ways which violate them. Hence, one and the same right, such as the right to life to use a prominent example, can be both positive with respect to what it requires of the government and negative with respect to what it requires of the rest of the citizenry.

How then, armed with the understanding Shue provides us, are we to interpret the

clause in Brandt that to have a moral right against another person to do, have, or enjoy some thing is for that person to have a strong moral obligation to refrain from interfering with the right holder's ability to do, have, or enjoy that thing *and* to enable the right-bearer to do, have, or enjoy that thing? Consider the famous rights espoused in the Declaration of Independence, the rights to life, liberty, and the pursuit of happiness. I propose that each of these rights is positive with respect to the government whose fundamental aim is to protect the vital interests of the citizenry, and is negative with respect to the rest of the citizenry.

My suggestion, then, is that to get the most plausible result from Brandt's account of rights, we should not take one and the same person to have a moral obligation to *both* refrain from interfering with the right holder's enjoyment of some right as well as enable the right holder to enjoy his right. Rather, I submit that we should understand moral rights claims of the sort Brandt describes as imposing different obligations upon different segments of society. If we make the amendment to Brandt which I recommend, then his account of rights would go roughly as follows. For one to have a moral right is for some people to have a strong moral obligation to enable the right bearer's doing, have, or enjoying that which is the content of the right and for other people to have a strong moral obligation to refrain from interfering with the right bearer's doing, having, or enjoying that which is the content of the right. Moreover, these strong moral obligations are only overridable in cases of extreme welfare demand.

What I hold to be the most important take away from Brandt's account of rights, as amended in the way I propose we should understand it, is that for a moral right to be effectively protected it will have both a positive and a negative requirement on the

conduct of certain others. The specific moral, non-trivial rights which we will ultimately take others to have will depend upon what the vital interests of these others are and what we take to be the best means of protecting them. I have used the case of the United States and its Declaration of Independence to try and elucidate this to some degree. Our Declaration of Independence makes two claims: (a) the fundamental aim of government is to protect the vital interests of citizens, and (b) these citizens are the bearers of such moral rights as the right to life, liberty, and the pursuit of happiness. Under the line of argument I have pursued, one can view (b) as a determination of some of the means by which (a) is to be achieved. I will now proceed to provide below an evaluation of Scanlon's rights account similar to the evaluations I have provided for the above two utilitarian rights accounts.

Reply to Account #3: Rights within Scanlon's Contractualism: Leif Wenar's Take

Wenar begins with a brief discussion of the Hohfeldian Analytical System, which lays out the various forms a right can take on. Rights can be active, passive, first-order, or second-order. Additionally, active rights can be either first-order or second-order, and the same holds for passive rights. This is all to say that rights on the Hohfeldian system concern two things: who has the authority to change the rules of conduct and what conduct is permissible to engage or not engage in. The Hohfeldian System is widely accepted as an accurate depiction of the various forms which a right can take on, and I see no reason to veer away from accepting it to be such. For a view of rights to be plausible, I contend that it should account for, as the Hohfeldian Analytical System does, the various forms that we tend to think of rights as being able to take on.

After his brief discussion of the Hohfeldian System, Wenar focuses his attention

in locating rights within Scanlon's contractualist framework. Scanlon has, in various different works, made certain claims about what rights are. Wenar highlights four different instances in which Scanlon does so. In *The Difficulty of Tolerance* Scanlon says that “rights are constraints on the discretion of individuals or institutions to act” (Wenar, *RWVOEO* 382). In *Content Regulation Reconsidered*, Scanlon asserts that “rights are constraints on discretion to act that we believe to be important means for avoiding morally unacceptable consequences” (Wenar, *RWVOEO* 382). In *Freedom of Expression and Categories of Expression*, Scanlon claims that “rights purport to place limits on what individuals or the state may do” (Wenar, *RWVOEO* 382). Finally, in the essay on human rights, Scanlon argues that “to assert a right... is either to deny that individuals or governments have the authority to act in certain ways, or to assert that they have an affirmative duty to act in certain other ways...” (Wenar, *RWVOEO* 382).

What these various claims by Scanlon have in common, and hence what underlies his view about what rights are, is that all these claims describe limits upon the discretion of *others* to act in certain ways. As Wenar points out, and rightly so in my view, Scanlon's view of rights as shown by these various claims does not allow for active first-order rights, at least directly. That is to say, Scanlon's view of rights, on which we are to view rights as articulating ways in which the discretion of others to act can be constrained, does not provide us with an understanding of the *active powers* had by agents themselves.

The view that rights entail placing certain constraints on ways in which others can act is a view which I have discussed previously in my evaluation of Brandt. I fully endorse this as a necessary condition of that which can correctly be called the most

plausible account of rights. If a rights account were not to discuss how rights constrain action, then it could not be the most plausible account of rights, for it would fail to discuss one of the most fundamental things which we generally take rights to do. However, Scanlon is not unique in viewing rights as having this power. In fact, as we have already seen, both Zivi and Brandt also endorse this view.

In a later part of *The Difficulty of Tolerance*, however, Scanlon goes on to make another claim about rights which does entail something which sets his view apart as somewhat distinct from Brandt and Zivi. He says that rights are “claims about the constraints on individual action, and on social institutions, that people can reasonably insist upon” (Wenar, *RWVOEO* 389). What sets this apart is his appeal to the notion of the reasonable. Recall that Scanlon's formulation of contractualism states that an action is morally wrong if a party to the contracting process, who is looking to sincerely arrive upon informed, unforced, general agreement, could *reasonably reject* a principle which would require performance of that action (Scanlon, *Contractualism* 110).

Scanlon also offers us a methodology of sorts for determining what rights people have; that is, what rights are reasonable to insist upon. His suggestion is that we perform a cost-benefit analysis in which we ask what things would be like if we were to be constrained in the way a given right would require, and we compare that state of affairs to the state of affairs in which we are not constrained in the way a given right would require. It is only once we have considered what points could be raised with regard to these two scenarios, and which side has made the more compelling case, that we can determine whether the right in question is one which would be reasonable to insist upon (Scanlon, *RWVOEO* 389).

Scanlon's view that rights claims entail constraints on ourselves or on others that can be *reasonably* insisted upon is one which I take to be plausible and a necessary condition of that which can be correctly called the most plausible account of rights. We recognize that there are legitimate interests that people have according to which morality can call us to conduct ourselves in this or that way, but also that there are interests with respect to which morality could not justifiably require us to conduct ourselves with an eye toward. The right to life, for instance, is often espoused in recognition of the fact that it is reasonable to insist upon morality demanding of others that they not kill me without sufficient justification. Continued existence can be, and is, reasonably viewed as a vital interest; indeed, it is recognized as such in our own founding political documents.

Furthermore, contemplation of two possible states of affairs – one in which individuals and institutions are constrained in the way the right to life would require and another in which individuals and institutions are not constrained in the way the right to life would require – reveals, I take it, that there are much stronger arguments to be made for the desirability of the state of affairs in which the right to life is protected. That is, there are much stronger objections to be raised against and it is much more reasonable to reject the state of affairs in which the right to life is not protected.

The right to free Justin Bieber concert tickets, however, is not a right which it would be reasonable for me to insist upon, and hence on Scanlon's view, this is not a legitimate right. First, such a right would not serve to protect any of my vital interests, which recall is the primary role of government. One may argue, as Wenar does, that there are rights which we take to be legitimate yet do not serve to protect a vital interest. I agree with Wenar on this point, there are indeed such rights. However, the lack of

protection of a vital interest *is not* the sole reason why I take the right to free Justin Bieber concert tickets to be unreasonable in the Scanlonian sense. Such a right would also fail the second test, in which one is to contemplate the states of affairs in which this right does and does not obtain, and then consider which state of affairs could have stronger objections raised against it, and would thus be more reasonable to reject.

Scanlon, for reasons my above examples were meant to encapsulate, is correct to say that for the constraints which a right would impose upon various individuals and institutions to be plausible, it must not be reasonable to reject the state of affairs which contains the protection of this right in favor of the state of affairs which does not contain the protection of this right. Having evaluated the rights accounts of Zivi, Brandt, and Scanlon, I believe what we have arrived upon is a list of various necessary conditions that an account of rights must contain if it is to be the most plausible, or plausible in any meaningful sense.

A Partial List of Necessary Conditions for a Rights Account to be the Most Plausible

I would now like to offer a list of five necessary conditions which will be contained by the most plausible account of rights. I do not claim that this is an all-encompassing list of the necessary conditions which will be contained within the most plausible account of rights. Rather, what I do claim is that any account of rights which does not contain these conditions is less plausible than it would be were it to contain them. From our evaluation of Zivi, Brandt, and Scanlon, we have encountered various claims about what rights are, the forms they take on, what their scope is, and so forth.

Each account we have considered has made plausible contributions to the above inquiries. Furthermore, I have made some recommendations about amendments we may wish to consider making to parts of some of these accounts so as to make them more plausible. Below is the aforementioned list of some of the necessary conditions that we can extract from the accounts of Zivi, Brandt, and Scanlon, conditions which will be present in an account of rights which can correctly be deemed the most plausible:

- (1) It will be able to distinguish trivial rights which do not serve to protect vital interests from non-trivial, moral rights which do serve to protect vital interests
- (2) It will be able to account for the various forms which a right can take on, as demonstrated in the Hohfeldian Analytical System
- (3) It will account for rights as instruments which are used to bring about some socially desirable state of affairs
- (4) It will account for the fact that one and the same right, for it to be effectively protected, requires positive action from some segments of society, such as enabling a right bearer to do, have, or enjoy the content of the right, and negative action from others, such as refraining from interfering with a right bearer's ability to do, have, or enjoy the content of the right
- (5) It will recognize a valid rights claim to be one which can be reasonably insisted upon; that is to say, it will recognize that for a rights claim to be valid,

contemplation of the state of affairs which does not protect this right and
contemplation of the state of affairs which does protect this right will result in
one's having stronger reasons to reject, or object to, the state of affairs which
does not protect this right

This list contains the most plausible elements of the rights accounts espoused by Zivi, Brandt, and Scanlon. Conditions (1) and (2) get at the idea that a right can take on various forms, and that a plausible, and especially the *most plausible*, account of rights should have something to say about this. To illustrate why I take this to be the case, consider the following example. Suppose that a friend and I were to disagree about what a chameleon is. My friend attempts to explain what a chameleon is by claiming that it is a green lizard. I claim, alternatively, that a chameleon is actually a type of lizard of which there are a variety of species and which is not always green, but rather can assume a variety of different colors.

It would seem to be the case that the account I give of what it is to be a chameleon is better, or more plausible, than the account my friend gives on the same matter, because my account explains more about the chameleon such as the fact that it can take on different colors. Similarly, I take it that given two rights accounts, all else being equal if one explains the various forms a right can take on, while the other does not, then the account which explains the ability of a right to take on various forms will be more plausible. Consequently, for a rights account to be the most plausible, it must be able to explain the various forms a right can take on, otherwise it would cease to be the most plausible account.

Condition (3) is meant to get at the function of a right. As I mentioned in my evaluation of Zivi's interpretation of Mill, when we make a rights claim we do not generally mean to just convey an opinion. The right to life, for instance, is not typically meant to function merely as a way of conveying a social stance on the sanctity of life. Rather, it is meant to convey the message that citizens have a vital interest in staying alive, and that given the government's fundamental objective to protect citizens' vital interests the right to life is established to serve the purpose of protecting this vital interest. Similar logic applies to this condition as applies to conditions (1) and (2), in the sense that given two potential accounts which attempt to explain what something is, if all else being equal one explains the function of the thing while the other does not, then the account which explains the function of the thing will be a more plausible account of that thing.

Condition (4) is meant to elucidate how the function of protection, as stated in condition (3), is actually carried out. For a right to effectively protected, it will require that violations are deterred and punished through positive governmental action, via deterrence, recognition, and punishment. This view is compatible with the claim that a right is not violated when other people refrain from acting positively. While inaction results in a right not being violated, this is a different matter than its being protected. I have argued that some governments, such as our own, state their primary purpose to be the *protection* of vital interests, and the positive and negative requirements which stem from a right work toward the accomplishment of this end.

Lastly, condition (5) entails discerning valid and invalid rights claims. Something is a legitimate right, on this view, when it can be reasonably insisted upon in the way

detailed in condition (5). Hence, this condition adds another dimension to our understanding of a right. Conditions (1) – (4) give us insight into the various forms a right can take on, what the function of a right is, and how this function is to be carried out, but they do not allow us to decide in the first place when a rights claim is valid. I submit that just as an account which tells us about something's form or function is a more plausible account of that thing than is an account which does not tell us about the form or function of that thing, the ability to discern between legitimate and illegitimate instances of a thing similarly enhances the plausibility of an account about that thing.

For an account of rights to be the most plausible, then, it must be able to at least explain the various forms a right can take on, what the function of a right is, how this function is to be carried out, and how we can distinguish between valid and invalid instances of rights. Obviously, if an account is able to do all of these things and more, then it is more plausible than the account which does only these things, but my point is that the *most plausible* rights account will contain *at least* these conditions.

The five conditions which I have presented here are the most plausible parts of the various rights accounts we considered back in Section II brought together. As we move forward into the last section of this project, this five part construction is what I will understand by the notion of a right. Hence, when in Section IV I engage with the question of which ethical theory, Millian utilitarianism or Scanlonian contractualism, can provide a better, more plausible justification of rights, it is an account of rights which contains at least these five conditions which I am referring to.

Section IV: The Endeavor to Justify Rights Through Appeal to Ethical Theory

In this section I am going to investigate the plausibility with which Mill's formulation of utilitarianism and Scanlon's formulation of contractualism can justify rights. I will begin by bringing to the fore the fundamental claims and structure of Scanlon's contractualism, so as to engage in the task at hand. Thereafter, I will do likewise with Mill's utilitarianism, toward the same end.

In the opening of "Contractualism and Utilitarianism", Scanlon remarks that act-utilitarianism and rule-utilitarianism are both flawed. Act-utilitarianism, he claims, leads to morally unacceptable consequences, and he accuses rule-utilitarianism of being seemingly unstable (Scanlon, "Contractualism" 103). These are charges which I will address once I have taken up my investigation of Scanlon's view, which he claims to be a plausible alternative to utilitarianism.

It is not necessarily the case, Scanlon argues, that an ethical theory has to serve one's current desires or advance one's interests; rather, he takes it to be true that one may have moral obligations even if his current desires were not served or if his interests were not advanced (Scanlon, "Contractualism" 105). This strikes me as bizarre. If an ethical theory were not to advance one's interests or to serve one's current desires, then what would be the incentive, or reason, for people to adhere to it? It appears to me that the purpose of a moral system is to advance, or at the bare minimum to protect, the interests of those to whom the moral system is to be applicable.

Let's get Scanlon's view on the table: "an act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced

general agreement” (Scanlon, “Contractualism” 110).

What are we to make of this view? The first thing we should note is that it only tells us about moral wrongness, and thus not about moral rightness. We have here a criterion for determining when an action is morally wrong; namely, when its performance would be prohibited by a system of rules, rules whose purpose are to regulate behavior, which could not be reasonably rejected as a basis for informed, unforced, general agreement (Scanlon, “Contractualism” 110).

So, then, actions are morally wrong when they would be disallowed by the resulting principles of the contracting process. There are a few issues apparent here. First, this requires knowledge of which principles would arise from the contracting process. Next, even if we do know which principles these would be, what are we to then say about rights? Do we want to say that persons have negative rights to protect them against the performance of those actions which would be disallowed by the aforementioned contractualist principles?

What’s more, given that Scanlon’s theory says nothing of moral rightness, how are we to arrive upon the notion of the positive right through his theory? We typically look to an ethical theory not just for knowledge about what we should not do, but also for knowledge about what we should do. One might wish to say that moral rightness is just the negation of moral wrongness, such that if an action would not be disallowed by a contractualist system of rules, then it is morally right. This is false, however, strictly speaking. Moral rightness is not simply the negation of moral wrongness, for there are also states of affairs, or particular actions, which we take to be morally neutral. Brushing my hair, for instance, seems to be an example of a morally neutral action. To try and

answer the above questions would require more resources than Scanlon has explicitly provided us with. On Scanlonian contractualism, it seems, our moral categories are limited to the morally permissible and the morally impermissible.

Consider the question of why one should follow contractualist morality. Scanlon argues that the source of moral motivation is one's desire to be able to justify his actions to others on grounds which they could not reasonably reject. This allows us, he argues, to have freedom of action in the sense that so long as we can justify our actions to others on grounds which they could not reasonably reject then we can be confident that our actions are not morally wrong (Scanlon, "Contractualism" 116).

Another advantage of contractualist morality, he argues, is what it can say about well-being at the individual level. On his view, what makes individual well-being significant is simply the fact that an individual can reasonably reject that which is contrary to his well-being or does not sufficiently weigh his well-being (Scanlon, "Contractualism" 119).

When considering whether a principle could be reasonably rejected, Scanlon argues, it makes sense to look to the person who would be worst-off under its actualization, because he would most plausibly be the person with the greatest reason for rejecting the principle. If we need to decide which of two principles to actualize, then it would make sense to compare the complaints of the worst-off under one principle's actualization against the complaints of the worst-off under the other principle's actualization. However, this is not to be confounded as some sort of utilitarian outlook, he posits, because the welfare which is of concern to the Scanlonian contractualist is that at the individual level (Scanlon, "Contractualism" 123).

It will do well to pause now and take stock of what Scanlonian contractualism arms us with. First, it gives us an account of moral wrongness. Next, it gives us a plausible account of moral motivation; one can be motivated to follow contractualist morality from the desire to justify his actions to others on grounds which they could not reasonably reject. Scanlon recognizes that such a desire is likely not innate, and must therefore be cultivated through moral education. Lastly, it allows us to assign significance to individual well-being in a way which does not require appeal to things like intrinsic value, but rather, through an understanding that one's well-being will be a factor which it is reasonable to consider when deciding whether or not to reject some principle.

Although Scanlon's formulation of contractualism does not directly speak to the notion of rights as much as we might like for our present purposes, nonetheless it seems that we can gauge how the aforementioned tenets of his contractualist theory justify the *content* of the five necessary conditions which I have argued will be contained by the most plausible account of rights. At the heart of condition (1) is the idea of being able to discern between the protection of vital and non-vital interests. One could make the case the standard of reasonable rejection works toward this end. Those principles which would violate our vital interests are ones which we could be said to have good reason for rejecting.

Condition (2), however, is one that the Scanlonian contractualist does not seem adequately armed to justify. As Wenar pointed out, and successfully in my view, the Scanlonian contractualist will find it quite difficult to account for, through reference to the tenets of his ethical theory, positive rights. At best, one could argue that the moral wrongness described in Scanlon's theory entails the existence of negative rights which

require people not to act in ways which would be prohibited by the rules which are to govern behavior. But even this charitable reading of Scanlon's theory leaves much about the various forms a right can take on unaccounted for.

Condition (3) concerns instrumentally bringing about a state of affairs which is socially desirable. Scanlonian contractualism, on my view, can be shown to do this. The end with which contractualism is concerned is individual well-being. The ability of individuals in the contracting process to reasonably reject principles which run counter to their well-being allows for the coming about of this desired state of affairs. Hence, contractualism can give a plausible justification of condition (3).

I take Scanlonian contractualism to be inadequate in justifying condition (4). This condition cannot be adequately justified by Scanlonian contractualism because this sort of contractualism cannot explain why it is that some people are required to take positive actions toward others. On this theory, we can explain what one is required not to do; namely, to refrain from acting in ways which would be disallowed by the system of rules which is meant to regulate behavior. However, much more tenuous is the task to find a claim about what we are required to do.

One might wonder why the Scanlonian contractualist could not just reasonably reject, for example, principles which do not call for us to provide assistance to others when doing so imposes insignificant costs upon us. I concede that such principles, quite plausibly, could be reasonably rejected. Recall however that Scanlonian contractualism does not address that which we can reasonably accept, but only that which we can reasonably reject. How could we manipulate Scanlonian contractualism to be able to justify a requirement for people to actively assist others when doing so imposes low costs

upon them? One might be tempted to simply negate the “reasonable rejection” clause, but this may not be wise, for reasons I espouse below.

Just as moral rightness is not simply the negation of moral wrongness, it seems false to say that it is reasonable to accept the negation of all of those things which we could reasonably reject. Suppose one were to propose the following principle, Principle H, which includes the following: “everyday citizens will brush their hair”. It seems reasonable enough that some days I may want to brush my hair, while on others days I may not want to do so. Hence, to protect my interest of being free to brush or not brush my hair on any given day, I could reasonably reject Principle H. But, from this I do not take it to follow that it is necessarily reasonable to accept \sim (Principle H), which would state that “everyday citizens will not brush their hair”. Once more, on some days I may wish to brush my hair. Even if one could reasonably reject principles which do not call us to provide uncostly assistance, this would not be enough to show that there therefore exist positive rights to receive assistance when it can be provided at a low cost.

As the above example is meant to show, we should be hesitant about concluding that it is reasonable to accept the negation of those things which can be reasonably rejected. Although it may very well be reasonable to reject a principle which does not call us to provide uncostly assistance to others, it does not automatically follow that it is reasonable to accept a principle which does call for us to provide uncostly aid. Consequently, the move to have Scanlonian contractualism explain positive action requirements by accepting the negation of that which can be reasonably rejected is not as fruitful as one might believe.

Lastly, condition (5) does appear to be, at least partially, justifiable through

appeal to Scanlonian contractualism. This condition has to do with recognizing when a claim for someone to act in a certain way is reasonable and when such a claim is not reasonable. On this ethical theory, we can make sense of when it is reasonable to ask someone to refrain from acting in a certain way and when such a request would be invalid. If a person were to act in a way which would violate the aforementioned system of rules which is set forth by contractualist morality, then a request that this person refrain from acting in that way would indeed seem reasonable. Conversely, if someone were to act in a way which does not violate this system of rules, then his action is not morally wrong on Scanlonian contractualism and a request for him to refrain from taking that action would be unreasonable.

I have argued that Scanlon's formulation of contractualism can, to some degree, plausibly justify conditions (1), (3), and (5), but not conditions (2) and (4). To answer the question of whether Scanlon's ethical theory does a better or worse job of justifying rights than does Mill's ethical theory, we must look to see which necessary conditions of the most plausible account of rights Mill's theory can provide justification for. Once we have seen which conditions are and are not justifiable through the lens of Millian utilitarianism, then the question may remain of how to rank their justificatory strength in an ordinal list.

If it were to be the case, for example, that Millian utilitarianism can justify all five necessary conditions, then the question of which ethical theory can provide the strongest justification would seem to have a clear answer. Similarly, if it were to be the case that Millian utilitarianism cannot be said to justify any of the five necessary conditions, then once again this contest would seem to have a clear winner. It is the

middle cases, when utilitarianism can be said to justify a few, but not all, of the conditions I have listed as necessarily belonging to the most plausible rights account, which will necessitate a discussion about the relative importance of each of the necessary conditions.

I would now like to lay out the fundamental claims and structure of Mill's utilitarianism, such that it can be compared to Scanlon's contractualism and answers can be given in response to the fundamental question with which this project is concerned. Mill, in *Utilitarianism*, begins with an explanation of both what it is for an action to be morally right as well as morally wrong. Actions are morally right, he holds, "in proportion as they tend to produce happiness", and furthermore, actions are morally wrong as they tend to produce unhappiness (Mill 7). By happiness, Mill understands pleasure and the absence of pain, and by unhappiness he understands pain and the privation of pleasure (Mill 7).

The first thing to note here is that Mill's ethical theory has already provided us something which Scanlon's did not, a definitive understanding of moral rightness in addition to an understanding of moral wrongness. Mill's accounts of moral rightness and wrongness strike me as quite plausible. If we accept, as I think we should, that the fundamental aim of morality is to make people better-off, then it seems to logically follow that what would be right according to morality understood as such is that which *actually* makes us better-off, and vice versa for what would be wrong according to morality understood as such.

As to the point of why we should believe that the fundamental aim of morality is to make people better off, I would simply ask the following. If this is not the fundamental

aim, then why is it the case that every human society seeks out a moral code to guide conduct? It would seem absurd for this to be done so ubiquitously were it not driven by the motivation to be made better off.

Mill's formulation of utilitarianism, furthermore, is not concerned with happiness at the individual level, but rather with the greatest amount of happiness altogether. It then follows that what this theory holds to be most fundamental is the promotion of lives which are as full as possible of many high quality pleasures and devoid as possible of pain (Mill 12). This is different from Scanlon, recall, whose theory is concerned with well-being solely at the individual level.

As part of the effort to bring about the moral community which will serve the utilitarian end, Mill argues, laws and institutions which work to make it the case that individual interests resemble, insofar as is possible, the interests of all of society, need to be maintained (Mill 18). Hence, here we see Mill endorsing the view that to bring about the maximally desirable state of affairs, not only must people refrain from harming or unduly interfering in the lives of others, but furthermore positive action must also be taken in the form of maintaining certain institutions and laws.

This, too, I find highly plausible. Recall our discussion in Section III about what actually protecting vital interests entails. It requires that some people refrain from action while others positively act in certain ways. Mill follows in this reasoning, for he too recognizes that for the interests of society to be protected, mere non-action will not suffice, but positive action in the form of maintaining certain laws and institutions will also be necessary.

Once more, we should now pause to take stock of the major claims of Mill's

utilitarianism. First, it has given us an understanding of moral rightness and wrongness. It has also posited as the most socially desirable state of affairs a society full of individuals whose lives are as full as possible of various high quality pleasures and as devoid as possible of pain. Furthermore, it advocates for the maintenance of certain laws and institutions so as to bring about the moral community which will be instrumental in bringing about the promotion of happiness.

The question before us is how well utilitarianism of this sort can justify rights, through consideration of the plausibility with which it can justify the five necessary conditions I laid out in Section III. Condition (1) calls for the ability to discern between vital and non-vital interests. Recall that on the utilitarian view the only vital interest is pleasure and evasion of pain, and that all other good things are valuable solely for their ability to promote this vital interest. Utilitarianism, then, can account for this distinction. The rights which protect one's vital interests, on the utilitarian view, will be precisely those which protect one from pain and which protect one from being robbed of pleasure.

Condition (2), I take it, can also be justified by Millian utilitarianism. There will be various means of promoting happiness and avoiding pain, each of which will be endorsed by the utilitarian for its ability to do so. Sometimes, the utilitarian will ask for positive action be taken, as in the case of the maintenance of various laws and institutions, and other times he will ask that certain actions not be performed, thus utilitarianism can justify, in various scenarios, endorsing various first-order rights. Furthermore, the utilitarian will want to adjust the authority of various institutions, depending upon whether they help or hinder the ultimate utilitarian end of welfare maximization, and thus utilitarianism will in various instances also be able to account for

second-order rights. Consequently, Millian utilitarianism can account for the various forms which a right can take on, as demonstrated by the Hohfeldian Analytical System, and thus condition (2) is justified.

Condition (3) is manifestly justifiable through consideration of the nature of utilitarianism. The ultimate end of utilitarianism is welfare, or happiness maximization. Hence, insofar as rights help to bring this state of affairs about, utilitarianism will support rights for this instrumental value.

Condition (4) concerns the recognition that a right can demand positive action from some and negative action from others. A very similar line of reasoning which explained how utilitarianism can justify the content of condition (2) explains how it can also justify the content of condition (4). Once more, the sole end of utilitarianism is the promotion of lives which are as full of pleasure and devoid of pain as possible. Various social arrangements and institutions will call for different courses of action, or inaction, in order for the utilitarian end to be served.

Condition (5) entails being able to distinguish between when a claim for someone to act, or not act, in a certain way is reasonable and when such a claim is not reasonable. Millian utilitarianism allows us to make sense of when it is reasonable to ask someone to act, or refrain from acting, in a certain way; namely, when acting, or not acting, in that way will serve to maximize utility. Any claim for action or inaction that does not serve to maximize happiness would be, on this ethical theory, unreasonable and thus invalid.

I have argued that utilitarianism, as argued for and understood by Mill, can justify the content of conditions (1) – (5). The end which utilitarian morality promotes, as well as its formulation of the morally right and the morally wrong, make it such that the

utilitarian can consistently endorse rights of any form. The utilitarian is not confined to endorsing a narrow range of rights as *correct* or *most plausible*, rather the utilitarian will support any right which functions as a means, or instrument, to furthering the utilitarian cause. Given that utilitarianism can plausibly justify conditions (1) – (5), whereas contractualism can only plausibly justify conditions (1), (3), and (5), I conclude that utilitarianism provides a more plausible justification of rights than contractualism.

Section V: Conclusion

In this project I have critically examined three accounts of rights, and from them I extracted five plausible features, or conditions which must necessarily belong to that account of rights which is to be correctly labeled the most plausible. This is not, however, an exhaustive list of the necessary conditions which the most plausible account of rights will contain, but rather, it is just a few of them as derived from the contributions of Zivi, Brandt, and Scanlon to understanding the nature of rights.

I conclude that rights understood this way, as entailing necessarily at least these five conditions, are better justified by Millian utilitarianism than by Scanlonian contractualism. This is because Millian utilitarianism allows us to make sense of all five of the necessary conditions in consideration, whereas Scanlonian contractualism can only make sense of three of the five necessary conditions. The reason for the inability of Scanlon's contractualism to provide an adequate justification for conditions (2) and (4), I argue, is because due to the way Scanlon formulates his ethical theory we can only, at best, make sense of negative rights. His account does not have room for an understanding

of positive rights as would be required to justify conditions (2) and (4). Until such an understanding of positive rights can be arrived upon within the theoretical framework of Scanlon's contractualism, it seems to be the case that Millian utilitarianism will continue to do the better job of providing a more plausible justification for rights.

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