



## Reply to Leif Wenar

**T. M. Scanlon**

Harvard University  
scanlon@fas.harvard.edu

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### Abstract

Explains how a contractualist moral theory can explain the moral phenomena commonly called rights, although it does not appeal to the notion of a right as a basic element of moral thinking, or explain the difference between rights violations and wrongs of other kinds. Argues that the latter failure is not an important fault.

### Keywords

rights, contractualism

In his generous and perceptive assessment of my views on rights, Leif Wenar finds two problems with what I have said, and failed to say, on the subject. The first is that my positive account of rights is too narrow to account for the full range of rights. The second is that my contractualist moral theory fails to explain the place of rights in our moral thinking because an account of all the moral principles that are valid, according to contractualism, would fail to tell us which of these principles describes a right and to whom this right is owed. I will respond to these interesting challenges in turn.

### Rights as Constraints

Wenar's first charge of narrowness concerns my statement that rights protect important interests. It is certainly true that many of the wide range of rights he lists, including the rights of a runner in baseball to an unoccupied base, and the right of a driver to make a right turn when a stop light is red, do not protect important interests. Not even all moral rights protect important interests. The rights of some promisors to trivial things they have been promised are clear examples of ones that do not.

My response, as Wenar predicts, is that when I said that rights protect important interests I was not talking about rights such as these. My concern, as he notes, was with freedom of expression, rights of due process, and other rights claimed against the state, rather than with legal or institutional rights, such as those conferred by traffic laws, or by the rules of baseball. I was not concerned with legal and institutional rights because there is no problem about how they are justified. They derive whatever legitimacy or normative force they have from that of the legal systems or other institutions that define them. By contrast, the moral rights I was concerned with place demands on what laws and other institutions must be like. They therefore cannot derive their authority from these institutions, so some explanation is needed of how they are justified.

This question of justification is made particularly acute by the fact that the rights I was concerned with often bar the state from doing things that there otherwise seem to be strong reasons to do, such as to ban speech that is likely to lead to civil unrest, or invade privacy in order to catch terrorists and to limit due process in order to convict them. If rights serve as “trumps” or “side constraints” limiting what can be done for such apparently strong reasons, this special moral authority needs to be explained. This need for explanation seems particularly pressing when the question is approached from a consequentialist starting point. But the need will remain as long as the considerations that rights are supposed to trump are seen as having significant justificatory force, even if good consequences are not the only ultimate source of justification.

The fact that the rights I was discussing are supposed to limit what can be done for the sake of particular ends also explains why I referred to them as “constraints.” This brings me to a second charge of narrowness, which is that this characterization covers, at most, passive first-order rights (claim rights) and leaves out second-order rights (powers and immunities) and active first-order rights (permissions).

When I wrote my papers on rights I was of course aware of Hohfeld’s analysis. When pressed as to why I did not take more account of the distinctions he made, my response was that I expected that the net effect of the arguments supporting a right—such as the right to freedom of expression, or the right to privacy—would be a normative structure (a set of limitations on discretion) that was composed of the atoms Hohfeld distinguishes, the exact form of this composition being determined by the arguments relevant to the right in question. The right to privacy, for example, would be a limit on the discretion of others, including the government,

to enter my house or examine my records *without my permission*. So the form of this limitation would incorporate a power.

It might be claimed that the right of freedom of expression is a permission—what Wenar calls an active right—and therefore not identical to any set of limitations on others' discretion to act. This seems to me a mistake. The crucial claim made in asserting the right of freedom of expression is that the government lacks authority to regulate speech in certain ways. The reasoning that supports this claim and determines its content (which “ways” it is in which governments may not restrict expression) concerns the consequences of governments' having more extensive authority to regulate expression. These include consequences for potential speakers and, as Wenar notes, consequences for others as well.

The conclusion supported by this reasoning is an immunity: a limit on the powers of government. As a result of these limits, individuals cannot be put under legal obligation not to speak in certain ways. But this does not establish a permission: it does not show that they are under no such obligation at all. Freedom of expression says nothing about whether those who published the Danish cartoons depicting Mohammed had a moral right to do so. Perhaps, given the likely consequences of doing so, they did not. But even if this is so the Danish government had no power to forbid publication.<sup>1</sup>

## Rights and Contractualism

I turn now to the important questions Wenar raises about the place of rights within contractualism. There are two questions here. The first is what role rights have within a contractualist moral theory. The second is the relation between the role contractualism assigns to rights and contractualism's claim to be an account of what we *owe to* other individuals.

Consider the obligation to keep a promise. This is a moral phenomenon that needs to be explained. One might offer an explanation in terms of rights: An individual who has the liberty right to do or not do A also has the power (second-order right) to lay down the right not to do A, thereby giving

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<sup>1</sup> More generally, I doubt whether the permissions that Wenar mentions constitute a distinct kind of right. His “active right” to walk the Scottish highlands seems to me best understood as consisting of the absence of any duty or obligation not to walk in the highlands together with some claim rights against others not to interfere in certain ways with his doing this, such as by blocking his path.

a second person both a claim right that he or she do A and a power to lay down this right in turn, making it permissible, after all, for the first person not to do A. But this seems to be just a description (in terms of rights) of the moral facts to be explained, rather than an explanation of those facts.

Contractualism attempts to explain why principles it would not be reasonable to reject will have the form just described, and to provide this explanation in terms of various interests that individuals have, which give them reason to reject principles that did not have this form.<sup>2</sup> Contractualism seeks to explain not only first-order claim rights but also powers, as well as the prior liberties (when it is the case that an individual is free, morally speaking, to do or not do certain things, and hence in a position to make promises regarding them). A contractualist justification for my Principle F explains how it is possible for a person, by offering assurance in certain circumstances, to make it the case that she is not at liberty to something that was previously open to her.<sup>3</sup> This is, I would say, a moral power. It also explains why a promisee has the power to release the promisor from her obligation. Potential promisees and promisors have reason to insist on a principle that includes the condition “unless B consents to X’s not being done,” rather than a principle that would make promisory obligations unalterable once they are undertaken.

So I believe that a contractualist theory can explain all of the moral phenomena that Wenar would count as rights, along with other facts about moral right and wrong. What such a theory does not do is to answer the question that Wenar poses: “Which of these moral phenomena involves a right?” I did not address this question in *What We Owe to Each Other* because it did not occur to me, and it still does not seem to me a question that it is important to answer.

I believe in rights in the sense of believing that the structure of our moral situation frequently has the form described by complexes of Hohfeldian atoms: we do have liberty rights, powers, and claims on each other of the sort that Hohfeld identified. But I don’t think that we need to appeal to the

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<sup>2</sup> I attempted to do this in “Promises and Practices” and in Chapter 6 of *What We Owe to Each Other*.

<sup>3</sup> My Principle F states: “If (1) A voluntarily and intentionally leads B to expect that A will do X (unless B consents to A’s not doing so): (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) B knows that A has this knowledge and intent; then, in the absence of special justification, A must do X unless B consents to X’s not being done.” *What We Owe to Each Other*, p. 304.

idea of a right to explain why our moral situation has this form, and don't think it matters very much exactly which parts of this structure we denominate as rights.

It might seem that rights have a crucial role in explaining the difference between those duties and obligations that are *owed to* specific individuals and those that are not, and that this is a distinction that contractualism in particular should recognize and account for. The obligation to keep a promise, for example, is owed to the person to whom the promise was made, and not to others who may benefit from its performance, such as the ailing mother whose son I promised that I would take care of her while he was out of town.

There are various ways in which an obligation can be owed to a specific person, and a contractualist theory can explain these quite adequately. Consider the case of obligations arising from promises. First, according to contractualism, the case for my Principle F, or another principle requiring one to keep a promise, depends centrally on the reasons individuals have to be able to rely on assurances they are given about what others will do. Although the full explanation of the matter takes into account other interests as well, this is what makes it reasonable for potential promisees to insist on principles like F, and makes it unreasonable for others to reject such principles. Second, non-rejectable principles will, for reasons I have mentioned, give the person to whom assurance is given the power to release the promisor from an obligation to perform. So in a contractualist account of promises promisees are singled out in two ways: by the central role that their interest in assurance has in justifying principles of fidelity and by the way in which those principles must make promisory obligations sensitive to their wills. I do not see what more than this is needed, by way of explaining the “directedness” of the promisory obligation.

These observations are relevant to the question Wenar asks about whether I support an interest theory of rights or a will theory. As the example just given shows, my contractualism explains our obligations in a way that accounts for the appeal of both interest theories and will theories. But it is committed to neither as constituting the essence of rights, since it is (and I am) committed to no view on this question.

I called my book *What We Owe to Each Other* because the part of morality that it describes is constituted by principles that are justifiable to others on the basis of the ways their lives would be affected if these principles, rather than various alternatives, were generally accepted. The title was intended simply as a label for this domain. As I have said, this domain includes the full range of Hohfeldian rights. It also includes cases of

wronging that do not, at least not obviously, involve violations of rights. For example, contractualism can explain why I wrong the mother in the example given above if I do not take care of her.<sup>4</sup> By promising her son that I would do so, I made it the case that she will not get the care she needs unless I provide it. It seems to me to follow that I would wrong her by failing to provide this care. Does she therefore also have a right that I take care of her? She does not have a right deriving directly from my promise. Does she have a right of some other kind? I am inclined to say that she does not. As Wenar says about whether the duties to rescue, or to provide help, involve rights, this is a question philosophers may disagree about. The answer does not seem to me very important.

Contractualism also explains the wrongness of some actions that neither violate rights nor wrong specific individuals. What I called in my book the Principle of Established Practices, which requires one to go along with established practices that promote important social goals in non-objectionable ways, would explain how citizens can have an obligation to pay taxes, to separate their trash into recyclables and non-recyclables, and perhaps to vote.<sup>5</sup> It would be wrong not to do these things, but it does not seem to me that other citizens have a right that we do them, or that I wrong anyone in particular by failing to vote, or by using shaving cream with ozone-destroying chemicals in it.

Wenar writes that any adequate moral theory should explain rights because “rights are the distinctive, even the dominant, normative concept in our world.” I agree that the moral relations we call rights are extremely important, and that any adequate moral theory must explain these relations, as contractualism does. What is less important, as far as I can see, is explaining exactly which of these relations is properly called a right.

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<sup>4</sup> Nicolas Cornell defends the claim that the mother is wronged even though she is not a right-holder (but not the contractualist explanation of this claim) in his paper, “Wrongs, Rights, and Third Parties.” I am indebted to this paper and to Cornell for helpful discussion.

<sup>5</sup> See *What We Owe to Each Other*, p. 339.