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LIBERALISM, CONTRACTARIANISM AND THE PROBLEM OF EXCLUSION

Philip Cook
University of Edinburgh
philip.cook@ed.ac.uk

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Introduction

For liberal contractarians, moral and political principles are justified if agreeable to persons as free and equals.¹ But for critics of liberal contractarianism, this justification does not apply to all those who should be treated as free and equal, but only to those capable of agreement. Some will be unable to agree because they lack the understanding or ability to make agreements. Others have so little to offer that there is no benefit to contracting with them. So if the justification of liberal political morality rests on agreement, it is not justified to those such as children or people with many different kinds of disability who lack the full capacities to form rational voluntary agreements. Such excluded may be treated kindly under contractarian politics, but they are not treated as fellow free and equals.

Although the problem of exclusion is one among a number of fundamental objections to contractarianism, it is particularly important. The problem of exclusion derives from the

¹ I use the term ‘contractarianism’ as a general description the family of views that characterise the justification of moral and political principles as a form of agreement. While I explain the difference between contractualism and contractarianism, and will use contractualism when referring specifically to these views, I include contractualism in the broad category of contractarianism as appropriate when discussing the approach generally. I reserve the term contractualism for the views of Scanlon and Southwood, but do not mean to imply that Rawls’s view could not legitimately be labeled contractualist. Typically contractarianism in its narrow sense is applied to views based on prudential rationality such as Gauthier’s, and contractualism refers to views based on moral motivations such as Scanlon’s. Rawls draws on both, and so either might be appropriate depending on the context. For different views on these distinctions see Samuel Freeman, ‘The Burdens of Public Justification: Constructivism, Contractualism, and Publicity’, *Politics, Philosophy & Economics* 6, no. 1 (2007): 5–43; Stephen Darwall, ‘Introduction’, in *Contractarianism/Contractualism*, ed. Stephen Darwall (Oxford: Wiley-Blackwell, 2003), 1–8. Similarly, I use broad terms such as ‘moral and political principles’ to describe the subject matter of agreement when discussing liberal contractarianism generally, and distinguish more specifically between agreements about justice or morality as appropriate when discussing the individual theories.

centrality of agreement in contractarianism. Agreement represents the ideal that principles of political morality must be acceptable to each individual. Agreement is taken to demarcate contractarianism from other approaches to liberal political morality, notably utilitarianism. Understanding why contractarianism suffers from the problem of exclusion helps us understand the distinctive character of contractarianism, and the importance of agreement in particular. But need exclusion be problematic? I suggest contractarianism need not be objectionably exclusive. I first introduce why agreement is important in contractarianism, and then consider the main versions of contemporary contractarianism and their different understandings of agreement. I discuss how agreement results in exclusion in each, and distinguish two kinds of response to the problem of exclusion: differential inclusion and permissive inclusion. Differential inclusion is unsuccessful because it offers those not fully capable of agreement unequal status. Permissive inclusion may either make the circumstances of agreement more open, or characterise the capacities required for inclusion more permissively. I advocate the latter as the most promising response to the problem of exclusion. I outline a more inclusive contractualism based on the capacity to share goals. We participate in relationships of sharing with a wide range of people, including children and people with different kinds of disabilities, not all of whom are fully capable of rational voluntary agreement. These relationships of sharing form the basis of relational duties that fit contractualist circumstances of agreement. We can therefore include as equals all those with whom we share goals in the relevant way in a contractualist justification of moral and political principles.

1. Why Agreement?

What lies at the heart of the exclusion objection? For contractarians, agreement represents an important aspect of our practical relations with each other: individuals are capable of choosing constraints on their interactions with others, and when chosen freely, these

constraints are justified. Principles are not chosen because they are justified; they are justified because chosen.² Historical contractarians considered how agreement might represent consent, and how consent may justify the constraints of political authority. But these arguments suffered badly at the hands of utilitarians.³ Freely chosen agreement to the power and authority of governments is conspicuously absent from ordinary political life. But each person's interest in their lives going well is conspicuously pervasive. For utilitarians, political authority is justified if it makes people's lives go better. Utilitarianism as public philosophy complemented liberal commitments to scepticism of political authority and the importance of treating people as rational and free to pursue that which makes their lives go well.⁴ The justification of laws and political morality through hypothetical agreement receded as utilitarianism offered a rational and determinate method to manage society and promote its greater well-being.

Though utilitarianism complements many liberal commitments, it jars with others. As free responsible adults, we are no doubt entitled to make choices and sacrifices between our preferences regarding our own greater benefit. But utilitarianism suggests society as a whole should be governed like this. So the question changes from: which interests of mine should I sacrifice for my greater well-being, to whose interests should be sacrificed for society's greater well-being?⁵ This classical utilitarian view, that social policies are right and institutions just if the aggregate of well-being is maximised, may threaten society's stability. It asks an individual not just to sacrifice one of their lesser interests for one of their greater; it asks one individual to sacrifice their interests for the greater interests of others. It imposes a burden that it is rational to reject out of self-interest, or reasonable to reject because unfair.

² Philip Pettit, 'Can Contract Theory Ground Morality?', in *Contemporary Debates in Moral Theory*, ed. James Dreier (Oxford: Blackwell, 2006), 79.

³ Famously, see David Hume, 'Of the Original Contract', in *Hume: Political Writings*, ed. Stuart D. Warner and Donald W. Livingston (Indianapolis, Ind.: Hackett Publishing, 1994), 164–81.

⁴ For an argument that this includes a utilitarian concern with distributive justice see Paul Kelly, *Utilitarianism and Distributive Justice: Jeremy Bentham and the Civil Law* (Oxford: Clarendon Press, 1990).

⁵ John Rawls, *A Theory of Justice, Revised Edition* (Oxford: Oxford University Press, 1999), 23–24.

So though utilitarianism gives liberals a clear method for making policies, it may affront liberal convictions that political authority be acceptable to each person. Acceptability to each person must then be a hallmark of a liberal order for it to be stable and legitimate.⁶ It seems natural that social rules may be acceptable if we are confident each person is bearing a fair share of the burdens they entail. If we can be confident that no rules will be enforced on us unfairly, and that each will share in maintaining these rules, we may hope that social life will be stable because agreeable.

Though welcome, actual agreement is not required for rules to be agreeable. The notion of agreement is hypothetical; it represents the practical relations with which we are concerned. It represents each individual's entitlement to refuse to accept a policy or principle that would treat them unfairly. For example, I might rightly refuse to accept a rule if it imposed on me a cost without benefit; or I might refuse obedience to a law enforced on me whilst others went free to ignore it. Whilst historical contractarians may have emphasised agreement as representing consent, today's contractarians emphasise agreement as representing the inviolable worth of each person. Agreement represents what is impermissible in a liberal society: the enforcement of any law or principle that is unacceptable to anyone, on good grounds. Agreement's representation of the inviolability of persons demarcates contractarianism from consequentialism in liberalism.

Agreements differ in views of the circumstances of agreement, the characteristics of those agreeing, the process of agreement, the subject-matter of agreement, and the outcomes of the agreement. Contractarians dispute whether agreements should represent simply our prudential interests in dealing with others; or also our moral commitments towards others. All agree though that representing the inviolability of individuals in contracts secures the

⁶ For wider discussions of the importance of acceptability to each person in liberalism see Jean Hampton, 'The Common Faith of Liberalism', in *The Intrinsic Worth of Persons*, ed. Daniel Farnham (Cambridge: Cambridge University Press, 2006); Jeremy Waldron, 'Theoretical Foundations of Liberalism', *Philosophical Quarterly* 37, no. 147 (1987): 127–50.

justifiability and hence stability of liberal society better than utilitarianism. But if preserving the inviolability of individuals depends on agreement, what about those incapable of agreeing? Does contractarianism merely swap the unacceptable burdens of aggregation for some for the unacceptable exclusion of others?

2. Agreeing because it is Fair and Just

Rawls turns to agreement to justify principles for the just government of society's most fundamental institutions. Utilitarianism fails to recognise the importance of the claims of justice of each person taken separately, but agreement does. Rawls takes agreement to concern the justice of social institutions because social life is characterised by a moderate scarcity of resources between persons roughly equal in mind and might, who see the merits of cooperation.⁷ Though cooperation is appealing, it is difficult because people have differing plans for their lives that may lead to conflicting claims over the scarce resources. These circumstances, combined with a limited generosity towards others, raise the problem of dealing justly with individuals' claims. Individuals will be concerned that their entitlements are addressed fairly by those institutions that have the most pervasive and coercive effect on their lives.⁸ If the most basic rules are fair to all, they should be regarded as agreeable to each. And if justice prevails, stability follows.

For Rawls, individuals' most important interests are to be able to develop their powers to understand and be motivated by the demands of justice (an effective sense of justice); and to be able to choose, follow, and revise if necessary how one's life should go (a capacity to form and revise a conception of the good).⁹ Having an interest in pursuing our good life whilst living justly with others motivates us to seek a justification that is mutually agreeable. We are motivated to find an agreement that we and others feel will provide a shared basis for

⁷ Rawls, *A Theory of Justice, Revised Edition*, 109–122.

⁸ *Ibid.*, 6–7.

⁹ *Ibid.*, 131–132; John Rawls, 'Social Unity and Primary Good', in *Collected Papers* (London: Harvard University Press, 1999), 359–87.

the promotion of our common interest in an effective sense of justice and pursuit of a conception of the good. We do not know what terms might be mutually acceptable, as we have no special insight into what justice might be independently of what we agree it to be. Contractarians typically agree that requirements of freedom and equality are not knowable directly through perception or a special kind of reasoning. They must be decided upon using a procedure that ensures the outcomes will be clear, specific, and will conform to our prior general commitments about what freedom and equality entail. There will be no way to judge if the outcomes of a procedure fit perfectly with what freedom, equality or justice requires, because this depends purely on what comes out of the procedure. But while we don't know the content of an agreement in advance, we can be clear and sure about the condition under which we must agree. If we are able to represent these commitments in the conditions under which we seek agreement, we can be confident that the agreement is justifiable because just.¹⁰

The circumstances of the agreement, Rawls's original position, are constrained by his view of the practical nature of persons and the implications of this for our claims on each other. The constraints on the original position represent fairness.¹¹ The content of the agreement is constructed through the idea of representative individuals considering what principles would best enable them to fulfil their highest-order interests. To eliminate partiality for their own particular view of the good life, Rawls denies these representatives knowledge of their personal life-plans and information about their individuality that may naturally affect decisions about what goods are most advantageous to them.¹² Representative individuals choosing with attitudes of mutual indifference to each other (no envy or self-sacrifice), choosing rationally and self-interestedly in these fair conditions would be assured to choose principles that are fair.

¹⁰ Rawls, *A Theory of Justice, Revised Edition*, 75.

¹¹ *Ibid.*, 17.

¹² *Ibid.*, 118–122.

On Rawls's contractarian view, individuals have good reason to agree to the principles constructed in the original position. Everyone, including those whose lives are less advantaged than others, will see that the content of the agreement represents their moral commitments to a fair social order. They will also see that their chances to pursue their plans for a good life are as advantageous as possible, even to the extent that greater advantages for some are only allowed if they benefit those least advantaged.¹³ The principles of justice can be shown to be agreeable from a common or shared point of view, irrespective of an individual's particular commitments and goals (the point of view of the representatives in the original position). These principles can also be shown as agreeable and preferable to others because they are consonant with each individual's natural desire to live alongside others justly. Given our common desire that justice be effective in regulating our lives with others, Rawls argues we will each endorse these principles because they create the social conditions for justice to be effective in our lives.¹⁴

While the principles of justice as fairness may be more acceptable than alternatives, individuals may find that they conflict with their plans for a good life. So though justified from a common, or shared, point of view, they may not have sufficient priority in individuals' everyday lives to make the agreement stable. Rawls's initially sought to show that the constrained choice of the original position would also be the choice of individuals who know about themselves and their plans for their lives. The principles would be agreeable to an extent that individuals would defer to them finally, and so the agreement would be stable. Individuals would accept them, even knowing about conflicts with their more particular goals and commitments, because it could be demonstrated that living under principles of justice is

¹³ Ibid., 65.

¹⁴ Ibid., 130–139.

also good for them. So principles of justice would be agreeable, and stable, because congruent with our good.¹⁵

Rawls later came to see that arguments for the congruence of justice and a person's good could not ensure stability, because it involves people regarding a life of freedom and equality as the most important good.¹⁶ In a free society individuals are able to adopt and pursue lives with different priorities, such as the religious who value obedience and self-negation most highly. Reasonable people, committed to living together under institutions that are just, may decide autonomy is not of ultimate value. In these circumstances of reasonable pluralism, Rawls argues that we could still demonstrate that the two principles of justice would be chosen over others from the point of view of individuals' general and shared interests, in the original position.¹⁷ But when considering how the principles would be acceptable from each person's particular point of view, we have to recognise that the agreement is limited in scope to political life.¹⁸ Thus Rawls turns from demonstrating the agreeability of the principles from a point of view that encompasses people's values and beliefs comprehensively, to one that appeals to their values and beliefs as citizens of a democratic polity. Citizens of a well-ordered society will regard themselves and others as entitled to be treated as free and equals in the most central matters of politics. They will be able to form a consensus amongst citizens acting in good faith towards each other as free and equal fellow citizens; and who are mindful of the limitations and restrictions on appeals they can make to their personal plans and commitments in justification of political authority.¹⁹

Limiting the reasons and justification to those political shared by all does not make the justification weaker or merely a pragmatic compromise. Whilst society may be composed

¹⁵ Ibid., 499–505.

¹⁶ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), xvii–xix and Paul Weithman, *Why Political Liberalism?* (Oxford University Press, 2010), 42–67.

¹⁷ Rawls, *Political Liberalism*, 22–28.

¹⁸ Ibid., 11–15.

¹⁹ Ibid., 144–149.

of a plurality of reasonable views of the good life, it also contains within it a shared tradition of regarding its citizens as free and equal. The ideal of living together with other citizens justly will have its own independent value: a political value. But the reasons people find to support it will be consonant with their personal views of the good life. While persons will find different reasons for supporting this political view of society, each will find that to be regarded as a citizen who is free and equal and entitled to respect as such (and to regard others as such too), is good for them as citizens. Given the special moral and practical importance of living in a just polity, citizens will also see this as part of what it is to lead a good life as an individual. So, Rawls came to see that the principles of justice, chosen by persons from a common point of view, must not rely on an appeal to only those views of the good life that value being free and autonomous throughout one's life. Even those who value religious obedience most highly, if committed to living alongside other citizens under a just and legitimate regime, would find the experience of mutual respect and flourishing as citizens to be part of what it means to lead a good life.²⁰

But is it necessary to show, as does Rawls, that principles are agreeable because they appeal both to our prudential rationality and our reasonable moral commitments? What if our interests and commitments conflict? Which is authoritative? Within the contractarian tradition we find some who argue that common prudential interests alone can lead us to adopt constraints on our behaviour that are agreeable and represent what we mean when we speak of justice and fairness. Others argue that moral reasons are sufficient in themselves to justify agreement on moral or political principles. Thus contractarianism divides from Rawls's combination of both rational and reasonable considerations into those who seek to derive principles for cooperation from prudence alone, and those who seek to derive them from our moral commitments to the freedom and equality of all.

²⁰ Ibid., 201–211.

3. *Agreeing because it is to our Mutual Advantage*

If all our interactions with others were like transactions in a perfect market, where all individuals acting purely from self-interest would make everyone as well-off as they could be, we would have no use for rules of cooperation. Morality and justice would be unnecessary; harmony and satisfaction would be optimum. But Gauthier agrees with Rawls that we find ourselves in circumstances of moderate scarcity, limited benevolence, and yet with the potential to benefit mutually from cooperation.²¹ Is it possible to explain that rules of cooperation are rational and so can be adopted voluntarily, or do rules of cooperation require a threat of coercion to ensure obedience?

Gauthier argues it would be rational to reject utilitarianism as a basis for designing cooperative social institutions or principles for cooperating with others. Utilitarianism may mean some receive unearned benefits, and others incur uncompensated costs, in order to maximise utility. This would create free-riders and parasites.²² Utilitarianism may also regard individuals' endowments (their property and factors they may use in market activity) as subject to re-distribution to maximise utility. But this would affect individual's freedom in work and exchange, and would treat the distribution of factor endowments as arbitrary and not a matter of rightful entitlement.²³ It would be rational for individuals not to comply with such rules, and this would threaten the stability of society. Such rules would need to be coercively enforced, and so utilitarianism fails to explain or justify stable voluntary cooperation between individuals.

Gauthier's alternative is contractarian. Moral and political constraints agreeable to all are justified and hence stable. Justice is rational; free-riding and parasitism irrational.²⁴ For Gauthier, we find something valuable if it contributes to fulfilling our preferences. Gauthier

²¹ David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), 114.

²² *Ibid.*, 105.

²³ *Ibid.*, 110.

²⁴ *Ibid.*, 113.

denies that there is a universal or objective list of preferences common to all. We prefer different things for different reasons. But there is a common and objective structure to preferences and our pursuit of them. If our preferences are settled and organised, it is rational for us to pursue that which we expect to fulfil our preferences most fully.²⁵ When faced with dealing with others, we have to take into account that others are also motivated to maximise their expected utility. This seems a recipe for conflict as we each try to bargain to obtain the most we can. We also seem faced with the challenge that while cooperation may sometimes be beneficial, other times cheating may be less costly and more beneficial than cooperating. If we come to doubt the trustworthiness of others to keep agreements and cooperate faithfully, society may descend into the paradox where it is rational for each of us to distrust the other and choose options we know will make us worse off, rather than risking trust and mutually benefitting.²⁶ But Gauthier argues that given the instability and the disbenefit of forgoing opportunities to cooperate, it is rational to constrain our reasons to maximise in each interaction. So we would adopt a strategy in dealing with others of seeking agreement to mutually constrain our maximising reasons in order to gain from the expected benefits of opportunities to cooperate. However, it would only be rational to agree to constraints on our maximising reason if we had some warranted assurance that others were similarly motivated. If we have sufficient reason to accept that others adopt the strategy of voluntarily constraining their maximisation of expected utility, then cooperation and its benefits will flourish.²⁷ But though we are now willing to constrain our reasons to maximise the fulfilment of our preferences, we still wish to fulfil them as fully as possible while interacting with

²⁵ Ibid., chap. 2.

²⁶ Ibid., 79–82.

²⁷ Gauthier later argued that rational individuals would not seek agreement with others by constraining their maximizing reason. Rather, individuals would coordinate their actions with others in order to achieve Pareto-optimality (where an individual gains the most they can without making anyone else worse off). Gauthier argues that if we understand individuals forming agreements as mutually 'agreed Pareto-optimizers' this allows us to explain voluntary cooperative behavior better than if we regard individuals as constrained maximizers, Gauthier 'Twenty-Five On', *Ethics*, Vol. 123, No. 4, *Symposium: David Gauthier's 'Morals by Agreement'* (July 2013), pp. 601-624

others. So Gauthier argues it is rational to adopt a strategy where we make the smallest concession to others to obtain the greatest fulfilment of our preferences: minimax relative concession.²⁸ Yet for each to accept the outcomes of such a bargain voluntarily, each would need to be assured the relative bargaining advantage was roughly equal; that no one had acquired property or technology or advantage at the expense of others: Gauthier's Lockean proviso on the conditions for agreement.²⁹ If the initial conditions of bargaining allowed predation by the strong over the weak, agreements may be struck where the weak accept from desperation and not advantage. Bargains lacking mutual advantage would rely on coercion and threats to be enforced because we could hardly be assured of the voluntary assent of the weak who receive no benefit. Such agreements are unstable and costly, and therefore we could expect them be of less value to us over time than agreements between more equally situated co-operators agreeing voluntarily to constrain their choices and actions for mutual advantage.

By constructing morality and justice through the agreement of rational, self-interested persons, Gauthier aims to justify the authority of principles on the basis of our capacity to decide freely when it is in our best interest to constrain our behaviour according to principles agreed with others. While we may see the value of constraining our reasons to maximise our expected utility, Gauthier emphasises that all agreements must lead positively to the pursuit of our self-interest. This provides a bulwark against legitimising any relationship where someone becomes merely an instrument for someone else's pleasure or satisfaction.

Exploitation, oppression, and false consciousness about one's preferences due to deceit, are illegitimate and unjustified on this contractarian view.³⁰

²⁸ Ibid., 165–170.

²⁹ Ibid., chap. 7.

³⁰ Jean Hampton, 'Two Faces of Contractarian Thought', in *Contractarianism and Rational Choice: Essays on David Gauthier's Moral's by Agreement*, ed. Peter Vallentyne (Cambridge: Cambridge University Press, 1991), 31–55.

An implication of Gauthier's contractarianism is that others are of value to us only in so far as we benefit from interacting with them. That others have only instrumental value denies what is, for many of us, a fundamental liberal principle: individuals have intrinsic value and are entitled to equal respect. Most liberals who endorse such a commitment would accept that it is permissible to bargain and agree constraints on maximising one's interests, and that this may explain the morality of a certain set of personal relationships. But they would contest that the whole of our moral interactions can reduce to this. For Gauthier, rational self-interest justifies the constraints on our private and public lives with others. Even if such bargains can be struck and found stable; even if these bargains resemble our moral intuitions about justified political authority; and even if they protect people from harmful subjugation; for many it neglects an important aspect of the value of living together on moral terms. For many of us, we are called to live on terms mutually agreeable because we regard it as wrong to live under rules which some reject for good reason. It is not wrong simply because of any harm which follows from such rules. It is also wrong at a more fundamental level.

4. Agreeing from Mutual Recognition

Many contractarians reject Gauthier's attempt to derive agreement on rules of cooperation from prudential rationality. Purely self-regarding agreements about morality or justice would be unstable: at some point free-riding may be the most rational choice for an individual.³¹ Rather than appeal solely to prudence, we should appeal directly to the motivation to agree on terms which treat all as free and equal. As the agreement is between those motivated to agree on moral terms, we need not steal away facts about ourselves in order to decide the content of principles of justice or rightness. We need not model constrained prudence; we can count on those motivated by moral concerns to constrain their prudential interests. Principles of justice

³¹ Brian Barry, *Justice as Impartiality*, Oxford Political Theory (Oxford: Clarendon Press, 1995), 31–46.

or morality are agreeable because they fit our will to be just. Once prudential reciprocity is eliminated from the motive to agree, principles governing our relationship with others should represent our motivation to live together on terms no reasonable person has good reason to reject.

Basing agreement on moral rather than prudential reasoning and motivation represents a distinct form of contractarianism: what Scanlon describes as contractualism. Scanlon argues that if persons are motivated to live together on terms no one could reasonably reject, then this gives content to (and also constrains) the reasons they give each other in justification of principles governing their interactions. In other words, reasonable people will seek to agree terms that cannot be reasonably rejected because of their interest and commitment to living in unity with others similarly motivated.³² The value of living this life of mutual recognition will have a special importance in their relations with others, and take priority over other values which may seem to conflict.³³ Scanlon argues that this motivation is based on the good reasons that count in favour of living a life of mutual recognition with others.³⁴ We are creatures whose attitudes such as beliefs, intentions, and preferences are sensitive to our judgments about considerations in favour or against things. When we judge that there are good reasons in favour of an action or belief we normally come to hold those beliefs, or try to act on those reasons. We need no other mechanism such as a desire to propel us. Those things for which considerations count in favour we regard as good and of value. This does not mean that we always want to promote that thing: having more friends is not necessarily better than having a smaller number who are sensitive to what friendship requires from us. But reasons counting in favour of something are sufficient to motivate and to confer value. If we recognise that persons are creatures whose attitudes are sensitive and responsive to their

³² Thomas Scanlon, *What We Owe to Each Other* (London: Belknap Press of Harvard University Press, 1998.), 153.

³³ *Ibid.*, 158–168.

³⁴ *Ibid.*, 162.

judgments about reasons, we have good reason to recognise this as a fundamental quality that should shape the conditions under which we live with others. If, as also seems natural, we see good reason to live alongside others, then we have good reason to want such a social life to be one we find mutually acceptable. All those motivated by this commitment to respect each person's freedom and equality, they share an ideal of social life as unified by the value of mutual recognition. The value of mutual recognition expresses each person's entitlement to accept or reject principles governing social life. To accept this value and allow it to order the claims we make and responses we give to others is what it means to be reasonable.³⁵

Reasonableness is an idea with moral content: the morality of right and wrong in dealing with others who share a motivation to respect each other's freedom and equality.

Principles governing our relations with others are acceptable if they cannot be rejected by anyone motivated by the value of mutual recognition. The principles must be acceptable, or not rejectable, to each person considered individually. Individuals may draw on a plurality of considerations that affect them personally, and these considerations will alter and adjust dynamically according to the context or issue at hand. Thus reasonable rejection is deliberately left unspecified concretely. But individuals may only give reasons that affect them, they may not reject a principle for reasons that are to do with the common good or considerations independent of a person-affecting reason.³⁶ This prevents utilitarian arguments and fortifies the value of mutual recognition as the equal recognition of each person individually.

While Scanlon has concentrated mostly on the morality of personal relationships with others, his contractualism bears on liberal political thinking in important ways. If we conceive of an agreement about right and wrong as characterised by the reasonable personal reasons of individuals, then utilitarianism is unjustified. Utilitarian justifications will include

³⁵ Ibid., 191–197.

³⁶ Michael Ridge, 'Saving Scanlon: Contractualism and Agent-Relativity', *Journal of Political Philosophy* 9, no. 4 (2001): 472–81.

those considerations that concern the aggregate of individuals, and while individuals can be assured that their interests will be counted, their importance will be weighed against the aggregate. An individual has good reason, from their point of view, to insist that their interests should not be considered according to its weighting relative to the sum of positive utility; their interests should be counted on their own merits.³⁷

Contractualism also challenges the utilitarian view that justification of political authority should be decided by weighing the relative satisfaction of preferences produced by different policies. Different people will have different considerations that will be relevant to judging a principle. It will be normal and reasonable to offer considerations of personal well-being and preference satisfaction, but well-being will not be a single measure or master-value when deciding if a principle should be rejected.³⁸ The procedure of considering personal reasons and evaluating their reasonableness also reflects the importance of publicity and transparency in agreement. Publicity and transparency promise to make agreements more stable, but they also express the importance of agreements being accessible to each person as free and equal.³⁹

More positively, contractualism offers liberals a perspective on what matters about justice. For some liberals, justice is primarily a matter of the justifiability of a distribution of some good. Liberal egalitarians differ about which good should be distributed and according to which principle, but many share a concern that justice is a question of distribution. But contractualism looks primarily to whether individuals stand in relations of mutual recognition and respect to each other. A person who has so little money that it makes their life hard, anxious, and vulnerable suffers a distributive injustice. But people with plenty may suffer social stigma and a repugnance of their reasonable objections. These people too suffer an injustice: a relational injustice. Contractualism explains what is wrong about this relational

³⁷ Scanlon, *What We Owe to Each Other*, 229–241.

³⁸ *Ibid.*, 141–143.

³⁹ Freeman, 'The Burdens of Public Justification'.

injustice, and thus gives liberals a broader and more pluralistic view of what we owe to others as a matter of justice.⁴⁰

This Scanlonian view appeals to the substance of our commitment to live with others on reasonable terms, acceptable to each individually. Scanlon accepts explicitly that living with others unified by a commitment to mutual recognition is assumed, or at least aspired to. There is no deeper or prior feature of human nature or reason from which we can derive or argue for this commitment. We may have good reasons to hope that it is common amongst those with whom we share lives. But, we also have reasons to be sceptical that we can explain or even persuasively justify the presence and forcefulness of this commitment in peoples' lives. For some this is appropriately modest and sufficient: we should not need an explanation of the dispositions and ideals of morality in order to give it a special importance and priority in our lives. But for many this is inadequate.

For contractualists, underlying all that we call wrong in our relations with others is a failure to respect another's reasonable rejection to that which wronged them. It vindicates this view of the morality of right and wrong by appealing to our commitment to living alongside others on reasonable terms, characterised by the value of living together in a unity of mutual recognition. When faced with deciding if a rule is reasonably rejectable, we have to draw on our considered substantive views about what reasonableness entails. But it seems circular to consider something wrong because reasonably rejectable if we reject it due to considerations about reasonableness which have moral content. Not only is the account of wrongness accused of circularity, but the basis of our considerations of right and wrong is held to be

⁴⁰ On the connection between contractualism and relational egalitarianism see Elizabeth Anderson, 'The Fundamental Disagreement between Luck Egalitarians and Relational Egalitarians', *Canadian Journal of Philosophy* 36 (2010): 1–23.

assumed, and not explained fundamentally either. Can contractualism explain the fundamental basis for our moral relations with others and avoid circularity?⁴¹

Southwood argues all normally developed adults share the capacities to reason together deliberatively. If we imagine people who are able to deliberate perfectly about the rules governing their lives together, their deliberations will result in agreement about what morality means for us. The ideal of perfect deliberation explains the fundamental basis for the form of the rules we agree should govern our relations with each other. It includes constraints such as considering the interests of all those affected by the decision, responding appropriately to the reasons provided by others, and reflection and adaptation in light of deliberation.⁴² These formal procedural constraints on deliberation do not involve concrete moral commitments. To deliberate discursively and reflectively with others is primarily a question of the style of reasoning and not an ostensibly moral matter. However, the constraints on ideal deliberation express the importance of our relations with each other. Ideal deliberation therefore provides normative practical constraints that help produce agreements that fit our ordinary understandings of morality while avoiding circularity. Reasonableness is therefore characterised by the formal constraints of the procedures of deliberation, rather than the substantive value of mutual recognition.⁴³ Southwood argues that contractualism can therefore explain the fundamental basis and normativity of morality by deriving it from our capacities as citizens of a community of deliberators.

Contractualism differs from contractarianism by basing the motivation and reasoning of agreement on reasonableness, and not only or also self-interest. If our prudential self-interest is not a fundamental motivation of agreement, then scarcity and limited benevolence are ephemeral as circumstances of justice. The circumstances of contractualism are a

⁴¹ For a detailed discussion of varieties of these objections see Nicholas Southwood, *Contractualism and the Foundations of Morality* (Oxford: Oxford University Press, 2010), 61–84.

⁴² *Ibid.*, 87–96.

⁴³ *Ibid.*, 128–135.

community of reasonable people motivated to find rules mutually agreeable to each other. Thus in contractualism, parties are characterised according to the notion of reasonableness that motivates the agreement. Scanlon characterises contractors according to the motivation and capacity to deliberate about the implications of governing relations with others according to the value of mutual recognition. Southwood characterises contractors according to the more formal capacities of ideal deliberation.

5. *Agreeing to Exclude*

Contractarians typically object to utilitarianism's treatment of those with preferences the fulfilment of which would not contribute to greater overall well-being. Agreement is meant to protect each individual's interest and entitlement to live under only those rules which are acceptable to them, given other's acceptance also. But if justification depends on agreement, those incapable of agreement are excluded.⁴⁴ This in itself is not necessarily a problem, unless numbered in the excluded are those whom we feel have moral standing. This is not a matter of untidiness or as yet incomplete extension to complex cases. The problem of exclusion is inescapable to contractarianism and contractualism. Agreement is the bulwark against utilitarianism. Contractarianism, contractualism, and consequentialism often overlap in ambition and concern. Agreement as the representation of acceptability to each divides contractarianism from utilitarianism. But saving individuals from the teeth of aggregation through justification as acceptability to each costs. What capacities are required to be counted among those qualified to contract? There are many we regard as having moral standing, towards whom we have moral concern, but who do not seem possess the capacities required for reciprocal agreement. Is the cost of saving some individuals from aggregation to exclude others from our agreements?

⁴⁴ See for example Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford: Oxford University Press, 2000), 66–71; David Phillips, 'Contractualism and Moral Status', *Social Theory and Practice* 24, no. 2 (1998): 183–204; Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (London: Harvard University Press, 2007).

Of course, contract theorists see that agreement implies exclusion: the scope of agreement may be narrower than the scope of our moral concern for others. We recall that agreement is understood hypothetically in contractarianism. Principles are not justified because of any actual agreement between persons. Agreement represents the notion that principles should be agreeable to each person understood appropriately; if not they should not be enforced. The hypothetical agreement should represent and explain accurately the practical relations with which we are concerned. If there is a lack of fit between what a contract theory says and our deeply held convictions about morality, then one or the other must be at fault. Either we doubt the theory, or our convictions. Gauthier argues the latter.⁴⁵

Our moral convictions may not be entirely reliable. If the disabled, the poor, and the frail elderly cannot contribute to the collective surplus, it is not rational from a purely self-interested view to agree rules of cooperation with them. Cooperation is not possible as we would receive nothing in return for our labours. Such people are incapable of joining agreements about morality or justice, and so on contractarian terms they are not entitled to the standing and benefits derived from agreement. Gauthier's theory is often criticised for such seemingly morally offensive conclusions. We might protest offence, but the merest glance at our avoidance of the reality of global and domestic poverty and neglect of the condition of the severely disabled amongst us may vindicate Gauthier's honesty.⁴⁶

The narrow inclusion of Gauthier's contractarianism may fit much of what we do, and may explain that we do this because we regard morality as a contract for mutual advantage. But many contractarians are dissatisfied. We can see two different ways of broadening the scope of agreement: differential inclusion and permissive inclusion. Differential inclusion maintains that relevant capacities are required to agree on principles of justice and morality.

⁴⁵ See for example David Gauthier, 'Why Contractarianism?', in *Contractarianism and Rational Choice: Essays on David Gauthier's Moral's by Agreement*, ed. Peter Vallentyne (Cambridge: Cambridge University Press, 1991), 15–30.

⁴⁶ See Ken Binmore, *Just Playing* (London: MIT Press, 1998), 258–259 quoted in Peter Vanderschraaf, 'Justice as Mutual Advantage and the Vulnerable', *Politics, Philosophy & Economics* 10, no. 2 (2011): 128.

Those fully able to co-contract are jointly and equally subject to the agreement. But we also wish to extend the contractarian protection of individual interests and standing to those who do not share in the full capacities of those agreeing. The benefits of agreement are offered to them, but co-authorship is not.

We might provide differential inclusion in contracts of mutual advantage if we endorse our moral consideration for those such as children and the severely disabled, even if they are incapable of cooperation.⁴⁷ Anyone failing to grant them moral standing would be reprehensible to us, and we would choose not to cooperate with them. This threat of non-cooperation would provide reason to extend moral consideration and thus protection and benefit to those less capable. But an agreement which includes consideration for the incapable is not then strictly one of mutual advantage, as morality cannot now be explained purely in terms of rational self-interest.

If we turn instead to Rawlsian contracts motivated by both self-interest and fairness we might more easily find scope for differential inclusion of those incapable of cooperation. Maintaining the difference between entitlements of co-operators and non-co-operators seems legitimate when selecting principles of distribution, as occurs in the Original Position.⁴⁸ But non-co-operators have interests and needs that merit moral consideration, and so parties may offer support through a social minimum they establish when deciding more concrete constitutional matters at stages of agreement later than the Original Position. Those incapable of cooperation are included because of their needs, not because of reciprocity, and this differential inclusion denies them entitlements to distributive equality.

⁴⁷ Christopher Morris explores these ideas in Christopher Morris, 'Moral Standing and Rational-Choice Contractarianism', in *Contractarianism and Rational Choice: Essays on David Gauthier's Moral's by Agreement*, ed. Peter Vallentyne (Cambridge: Cambridge University Press, 1991), 76–95 and Christopher Morris, 'Justice, Reasons, and Moral Standing', in *Rational Commitment and Social Justice: Essays for Gregory Kavka*, ed. Jules L. Coleman and Christopher Morris (Cambridge: Cambridge University Press, 1998), 186–207.

⁴⁸ Cynthia A. Stark, 'How to Include the Severely Disabled in a Contractarian Theory of Justice', *Journal of Political Philosophy* 15, no. 2 (2007): 127–45; Cynthia A. Stark, 'Contractarianism and Cooperation', *Politics, Philosophy & Economics* 8, no. 1 (2009): 73–99.

Southwood argues that those affected by the agreement but incapable of agreeing themselves, should be included in a broad sense of agreement. The interests of these people should feature directly, even if the people themselves do not. Representatives and trustees should act on their behalf in the agreement, maintaining that crucial contractualist commitment to the entitlement to reject principles from a personal point of view, even if that point of view is represented by other persons.⁴⁹ Southwood's broad inclusion differentiates those who are fully equals in democratic citizenship and so direct contractors, and those unequal due to lack of capacity who are indirect contractors.

In each of these cases, those suffering some kind of incapacity are included in agreement, but differently from those fully capable of agreement. Introducing moral constraints prior to an agreement of mutual advantage is ad hoc, and renders it simply a more self-interested version of a moral contractualist agreement. But even if we accept this cost to the explanatory economy of mutual advantage contractarianism, those included have very different standing from fully capable contractors. Their standing depends on others having consideration for them, and so their moral status is derivative, whereas the standing of the contractors is based on their own capacities.⁵⁰ Those capable contractors who have consideration must also possess a powerful altruism towards the incapable excluded in order to accept the costs to themselves of not cooperating with inconsiderate contractors. Relationships based on altruism are not reciprocal, and reciprocity of either advantage or recognition is important to contractarianism in general. Inclusion without reciprocity amounts to exclusion from contractarian agreement. It denies them the entitlement to object to a principle from their own interests, which is central to contractarianism. Thus the substance and basis of the moral relationships between capable and incapable contractors is different from the relationships between co-contractors.

⁴⁹ Southwood, *Contractualism and the Foundations of Morality*, 107–117.

⁵⁰ *Ibid.*, 49 & 169.

Incorporating non-co-operators on the basis purely of their neediness not only denies them relational advantages such as the equality guaranteed by the difference principle, but also expresses an attitude that regards them as inferior, which is an objectionable relational harm. Southwood's account includes the interests of 'atypical' persons directly in deliberative contractualism. But this is the wrong kind of reason to include persons if we wish to express equal respect to others. We are in effect diluting contractualism with consequentialism as we take effects on people's interests as the morally important fact about them, rather the attitudes of respect we feel owed them in virtue of their equal standing as persons.⁵¹ This creates a different kind of moral relationship between contractors and those incapable of contracting fully independently.

Differential inclusion is always justified by variations in capacity that are taken to merit unequal moral standing. But an alternative approach to the problem of exclusion seeks to minimize the capacities required for inclusion in the agreement. This permissive approach to inclusion may be achieved by dropping a seemingly necessary condition to agreement. We might show that the requirement that each contribute to receive benefits is unnecessary to be included in agreements of mutual advantage.⁵² Non-co-operators can be included in agreement if we assume cooperation will involve each of us having periods when we are inactive and not contributing to the cooperative surplus, and periods when we are productive and contributing. It is therefore rational to recognise that as we are sometimes either providers or recipients, we might receive a benefit without at the same time providing benefit in return. Thus contribution is not a necessary condition to receive a benefit from those motivated by self-interest. But dropping the condition that contribution is necessary to receive benefit in agreements of mutual advantage threatens to make the scope of morality or

⁵¹ Southwood in fact regards this as a merit of his account as it includes them as equals in one sense; but ensures that they are not regarded as fully equal co-authors of an agreement. *Ibid.*, 170.

⁵² Vanderschraaf, 'Justice as Mutual Advantage and the Vulnerable'.

justice infinitely open. Unrestricted inclusion seems as unattractive as narrowly restricted inclusion.

Alternatively, rather than dropping a necessary condition to the circumstances of the agreement in order to widen inclusion, we may understand the capacities for agreement more permissively. Children and many people with disabilities contribute to family life through their bonds of affection and reciprocal attachment, and this contributes greatly to the quality of relational goods enjoyed by all the family.⁵³ If contractualism is motivated by a commitment to treat others with mutual recognition, and if we understand the participation of children and those with disabilities in important relational goods such as family life as involving forms of mutual recognition, then those lacking the full capacities for rational agreement can be included as equals in agreement.

A permissive understanding of the capacities for agreement seems the right kind of response to the problem of exclusion in contractarianism. Permissive inclusion focuses on including those with very different capacities as equals in full standing. It therefore fits accurately our moral convictions that such persons should be included as equals, and not merely accommodated retrospectively. However, this permissive view of inclusion must explain how significant relationships of mutual recognition can be present in the absence of capacities normally taken as necessary to agreement. We cannot merely observe the more permissive presence of cooperation as participation in relational goods without explaining its structure and moral significance in cases between people with widely different capacities. Such an explanation may emerge from understanding how practices of sharing between people with very different capacities serve as the basis for the moral relationships with which contractualists are concerned.

⁵³ Christie Hartley, 'An Inclusive Contractualism: Obligations to the Mentally Disabled', in *Disability and Disadvantage*, ed. Kimberley Brownlee and Adam Cureton (Oxford: Oxford University Press, 2009), 138–61; Christie Hartley, 'Justice for the Disabled: A Contractualist Approach', *Journal of Social Philosophy* 40, no. 1 (1 March 2009): 17–36.

6. *Agreement as Sharing*

How can we include those who do not have the capacities for agreement as characterised by rational, informed, voluntary acceptance of rules? Versions of differential inclusion tend to require a high level of cognitive and volitional capacities for agreement. But capacities necessary for agreement can be characterised permissively so that those who are incapable of fully rational informed voluntary agreement may yet be included because they are capable of sharing in relationships of mutual recognition.

If we look to our relationships with a broad range of people who are not fully agents, including children and many types of disabled people, we find rich bonds of sharing. If we look first at with whom we share morally relevant relationship, and what that sharing involves, we find that in our sharing we are making agreements with many typically excluded from contractarian models of morality. Sharing is normatively significant, and we share with those who may not yet or ever meet our ideal of free, autonomous, rational contractors.

Sharing in plans and sharing intentions demands a lot from us intellectually. Perhaps most significantly it requires knowledge of others and of propositions about their minds. It requires, for example, that I know that I intend to paint the house, that I know you intend to paint the house, and that I know that we intend to paint the house together.⁵⁴ Clearly, children and many people with various cognitive or developmental disabilities will be unable to share plans and intentions in this way. But this kind of sharing is the result of a process of coming to know others and their minds. Sharing intentions is not something we boot-strap ourselves into doing when we become adults. If we examine how the capacities for sharing intentions develop, we find that they grow from a more fundamental practice of sharing that does not involve the full-range of abilities required for sharing intentions. For example, while children

⁵⁴ Michael E. Bratman, 'Shared Intention', *Ethics* 104, no. 1 (1993): 97–113.

and adults may not be able to share intentions, they can share goals.⁵⁵ Putting away the toys together can be a shared cooperative goal. Both the adult and child can order their activities around the fact of sharing the goal: they may go about picking up different toys to put in the box; they may get out of each other's way waiting for their turn to put the toys in the box. This illustrates that sharing goals is common between a much wider range of people than merely those competent to share intentions and make explicit agreements. Children and those with developmental disabilities will share goals of various kinds with able adults. This requires cognitive and volitional capacities that distinguish those capable of sharing (such as children and people with a range of disabilities), from those incapable (such as those in a persistent vegetative state and many kinds of non-human animals).

Sharing, including sharing in goals, is normatively significant. It does not always create moral duties between sharers. We could share in performing an immoral act and be under no duty to the other to continue sharing. But sharing can create morally significant relationships.⁵⁶ If the goal is morally permissible, then the fact of sharing a goal creates expectations and relationships of reliance between the sharers. When others come to rely on us, and plan around that reliance, we incur obligations towards those with whom we are sharing. Explicit agreements or ostensible assurances about the shared goals are not required to form duties of performance and due consideration to other sharers. Even in cases of our relations with very young children or those disabled developmentally, we can be co-authors and co-subjects of our shared goals. This sharing provides a basis for relational duties of reliance and loss prevention more widely than only between those fully capable of rational voluntary agreement.

Those who share goals and intentions create constraints and duties that may be understood from a contractualist point of view. Thus sharing will involve moral relations that

⁵⁵ Stephen Butterfill, 'Joint Action and Development', *The Philosophical Quarterly* 62, no. 246 (2012): 23–47.

⁵⁶ Facundo M. Alonso, 'Shared Intention, Reliance, and Interpersonal Obligations', *Ethics* 119, no. 3 (2009): 444–75.

are relevant to contractualism. By understanding the capacities required for agreement more permissively, namely those capacities only necessary for sharing goals, we can include those who have not developed the full range of capacities required for rational, voluntary, independent agreement. So children, and those with learning disabilities have the capacity for sharing in relationships with others, but not the full set of capacities required for agreement.

Sharing in goals with children or disabled people can create relational duties, and can therefore require us to respect their entitlements in sharing, such as reliance and loss prevention. We as fully able adults are also required to mitigate our attitudes of blame and resentment if those with whom we share cause us loss or prove unreliable due to their limited capacities. So there is an appropriate asymmetry in how characterising capacities for agreement permissively affects inclusion and responsibility. Children and people with various disabilities are able to form those relationships that are relevant from the point of view of contractualist agreement: practices of sharing which then create moral duties involving mutual recognition. It is therefore appropriate to attribute moral standing permissively to those with capacities for sharing in goals. But it is also appropriate to mitigate out judgments of substantive moral responsibility towards those with limited capacities and experience.⁵⁷

Addressing the problem of exclusion by characterising the capacities for agreement permissively according to the practice of sharing has several advantages for contractarianism. First, it provides the right kind of reason for inclusion. By lowering the bar of inclusion from capacities of fully rational voluntary agreement to capacities for sharing in goals we include all those for whom we have moral concern in the scope of agreement. Agreement is understood more broadly but still with sufficient determinacy to exclude those incapable of ordering their mutual interaction by sharing goals. This is therefore permissively inclusive, but appropriately exclusive of those incapable of the practice of sharing goals. Second, this

⁵⁷ See Scanlon, *What We Owe to Each Other*, 248–251 on the importance of the difference between substantive responsibility and responsibility as attributability.

view of permissive inclusion through sharing is explanatorily accurate and fundamental. It does not rely on abstractions or hypotheses about contractors, but is derived from understanding accurately the practices of sharing in which we participate with a wide range of people. Similar to the structure of Southwood's deliberative contractualism, it offers a fundamental explanation because it does not appeal to substantive moral commitments to ground contractualist moral principles, but is derived from primarily non-moral capacities and practices (sharing) which in certain circumstances subsequently create moral relations of mutual recognition that then constitute the circumstances of contractualism. Finally, it is able to explain how we can both permissively include as equals persons with a wide range of capacities, and also recognise the appropriateness of different judgments of substantive responsibility in our agreements.

Conclusion

Agreement is fundamental to contractarianism, and the problem of exclusion is entailed by agreement. But contractarianism need not be objectionably exclusive. If we look closely at the real practice of sharing with others, we see that we are already in the right kind of relationships with those who may lack the full capacities for rational voluntary agreement. Including permissively in agreement all who are capable of sharing goals may help us respond to the exclusion objection to contractarianism and explain how everyone for whom we have moral concern can be included in an inclusive contractualist moral community.