



CONTRACTUALISM, RECIPROCITY, COMPENSATION

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JOURNAL OF ETHICS & SOCIAL PHILOSOPHY

VOL. 2, No. 3 | MARCH 2008
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TWO GENERALLY RECOGNIZED moral duties are to reciprocate benefits one has received from others and to compensate harms one has done to others. In this paper I want to show that it is not possible to give an adequate account of either duty – or at least one that corresponds to our actual practices – within a contractualist moral theory of the type developed by T. M. Scanlon (1982, 1998). This fact is interesting in its own right, as contractualism is a leading contemporary contender among deontological moral theories, and the two duties I have mentioned are fairly standard ingredients of such theories.¹ But it also serves to highlight a general problem with contractualism, at least in Scanlon’s version – namely its one-dimensional view of the keystone of any plausible deontological theory: the idea of respect for persons.

1. Contractualism

Our first order of business will be to give a brief description of Scanlon-style contractualism that will allow us to consider how that theory handles the obligations of reciprocity and compensation. Scanlon offers an account of an action’s being wrong, in the sense of *wronging* someone. He writes:

[Contractualism] holds that an act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced general agreement. (1998, p. 153)²

This canonical formulation is somewhat complex, but we should be able to abstract from some of that complexity here. The key idea is that of “reasonable rejection.” I will understand it in terms of what Scanlon himself, following Parfit, calls “the Complaint Model” (p. 229). According to this model,

a person’s complaint against a principle must have to do with its effects on him or her, and someone can reasonably reject a principle if there is some alternative to which no other person has a complaint that is as strong. (ibid.)

I choose this interpretation for two reasons. First it makes good sense of the way Scanlon himself applies contractualism – as he seems to acknowledge (ibid.). But also, without the Complaint Model, contractualism

¹ For example, they both occur on Ross’ list of “prima facie duties,” as “duties of gratitude” and “duties of reparation,” respectively (1930, p. 21).

² All references to Scanlon are to this book, unless otherwise noted.

has less content than one might wish. It simply becomes hard to apply it with any reasonable degree of precision.³

Now, Scanlon does not endorse this interpretation of his theory, and indeed mentions two ways in which that theory supposedly diverges from the Complaint Model (*ibid.*).⁴ Both call for some comment. The first is this: the Complaint Model assumes that “effects on him or her” are effects on well-being, and that is too narrow. However, this “welfarist” interpretation of the Complaint Model does not seem mandatory. Scanlon’s actual words – that a complaint must deal with the principle’s “effects” on the complainer – suggest no such narrow interpretation. His own view is that the reasons a person may have to reject a given principle must be “personal.” As I understand him, such reasons may, and very often do, concern themselves with the person’s own well-being, but may also “have to do with [the person’s] claims and status” (p. 219). The exact interpretation of this saying is not obvious, I admit, but I would at least take it to imply the following: a complaint must point to something that is *bad for* the person making it, even if this badness is not best understood in terms of well-being. It is true that requiring *in addition* that reasons to reject must be reasons of well-being would make the Complaint Model, and hence contractualism, still more definite, but I agree with Scanlon that we would purchase this advantage at the cost of an excessively narrow view of reasons – at least if we understand well-being the way Scanlon does (see chapter 3). Appealing, as I do, to the broader notion of what is “bad for” a person strikes me as a reasonable compromise.

Scanlon’s other objection to the Complaint Model is that it ignores the fact that we sometimes, even in contractualist reasoning, presuppose “a framework of entitlements” that we do not attempt to justify in the context (p. 214). To use one of Scanlon’s own examples, when we apply contractualist reasoning to determine what persons are required to do to help others in need, we take for granted that the resources agents may use are (typically) their own, so that the needy cannot simply lay hold of these themselves without permission. Of course, the background assumptions themselves need contractualist justification, but presumably that justification will itself make other background assumptions, and so on. Scanlon

³ Reibetanz (1998, p. 311n18) makes this point. However, she goes further, arguing that a sufficiently definite form of contractualism must be formulated in terms of well-being. There will be more of this in the text below. This question of definite content is closely related to the familiar charge that Scanlon’s contractualism is circular or empty, one that Scanlon himself addresses in his book (especially pp. 213-18). There is a considerable literature on this issue. Among others, interested readers may consult Pogge (2001), Ridge (2001) and Kumar (2003). Suikkanen (2005) takes on most of the literature.

⁴ For Scanlon, the most attractive feature of the Complaint Model is that it retains what Parfit (2003) has called the “individualist restriction.” In Scanlon’s own words, “the justifiability of a moral principle depends only on various *individuals*’ reasons for objecting to that principle and alternatives to it” (p. 229, italics in original). This restriction makes it harder to account for the phenomenon of *aggregation* in ethics, as it prevents us from aggregating the complaints of several persons into one larger complaint. I wish to avoid that debate here. Apart from the papers by Reibetanz and Parfit already mentioned, a recommended reading list might include Otsuka (2000, 2006), Kumar (2001), Kamm (2002), Norcross (2002) and Raz (2003).

refers to the phenomenon I have described as “holism about moral justification.” His brief account of it certainly raises more questions than it answers, and this is not the place to address them. (For one thing, the reason I use one of his own examples is that I find it hard to generalize from the ones he offers – though that will not deter me from trying later.) We will see below how it can be relevant to our concerns. What matters now is this. Scanlon’s warning notwithstanding, I will keep using the Complaint Model as an interpretation of contractualism, bearing in mind that we have to apply it against a certain background. Returning to Scanlon’s example, if we ask what we owe to persons in need, we have to disregard the reasons the needy may have to want to be able simply to take whatever they need, because many of these resources will be the property of others – and the relevant property rights are not in need of justification in the context. It does not matter that the reasons the needy have may be stronger than the reasons the owners have to keep controlling these resources.

There is actually another difference between the Complaint Model as here stated and Scanlon’s actual view. This is that Scanlon, in applying his contractualism, does not consider the “complaints” of concrete individuals, but rather instead what he calls “generic reasons” to reject (p. 204). These correspond to certain *standpoints* from which principles are to be assessed. To illustrate, consider an obviously wrongful action such as my killing Bob. The wrongness of this action, Scanlon would say, does not consist in the fact that *Bob specifically* can reject any principle permitting someone like me to kill someone like him in circumstances like the ones that actually prevailed; rather it consists in the fact that *any person – any victim* – could reject any such principle. However, it is not difficult to modify the Complaint Model to accommodate this suggestion of Scanlon’s. For any principle *P* under scrutiny, we would have to identify a class of victims and a class of agents. These two classes correspond to two distinct standpoints. Who are these persons? Suppose *P* were generally accepted. Then the class of agents are those people who would conduct themselves in the way *P* mandates or at least permits, whether this conduct consists in action or omission, whereas the class of victims are those people, if any, who would be adversely affected by those same acts or omissions. In applying the Complaint Model, then, we simply compare the reasons victims have not to want *P* to be generally accepted, with the reasons agents have not to want to have any alternative principle generally accepted. Given that our starting point was the question of the moral permissibility of my act of killing Bob, an “alternative” principle here is simply any principle that does not permit my killing Bob in the circumstances.⁵

⁵ Obviously any one person could be both a victim and an agent. What interests a contractualist, though, is a comparison of the reasons that person would have qua victim with those he would have qua agent. Or at least that is how I will understand contractualism in this paper.

2. Reciprocity

What is the duty to reciprocate? This is not the place for a thorough investigation.⁶ I will make do with some general remarks that will be relevant in what follows.

(1) As far as the relationship between gratitude and reciprocity is concerned, I follow what I take to be the standard view: “The emotional component of gratitude is what differentiates it from the virtue of reciprocity” (Fitzgerald 1998, p. 120). Though my focus will be on the “outward performance” characteristic of reciprocation, I also want to stress the important link between inner and outer. Though it is possible to reciprocate without feeling gratitude, it is desirable that in so acting one be motivated by just that feeling.

(2) The duty to reciprocate is not necessarily assumed voluntarily. It is not a promissory or contractual obligation. As Becker writes: “We do not need the notion of reciprocity to get an account of voluntary agreements. If it is to have a useful place in moral theory at all it will be for an account of nonvoluntary obligations – the kind we acquire whether we ask for them or not” (1986, p. 73).

(3) The duty to reciprocate is (typically, at least) not enforceable, and in this way it differs from promissory obligations. That is to say, even if it is true that you owe me reciprocation for services I have rendered you, it does not follow that I may force you to benefit me in return, either personally or through the state. In part for this reason, I deny that there is a *right* to reciprocation – though I will allow the existence of a *claim*, where the latter is understood not to entail enforceability, and that a beneficiary may *wrong* his benefactor by not reciprocating.⁷

(4) When it comes to the *content* of the duty to reciprocate, we can distinguish two relevant dimensions. On the one hand is a *qualitative* dimension. It concerns the specific form reciprocation should take, what would be fitting. I will not consider such issues here.⁸ On the other hand we have a *quantitative* dimension, concerning *how much* we are required to do in reciprocating others’ good deeds, whatever form that reciprocation may take. Here there is one dominant idea, namely that reciprocation is supposed to be *proportionate*. But to what? As many have pointed out, there are two primary factors: the benefit received and the benefactor’s effort or sacrifice (and risk perhaps), where both of these are measured in

⁶ For fuller treatments, see Becker (1986) and Schmitz (2006, chap. 3). Much of the literature on the related topic of gratitude is also relevant: see, among others, Berger (1975) and Simmons (1979, pp. 163-83).

⁷ It is a common view about *gratitude* that, though there is a duty of some sort to show gratitude (in the form of external conduct), there is no right to such treatment – see, e.g., Card (1988). Others go further, however, and deny that there is any kind of duty (or obligation) to be grateful (again in the sense of external conduct). Instead they suggest that we should understand gratitude and reciprocity merely as virtues. Wellman (1999) defends such a view. However, he seems to understand a duty (or an obligation – he uses these terms interchangeably) to entail enforceability.

⁸ For relevant discussion, see Becker (1986, pp 107-11).

terms of well-being.⁹ It is obvious that these two factors often point different ways, in the sense that it is impossible for the obligated person (henceforth: the beneficiary) to give the claim holder (henceforth: the benefactor) a benefit whose magnitude is proportional *both* to the benefit the beneficiary himself received *and* the benefactor's sacrifice. Sidgwick, in describing what he takes to be the "common-sense" view of the matter (if not necessarily his own), offers the following example:

[I]f a poor man sees a rich one drowning and pulls him out of the water, we do not think that the latter is bound to give as a reward what he would have been willing to give for his life. Still, we should think him niggardly if he only gave his preserver half-a-crown: which might, however, be profuse repayment for the cost of the exertion. Something between the two seems to suit our moral taste: but I find no clear accepted principle upon which the amount can be decided (1907, p. 261).

As Sidgwick says, there is no obvious solution to this problem. It will be the focus of my discussion below. My aim will be to show that it poses serious difficulties for contractualism.¹⁰

I do not know whether it is possible to devise a principle of reciprocity that would do a reasonably good job of capturing our intuitions about proportionality.¹¹ And indeed there are, to my knowledge, few proposals in the literature about how to understand the notion of proportionality in reciprocation.¹² However, for our purposes no such principle is required. The question that mainly concerns us is whether contractualism can account for our intuitions about reciprocity in an acceptable way, regardless of whether we are able to sum up these intuitions in some principle. Now, it is true that contractualism is defined in terms of principles, and that might seem to be a problem in itself. If any principle we could formulate as regards reciprocity is inadequate, then that will presumably mean that for any such principle there will be someone who could rea-

⁹ See, e.g., Sidgwick (1907, p. 261), Berger (1975, p. 299), Simmons (1979, p. 169) and Becker (1986, pp. 111-13). Kant mentions another consideration that might matter to the content of the duty to reciprocate, namely "how unselfishly [the favor] was bestowed on [the beneficiary]" (1797, p. 456). He seems to think of effort as relevant only as a sign of unselfishness (1997, p. 199).

¹⁰ In addition to the question of proportionality another merits consideration, but will receive none here. That is whether contractualism can explain why reciprocation ought to come from beneficiaries specifically, and not from a common fund or from other persons (cf. Becker 1986, pp. 103-5).

¹¹ I am indebted here to comments from Wlodek Rabinowicz.

¹² Becker offers the following suggestion: the beneficiary should aim "first for returns matched to the benefit received, at no net loss, and failing that, for returns matched to sacrifices" (1986, p. 113). In fairness I should mention that Becker's approach is virtue oriented and he is really describing a *disposition* he thinks there is good reason for persons to have. I should also say, however, that though Becker generally tries to justify the disposition to reciprocate by appealing to its usefulness to all, he makes no attempt to justify the particular form of the disposition he favors as opposed to possible competitors. In any case, this principle of "proportionate benefit" would need to make room for many significant exceptions if it is to be adequate. Also, its lexical structure (attend to sacrifice only when it is beyond one's means to match benefit) seems implausible.

sonably reject it. As a consequence, contractualism could give no guidance whatever about how to reciprocate. However, if this is indeed a problem for contractualism, it is a very general one, as there are few areas in moral philosophy where it is possible to formulate adequate principles. For that reason I will suppose that this problem can be overcome.¹³

Now, even though I will endorse no principle of reciprocity, I do need to say something about how we, or at least some of us, conceive the duty to reciprocate, to use as a benchmark. I will have more to say about this matter in section 4; for now I make do with noting that the beneficiary's act should respond to *the value of the benefactor's act*. That is, the two acts should be proportional in value. That formulation is neutral between the two standard criteria (benefit and sacrifice). After all, both factors may affect the value of the act. This general claim is only moderately helpful – and certainly too indeterminate to deserve being called a “principle” of reciprocity – but I believe it suffices for our present, critical purposes. In particular, we should be able to tell that some account of reciprocity is unlikely to match this idea. It will be my contention that contractualism fails this test.

Let us now apply Scanlon-style contractualism to the issue of reciprocity. What sort of principle is it likely to generate? Here is an initial suggestion: a contractualist should favor a principle which I will call *Equal Gain*. According to this principle, and assuming mutual gain is possible, the beneficiary should reciprocate to the point that both parties have made equal *net* gains, or at least approximate to it as closely as possible. (An exception, presumably, is when an unequal distribution of gain is Pareto superior.) I assume here that we measure “benefit” in terms of well-being, however conceived, rather than money or other such goods. Note that, due to possible differences in efficiency between the two parties, such equality is compatible with significant differences in *gross* benefit, and conversely.¹⁴ Equal Gain has a certain symmetry to it that should please contractualists. Remember the Complaint Model. In applying it we search for an equilibrium point, such that if we demand more of agents they can complain, and if we demand less, patients can. In the special case of reciprocity, Equal Gain seems *prima facie* to represent that equilibrium point. Later I will consider reasons for doubting this verdict, but for now I will assume that it is correct.

We now need to ask how well Equal Gain fits our normal understanding of the duty to reciprocate. Now, I will not ask whether there are counterexamples to Equal Gain. After all, I have conceded that it at least may be the case that any principle we can come up with will face counterexamples. If such is indeed the case, merely pointing to some for Equal

¹³ I urge readers to consult Scanlon's own discussion of the role of principles in contractualism (pp. 197-202) and decide for themselves whether it adequately meets the difficulty.

¹⁴ For a concrete, if schematic, example of the latter type of discrepancy: A uses 10 units of benefit to create 20 units of benefit in B (that is, A converts benefit at a rate of two to one), and then B uses one unit of benefit to create 20 units of benefit in A (that is, B converts at a rate of 20 to one). Then both enjoy the same gross benefit (i.e., 20 units), but B's net gain is significantly greater (19 versus 10).

Gain will not get us very far. Instead we have to ask the question of fit at a more theoretical level. One possible point of divergence is what we might call the motivation, or guiding idea, behind our everyday conception of the duty to reciprocate and Equal Gain, respectively. We have found that a central idea we have about reciprocity is that the beneficiary's responsive act should be proportional in the value to the benefactor's original act. But Equal Gain does not answer to that idea at all. It corresponds rather to the notion of a "fair deal." When is a business transaction between two parties, who may be quite indifferent (or even hostile) toward one another, fair? It is when both make the same net gain from the transaction – or the same net loss, if it is inevitable. The notion of a fair deal may have some moral importance – it is certainly a notion we have and apply – but it is not the same as that of reciprocity.

A closely related point is that Equal Gain breaks the link between reciprocity and gratitude, mentioned earlier. Insofar as a beneficiary, in responding to the benefactor's act, is motivated by a feeling of gratitude – as we are supposing he ideally should – it is hard to see that he would at the same time guide his choice of response by appeal to Equal Gain. After all, one feels grateful because one has been benefited by another, and the greater the benefit, the more grateful one will typically, and properly, feel. Presumably, then, insofar as one's responsive act is motivated by this feeling of thankfulness, the magnitude of one's response will be proportional to one's degree of gratitude. At any rate one is less likely to put much weight on the matter of equal net gain.

Another point of divergence between Equal Gain and our ordinary conception of reciprocity comes into view when we *do* consider counterexamples, namely the type of *justification* people could offer for their claims under Equal Gain. For whenever Equal Gain would permit the beneficiary to give back less than he received, he could justify such an action with the words: "Why should you get more out of it than I do?" And whenever Equal Gain would license the benefactor to demand, or at least expect, more than he gave, he could grumble with those same words, if he does not get it. Not a very attractive attitude, certainly. But does it show that Equal Gain is mistaken as a view of what the beneficiary *owes* the benefactor? True, it is not always morally admirable to insist on one's due, still less to refuse to go beyond it. But in fact it seems typically to be positively inappropriate to react the way Equal Gain would recommend in cases of the type mentioned. That fact does not tell in favor of Equal Gain as a principle of reciprocity.

All in all, then, it would seem that if contractualism would indeed endorse Equal Gain, or some variant, it is headed in the wrong direction. However, it is not obvious that contractualism *should* endorse that principle. Let us therefore now consider that issue. The first point I want to make here is the following. We have to avoid the mistake of looking at each individual transaction in isolation; what matters for contractualists are the consequences of a principle's being generally accepted. This point is important in the present context because once we consider these general effects, we may find that Equal Gain is reasonably rejectable in favor of some other principle. It is hard to be certain about these matters, but it

is at least possible that Equal Gain *is* reasonably rejectable in favor of a certain other principle. For consider a principle requiring beneficiaries to give *more* than equal gain to benefactors (although it is not clear *how much* more). If that principle were generally accepted, the result will likely be a greater number of beneficial actions overall compared with what we would get with Equal Gain, for with the alternative principle it would pay more to benefit others. Even though beneficiaries would then have to do more to reciprocate than under Equal Gain, they might still end up better off overall, because they would be benefited more by others. Their net gain per interaction would be smaller, but their total net gain could still be greater. Then they would not be able reasonably to reject that more demanding principle in favor of Equal Gain. In general, a very reasonable principle of contractualist reasoning has it that if the consequences of one's principle's being generally accepted are Pareto superior to the consequences of another's being so accepted, in terms of whatever matters, no one can reasonably reject the former in favor of the latter. Furthermore, a principle offering *less* than Equal Gain does to benefactors could not plausibly be better for them than Equal Gain is, as they initiate all exchanges. Hence such a principle could *not* be preferable to Equal Gain.

What are the implications of all this for contractualism? As far as I can tell, the possibility of such an alternative principle offers little solace for adherents of that doctrine. The question we need to ask here is whether the alternative of giving benefactors more than equal gain, granting it to be Pareto superior, would approximate more closely than does Equal Gain to what I take to be the decisive idea behind reciprocity – that the beneficiary's action should match the value of the benefactor's act. However, as such matching would presumably sometimes mean that the benefactor's net gain is less than equal, rather than more, this is quite unlikely.

Another consideration is in need of attention, and it brings us back to Scanlon's "holism about moral justification." Remember, Scanlon maintains that whenever we apply contractualist reasoning to a moral principle, we do that against a background of entitlements that are not in question in the context. But now, whatever our ultimate verdict on it, the contractualist argument for Equal Gain presupposes that beneficiaries' resources – understood broadly to include services as well as goods – are "up for grabs," in the sense that we are to compare the strength of the reasons the two parties have for wanting to control them. Only then could the fact that one party gets a worse deal be a reason for him to reject any principle licensing such an arrangement.¹⁵ If the beneficiary's

¹⁵ Matters are actually more complicated, for if beneficiaries' resources are "up for grabs," then why would not the fact that the benefactor is *worse off* to begin with give him reason to demand more than equal gain from the transaction? This consideration gives us all the more reason to suppose that the question of the content of the duty to reciprocate arises only against the background assumption that the distribution of resources between the parties is OK as it is, prior to the benefactor's intervention, and in particular that we may disregard any inequalities between them. (Scanlon addresses the complex question of the relevance to contractualism of differences in levels of well-being between persons at pp. 223-9.)

resources are not “up for grabs,” then we are not to use these reasons as input into the Complaint Model. In other words, even should the benefactor somehow have more reason than the beneficiary to want to control some of the beneficiary’s resources, that fact does not matter to what the beneficiary is required to do – in particular it does not mean that the beneficiary would wrong the benefactor by not handing over control of those resources to the benefactor as reciprocation.

And so we need to ask: why should contractualists presuppose to begin with that beneficiaries’ resources are “up for grabs”? The duty to reciprocate arises because, and only because, of the benefactor’s action. Prior to that action the benefactor has no claim whatever on the beneficiary; or if he does, that claim is (typically) irrelevant to the one that arises from his beneficial action. When we apply contractualism to the question of reciprocity, it is therefore natural to do so against the background assumption that there are no antecedent requirements. That is to say, for present purposes we may regard persons’ resources as not up for grabs. And in particular, prior to the benefactor’s deed, the beneficiary’s resources are not up for grabs. The question we face, then, is this: why should the benefactor’s act transform a situation in which the beneficiary’s resources are *not* up for grabs into one in which they are? In particular, why should it make the benefactor able to claim part of those resources with the motivation that without them he would end up with a worse deal? This question is especially pressing in view of the fact that the beneficiary, we may suppose, did not ask for the benefactor to act as he did, and so could not be said to have *consented* to being benefited the way he was. It is in situations of this kind that reciprocity becomes especially important, as I have pointed out.

Suppose the presupposition is indeed unwarranted, so that beneficiaries’ resources are not subject to the contractualist process of weighing reasons against each other. Where would that leave us? One suggestion is that it would leave us with a different, and perhaps more familiar, contract theoretical view of reciprocity – the one we find, for instance, in Hobbes’ “fourth law of nature” or law of gratitude: “a man which receiveth benefit from another of meer grace, Endeavour that he which giveth it, have no reasonable cause to repent him of his good will” (1651, p. 75). I take this formulation to mean that the beneficiary should give just so much as is necessary to make the benefactor’s act worthwhile (at no net loss to himself, presumably). Call this principle *Minimal Gain*.¹⁶ It clutches onto one of Sidgwick’s two criteria at the exclusion of the other. Minimal Gain is all self-interested beneficiaries will agree to, and presumably something self-interested benefactors are prepared to accept: it is what a practice of mutually beneficial exchanges needs to get going and

¹⁶ In expounding a Rawlsian contractualist view, Richards (1971) adopts a related view: “The form that [the beneficiary’s] gratitude should take should roughly depend on the cost that [the benefactor] incurred in being kind or beneficent” (p. 211). However, he only says that benefactors who incurred greater costs should get more in return, not that all benefactors should get full compensation. He justifies his view by appeal to the general idea that contracting parties apply a maximin principle (with respect to welfare), but does not elaborate.

flourish. As before, beneficiaries could agree to a principle requiring more of them than Minimal Gain does, if such a principle should prove Pareto superior to Minimal Gain. However, I will ignore this possibility in what follows, as I see no reason to believe that it makes a decisive difference.

The argument for Minimal Gain I just stated is Hobbesian in spirit, presupposing self-interested contractors. By contrast, Scanlon's contracting parties are not supposed to be (purely) self-interested, but rather to pursue principles that no one who is also so motivated could reasonably reject. To recall, we understand this motivation in terms of the Complaint Model: to say that people have the kind of motivation Scanlon talks about is to say that they are motivated always to seek a principle P such that for every alternative principle P^* there would be someone with at least as strong a reason to reject P^* as anyone has to reject P . But now, as I have mentioned, in determining the strength of people's complaints we may have to disregard certain reasons they may have, because of background assumptions we are making. (This is Scanlon's "holism" again, remember.) What is more, in the present context we are assuming that we are to perform just such a "bracketing" maneuver with respect to the reasons benefactors may have to claim some of the beneficiaries resources. As a consequence, the principle that comes out of the Complaint Model's reason-weighting process is simply the one most favorable to beneficiaries. This, we have in effect supposed, is Minimal Gain. In particular, the result will not be a principle permitting beneficiaries to reciprocate with *less than* the benefactor's costs, as there would be many fewer beneficial acts under such a principle. However, the fact that it would be better for benefactors if they received more than what Minimal Gain offers them does not matter, for their reasons to want more do not count, given the background assumption.

And so we ask: is Minimal Gain a plausible principle? Again I wish to avoid arguing simply by counterexample, though such there certainly are (Sidgwick's case, for one). So what can we say at a more theoretical level? In criticizing Equal Gain, I held that it was a principle for the notion of a "fair deal" rather than one for reciprocity. Is an analogous criticism possible of Minimal Gain? That is, does it fit some other moral phenomenon better than it does reciprocity? I believe so, and that other phenomenon is *non-exploitation*. To compensate the benefactor for his sacrifice, at no net loss, is the least one would have to do not to count as an exploiter. Non-exploitation is doubtless a moral ideal of great importance, but it is not the same as reciprocity. And there is another, related parallel with Equal Gain. For Minimal Gain also breaks the link between gratitude and reciprocity. It is no more likely that a person motivated by gratitude should apply Minimal Gain in determining an appropriate response than that he would apply Equal Gain. Indeed, Minimal Gain makes the very notion of "appropriateness" seem out of place. The reason, I believe, is because it points to no recognizably *moral* reason for the beneficiary not to go beyond the response it prescribes. Minimal Gain may have the beneficiary count as a "sucker" in so acting, but does not suggest that the action is inappropriate. (Equal Gain does not face quite this problem, by the way, though the moral reason it does provide for not

going beyond equal net gain is misplaced.) Relatedly – and again we can see the parallel with Equal Gain – the reason Minimal Gain would have the beneficiary offer for not going beyond what is necessary to move the benefactor to action is “What’s in it for me?” As before, this is not an attractive attitude in the context.¹⁷

In conclusion, whether or not we maintain that beneficiaries’ resources are “up for grabs,” contractualism will generate principles of reciprocity that fail to match many of our convictions about that phenomenon.

3. Compensation

What is the duty to compensate? Again I will offer no thorough treatment.¹⁸ For our purposes, the essential points are these.

(1) Some philosophers draw a distinction between *compensation* and *reparation* (e.g., Boxill 1972). On this use of the terms, compensation may be due for a wide variety of harms or losses, including ones caused by accidents or nature (even congenital health problems). As a consequence, the corresponding obligation is borne by society as a whole rather than by specific individuals. In talking about compensation, so understood, we are not interested in who is *responsible* for the loss, as no one need be. By contrast, reparation is due only for unjust actions, and the obligation to make reparations belongs squarely to the offending party (which could, however, be society as a whole). My concern in this paper is exclusively with reparation. Nevertheless, I will use the term “compensation” below, as it seems to be more standard.¹⁹

¹⁷ It might also seem like something only a Hobbesian contract theorist could endorse the beneficiary’s saying – and not Scanlon. However, if Scanlon does make the background assumption that the beneficiary’s resources are not subject to the comparison of reason strength, then he has in effect permitted just such a justification. To repeat, with that assumption in place the beneficiary has no need to take into account the benefactor’s interest in further compensation.

¹⁸ In addition to references cited below, see O’Neill (1987), Goodin (1989) and Roberts (2002a).

¹⁹ A complicating factor is the following. Most writers hold that compensation for harm may be due from a specific individual (thus bearing one of the characteristic marks of reparation) even when that individual committed no injustice (thus not bearing the other). One type of case is represented by Feinberg’s much-discussed example of the hiker who breaks into an isolated mountain cabin to seek shelter from a blizzard (1978, p. 102). Feinberg holds that the hiker commits no injustice but does owe the cabin owner compensation for the damage. (Montague, 1984, is a rare dissenter.) In another type of case, the agent is not even responsible for the harm. MacCormick, for instance, suggests that a driver could owe compensation for bumping into another car, even if at the time he was too agitated to exercise the kind of control over his driving necessary for holding him responsible for the incident (1977-78, p. 178). By contrast, if the accident occurred because the driver suffered a heart attack, he owes no compensation. Then the heart attack, rather than the driver, caused the accident (*ibid.*, p. 183). Though MacCormick’s view of these cases likely conforms with our actual legal, and perhaps also moral, practices, I will attend in the text only to “standard” cases of wrongful harming in which the agent *is* responsible.

(2) We must separate compensation, or reparation, from *restitution*. At times it is possible for a wrongdoer to simply restore that which he took from his victim, typically in cases of theft. If I steal your car and am caught, plainly I should be made to return the car to you, if that is possible. In addition to this restitution, however, I may also be liable to compensate you for the harm you may have suffered in having your car stolen and having to do without it for a certain period. When I speak of the duty to compensate, it is the latter I have in mind. An important difference between the two is that if the wrongdoer is forced to compensate his victim, and not just restore what he took away, he may end up worse off than he would have been if he had not done the harmful deed. The reason why he may not end up worse off is that he could be allowed to keep the gains he made from that deed. These may be greater than what he owes in compensation.

(3) We should also separate compensation from *punishment*. The duty to compensate the victims of one's wrongdoing is additional to any punishment one may incur as a result of those actions. Normally we think of punishment as a moral relation between the offender and society as a whole, unlike compensation/reparation, and we do not think the purpose of punishment is to "make it up to" the victim, or at least not exclusively. Analogously, then, the justifications offered for punishment are not likely to work for compensation. In particular, though a system of compensation, in addition to punishment, would presumably work as an additional deterrent, deterrence alone could not explain why *the victim* should get anything.²⁰

(4) Now, while compensation is no punishment, it does make some sense to think of reciprocation as a kind of *reward* for a good deed. This difference is reflected in the different criteria we apply to determine *how much* we are to reciprocate and compensate, respectively. In particular, the traditional view of the duty to compensate (make reparations) is that what the offender is to give the victim is determined simply by the value of that which was lost. As long as the offender is in the relevant sense (sufficiently) responsible for the harm, we do not care about his degree of blameworthiness. Analogously, compensation is not supposed to make up for, or "annul," the *wrong* the victim suffers (if any). Possibly that is the role of punishment (which does take the degree of blameworthiness into account). As a result, determining proper compensation is easier than determining proper reciprocation. In particular, we say that proper compensation should be *equal* in value to that which was lost. Among philosophers it is common to understand this notion of equivalence in *counterfactual* terms. A canonical formulation is due to Nozick (1974, p. 57):

Something fully compensates a person for a loss if and only if it makes him no worse off than he otherwise would have been; it compensates person *X* for person *Y*'s action *A* if *X* is no worse off receiving it, *Y* having done *A*, than *X* would have been without receiving it if *Y* had not done *A*.

²⁰ Admittedly some writers want to tie punishment much more closely to compensation than I have recommended here. See, e.g., Barnett (1977).

Here I will endorse this formulation, ignoring various difficulties.²¹ Let us call the resulting principle *Equivalent*. In endorsing a principle, then, my treatment of compensation differs from that of reciprocity. Hence the question facing us is whether contractualists can defend Equivalent.

As Coleman has noted, we face two questions in accounting for claims to compensation: “What are the grounds necessary and sufficient to justify a victim’s claim to recompense? and....Under what conditions ought an injurer be obligated to provide compensation to his victims?” (1982, p. 185). Coleman is also right to point out that we are not entitled simply to assume that the answers to these two questions coincide (*ibid.*) – though I am inclined to hold that they do. In this discussion I will focus on the second of the two questions above – the one about the offender’s obligation – as I believe it is a tougher nut to crack for contractualists.

Offhand, when we ask why offenders must offer compensation in the first place, we are bound to zero in on the fact that the harm is *their fault*, something for which they are responsible, even if they need not be *blameworthy* for their actions.²² Indeed, this thought is so natural that it is hard to imagine our accepting any account of the duty to compensate that did not rely on it. In particular, if we look only at the victim’s interest in being “brought back” to where he was, we could not explain why the *offender* should ever do the bringing back, rather than the state.

As it happens, Scanlon provides a method for taking into account the role of fault and responsibility. He calls it the “value of choice” account.²³ His idea is that it is on the whole good, both instrumentally and in itself, for persons to exercise control over their own lives, in the sense that what happens to them depends on their choices. Therefore they will have reason to reject principles that deny them this control in favor of alternative principles that do not. And their reasons to reject principles that give them control will be weaker than their reasons to reject otherwise similar ones that do not. For example, Scanlon considers a principle that permits people to engage in activities that risk causing harm to others. Here it matters considerably, he would say, whether the people who come to harm had a choice about avoiding the danger. The reason is that they are better off with the choice than without it – or, rather, they typically are.

How can we apply the notion of the value of choice to the duty to compensate? Here my procedure will be as follows. To justify a principle in contractualism, we need alternative principles to compare with. We show, at least tentatively, that a certain principle is not reasonably rejectable according to the Complaint Model by showing that plausible alternatives to that principle can themselves be reasonably rejected in its favor. Now, as far as compensation is concerned, the contractualist is supposed to show that Equivalent cannot be reasonably rejected. Hence we need to furnish that principle with some plausible alternatives. More-

²¹ For a critique of the counterfactual conception, see Roberts (2006).

²² On the last clause, see note 18 above.

²³ See especially pp. 251-67, and also Scanlon (1988).

over, as the point of introducing the value of choice precisely is to account for the importance of fault, it is natural to ask whether an appeal to that value would make Equivalent preferable for contractualists to whatever principles are plausible for regulating compensation for harms that do *not* involve fault. And so we ask: how should we handle compensation for harms for which no one is responsible? There is no reason to think that any one arrangement fits all such cases equally well, but two types of treatment stand out. On the one hand, we could let the loss lie where it falls, meaning that the person harmed absorbs it. On the other, we could let society shoulder it, sharing it equally among all. Let us call these two principles *Own Risk* and *Universal Sharing*, respectively. Now what happens when we add fault as a new ingredient but retain either of the above two principles? Let us compare Equivalent with these two alternative principles as they apply to fault cases.

Consider first *Own Risk*. In comparing it with Equivalent we find first that in one way offenders and victims are equal with respect to them, for offenders bear the same burden under Equivalent that victims bear under *Own Risk*. In both cases, the cost of the harm the offender causes is at stake (supposing it to be compensatable). But in another way offenders are at a disadvantage, and that is precisely where the value of choice comes in. For when we compare how victims fare under *Own Risk* with how offenders fare under Equivalent, we find that the latter are in one way better off.²⁴ For under *Own Risk*, victims (and indeed everyone) have to worry about becoming uncompensated victims. By contrast, under Equivalent, offenders face no parallel worry, as it is up to them whether to put themselves in a position where they are required to compensate. Victims have no such control. This difference between victims and offenders is a difference in the value of choice: it is a consequence of the unequal distribution of the possibility of choice. Hence victims can reasonably reject *Own Risk* in favor of Equivalent, because they fare worse under the former than offenders do under the latter.²⁵ But does that mean that Equivalent is home safe? No it does not. Why? Because it should be possible to compromise between it and *Own Risk*, finding a principle that does even better. In particular, this compromise principle would require the offender to pay a share of the harm that makes up for the victim's relative loss in terms of worry. At some point, an equilibrium is reached. This equilibrium may be impossible to determine in practice, but at least in theory it should be preferable for a contractualist.

Let us turn now to *Universal Sharing*. With it in force, the problem of victims' worrying disappears, for they are compensated as under Equivalent. Any complaint against *Universal Sharing*, then, must come from non-offender payers (including victims). Again there is a difference between the parties with respect to the value of choice. For the offender

²⁴ The most effective comparison is between those who are offenders only (never victims) and those who are victims only (never offenders).

²⁵ Note that how strong a reason an offender has to reject Equivalent depends on whether he gets to keep the gains from his harmful acts. In either case, though, the victim's reason to reject *Own Risk* is stronger.

has a choice of whether to take on the burden under Equivalent, but the non-offender payer has virtually no choice about taking on the burden under Universal Sharing. However, there is also an important difference from the last case (the comparison with Own Risk). For the burden the offender must bear under Equivalent (compared to what the non-offender payer bears under Universal Sharing) is wholly dependent on how he actually chooses, or did choose; whereas the worry all parties must endure under Own Risk is theirs regardless of how they choose. The value of having a choice, then, is prospective – an expected value. It is intelligible only from an *ex ante* perspective. Or, rather, that is so insofar as that value is instrumental – which seems to be the main factor in the present case: under Equivalent, but not under Universal Sharing, a person can avoid paying by simply not harming others. I mention this fact about Universal Sharing only to set it aside, important though it is. There is a general question about how prospects or probabilities enter into contractualist reasoning, and Scanlon's own remarks on the topic (especially p. 208-9) are not easy to reconcile with his practice. But I will suppose that there is a satisfactory answer to this question, so that it need not trouble us now.

Even setting aside this worry, though, we encounter again a problem much like the one we came across in comparing Equivalent with Own Risk. For just as it is possible to compromise between the latter two principles, so it is possible to compromise between Equivalent and Universal Sharing. That compromise would entail a system in which all help in shouldering the burden of compensating victims of wrongdoing, but offenders bear a disproportionate share of the burden. As we move along the distribution axis in the direction of Equivalent, we will eventually reach an equilibrium point, where offenders have as much reason to reject an alternative principle requiring them to pay more than they do, as non-offender payers have to reject a principle requiring *them* to pay more than *they* do. What both compromises (with Own Risk and Universal Sharing, respectively) have in common is their reflecting the fact that whatever offenders gain by being able to choose, relative to others who are unable, is worth only so much. At some point, and well before we reach the extreme represented by Equivalent, that value will be outweighed by the burden of compensation. After all, in some cases Equivalent could lead to economic ruin for the offender.

A complication here is this. How offenders do depends considerably on whether they are allowed to keep the gains of their harmful acts ("wrongful gains"). According to one principle about such gains, offenders get to keep whatever is left after they have compensated their victims. It might seem possible to defend Equivalent as part of a *package* with this principle about gains, on the grounds that offenders could not reasonably reject the combination (even if they of course would prefer Universal Sharing in the package instead). There is a question here about whose standpoint we are to consider. Not all offenders gain anything from their wrongdoing, and for them the package is no more attractive than Equivalent on its own. It is not clear why we are not to consider the standpoint of such an offender. A further question is whether a compromise posi-

tion also might not be preferable to the package. That compromise, again, would involve moving in the direction of Universal Sharing. However, there seems to be no general answer to this question. What a given offender could reject depends on how much he stands to gain from his harmful actions. The more he gains, the less reason he has to reject the original combination, and conversely. Indeed, if he gains enough to pay compensation and then some, he plainly has no reason at all to reject Equivalent. A more complex compromise is certainly possible, according to which offenders who gain much are to follow Equivalent, while Universal Sharing applies to those who gain little or nothing, and perhaps various compromises between those two principles for offenders in between. Even apart from the considerable practical difficulties that must inevitably plague any such arrangement, it has little to recommend it. Surely the same first-order principle should apply to all offenders, special cases aside.

Summing up: I have criticized the attempt to employ Scanlon's notion of the value of choice to account for our duty to compensate, or make reparations to, the victims of our own wrongdoing. My main point has been that whatever the magnitude of the value of choice, it can be outweighed by other values and, in particular, by the reasons offenders have not to compensate their victims. As a result, the duty to compensate will be limited in a way we may not much like. Yet I have to concede that a compromise position like the ones I have described, in which all share the costs of wrongful harming but offenders bear a heavier burden than others, is not obviously absurd. The "common-sense" principle Equivalent in effect presupposes that offenders are always 100 percent responsible for the harm they cause, as it always makes them pay 100 percent of the compensation. But it is far from clear that any offender is ever responsible to that extent. Surely sometimes those who harm others can say "I blame society." This point leads to many interesting questions which I cannot address here. I can only state the conclusion that an appeal to the value of choice leads to a revisionist view of the duty to compensate. Whether that is a good thing is a matter for later discussion.

Let me end by briefly addressing a natural worry at this point. It is that Scanlon's approach to responsibility, including the value of choice doctrine, is idiosyncratic and not an essential feature of contractualism. This charge forces us to consider the question of what *is* essential to contractualism. My answer, in line with my characterization of Scanlon's doctrine in section 1, is that at least this much is essential: (i) in contractualism the contents of claims and duties are determined by the strength of reasons persons have to reject principles specifying such contents; and (ii) these reasons have to be personal, in the sense that they have to do with what is good and bad for individual persons. Hence, setting aside the just-mentioned possibility of revisionism, contractualists looking for an adequate account of the duty to compensate would need to show that offenders' personal reasons to reject a principle requiring them fully to compensate their victims is weaker than anyone else's personal reasons to reject a principle requiring less of offenders. That is the challenge. Of course I have not proved that it cannot be met. Perhaps it could, employ-

ing some quite different way of accounting for the role of fault. In the concluding section, though, I will suggest reasons for thinking that contractualism is not the best theory for the job.

4. Discussion

Why do these problems arise for contractualism? Where does it go wrong? To see my answer, we need to have a closer look at the basis of that doctrine. It is designed to explain how moral requirements reflect the value of persons as persons. Scanlon says explicitly that the way we respect that value is by abiding by the dictates of contractualism, by treating persons only in accordance with principles they cannot reasonably reject. Indeed, his view is that the special value of persons consists precisely in the fundamental moral requirement to treat them that way, though he does not claim to be able to prove this claim (p. 106). Specifically he talks of the value persons have in virtue of being able to “assess reasons” and to “govern their lives according to this assessment” (pp. 105-6). As a consequence, contractualism is well positioned to account for those moral claims of persons that serve to express just that value – but not others. Let me expand on this observation.

The moral content of contractualism comes from the notion of reasonable rejection: it explains how following that doctrine respects the value of persons. And to rehearse, the notion of reasonable rejection in turn we analyze in terms of (i) the Complaint Model and (ii) a restriction on what counts as reasons to reject – specifically, only that which is bad for a person is a reason for him to reject a principle. Combining these two ideas we find that a person can reasonably reject a principle if its general acceptance would be worse for him than the general acceptance of any alternative principle would be for anyone else. Ignoring this comparative fact amounts to a failure to respect that person as a person. Take the right not to be killed, for instance. All persons typically have a very strong reason to seek their own survival, because it is bad for a person to die. Moreover, this reason is typically stronger than the competing reason anyone else may have in seeing them dead. Hence victims can reasonably reject any principle permitting their being killed (at least barring special circumstances). Killers may have reason to reject the competing principle forbidding killing, but this reason is much weaker, and so they could not themselves reasonably reject it.

However, not all moral claims are like the right not to be killed, belonging to the person simply in virtue of that which gives him his characteristic value as a person. Some claims belong to people in virtue of actions they have performed. The claim to reciprocation is a prime example. Such claims correspond not simply to the value of their holders, but to the value of certain *actions*, or aspects of actions.²⁶ Analogously, actions

²⁶ Note, by the way, that there are (at least) two ways of measuring the value of an action, either in terms of its consequences for those it affects or in terms of its effects on the agent. The two standards used in reciprocity, beneficiary’s gain and benefactor’s sacrifice, respectively, correspond to these two measures.

can also make persons bear *duties* to others. The duty to compensate is an example here.²⁷ Note that what I am here saying is not merely that there are what Hart called “special” rights, or claims, rather than general ones – that is, claims that “arise out of special transactions between individuals or out of some special relationship in which they stand to each other” (Hart 1955, p. 84 – though I have in mind here only the former of the two categories he mentions). The reason I go beyond Hart’s notion is this: special claims do not necessarily involve any role for *proportionality*. For instance, take promise rights as normally conceived. These are special in Hart’s sense (in that they “arise out of special transactions between individuals”), but are not defined in terms of any notion of proportionality. The cases of reciprocity and compensation are different, precisely because the relevant claims or duties correspond to the values of certain actions, or of certain aspects of these actions. Hence, I maintain, if contractualism is understood simply as a way of accounting for the value of persons – which is more or less how Scanlon portrays it – then it cannot deal adequately with such claims and duties. That is my explanation of how contractualism goes wrong.

Perhaps the best way of amplifying and backing up that diagnosis is by responding to what is surely a very natural objection. This is that claims of this type, such as reciprocation and compensation, are manageable within a contractualist setting if we can only help ourselves to the idea that getting proportional reciprocation and compensation is good for one, perhaps sometimes apart from effects on well-being. That is, getting a certain amount as deserved compensation, say, is better for one than getting that very same amount but not as compensation, even other things equal. For instance, compare the case where I wrong you and then compensate with the case in which I wrong you and do not compensate, but you happen to win a comparable sum in a lottery. Turning to the case of reciprocity, we might likewise agree that just as it is good for the benefactor to get proportional reciprocation, independently of well-being, it is also good for the beneficiary to offer it, independently of well-being. Armed with these assumptions, we might be able to apply the Complaint Model as usual to arrive at reasonably plausible principles of reciprocity and compensation. Thus we can incorporate action value into the model in a natural way. Indeed, it is not clear to me that there is any other way of accommodating the duties to reciprocation and compensation within contractualism.

I am not sure whether these assumptions really are sufficient to yield plausible principles. However, I do not think this question is important. For I deny that a response of this type is open to contractualism in the form I have characterized that doctrine (i.e., Scanlon’s). We need to ask *why* it is good for persons to receive (and offer) proportionate reciproca-

²⁷ While I take the claim to reciprocation to be primary to the correlated duty, I believe that the reverse relationship holds in the case of compensation. The reason for this asymmetry is simply that the value of the relevant actions (or the reasons constituting that value) is always primary. Hence the agent’s moral position – the benefactor’s or the offender’s – is primary to the patient’s.

tion or compensation. One possible answer is that it is because they have a *claim* to such treatment, and treatment to which one has a claim is always good for one. It should be clear that contractualists could not give this answer. It is circular, as their task is to show precisely that such a claim exists.²⁸ Moreover, I hold that this answer is pretty much correct. The value of an action creates reasons to act, either for the agent himself or for others. Or as I would prefer to say, their value *consists in* there being such reasons.²⁹ The existence of such reasons is presumably a fundamental fact. Moreover, these reasons take the form of *claims* or *duties*. In the case of reciprocation, the benefactor has a claim consisting in a reason on the beneficiary's part to treat him a certain way, a reason due in part to the benefactor's having exercised his agency a certain way. In the case of compensation, by contrast, the agent's duty consists in a reason to treat another a certain way, a reason due in part to the agent's having exercised his own agency with respect to the victim in a certain way. Now, I see no need to deny that it is good for persons to receive (and offer) proportionate reciprocation or compensation, and hence that they have a reason to want to receive (or offer) such treatment. But I maintain that this reason, if it indeed exists, simply stems from the reasons constitutive of the value of the original action, the one that made the claim or duty exist in the first place. If we grant no reasons of this latter kind, I cannot see why we should recognize any reasons of the former kind either. It is *because* I performed an action with a certain value, or another performed such an action against me, that it is now good for me to receive (or offer) the appropriate type of treatment, the treatment such that the action's value in part consists in reasons for providing me with it (and *mutatis mutandis* for offering the treatment). But then the value for me of the treatment, or the reasons constituting that value, is a secondary phenomenon – not an explanatory one, as it is in contractualism.

What I am saying, then, is that the reasons we have to treat persons in accordance with the value of their actions, or the value of our own actions that affected them, are on a par with, and not simply reducible to, the reasons we have to treat them in accordance with their value as persons. In just the way the value of persons is constituted by (or generates) reasons to treat persons certain ways – perhaps in line with Scanlon's contractualist formula – the values of persons' actions are constituted by (or generate) other reasons to treat these persons certain ways. And so I am not out to show that contractualism is inadequate across the board. Earlier I reminded us of the point that that doctrine is designed to explain how moral requirements reflect the value of persons as persons, and perhaps it does offer that explanation. But not all claims that persons have on us are due simply to their being persons. In particular, some are due (also) to their (or our) having acted a certain way, such that this action calls for some form of appropriate response. I am only saying that contractualism is unsatisfactory as an account of claims of the latter type,

²⁸ Cf. note 3 above.

²⁹ Scanlon would prefer the latter formulation too, as being in line with the "buck-passing" conception of value he favors. See pp. 95-100.

such as those of reciprocity and compensation. However, I do not expect that contractualists would accept the view I have taken here of duties and claims. In particular they might want to reject my fundamental premise that the value of actions gives us, or consists of, reasons to treat their agents any particular way. It is certainly not possible here to defend that view: I put it forth simply as an explanation of certain moral phenomena.³⁰

Scanlon could also respond to my criticism in another way. I have argued that we have moral duties to reciprocate and compensate that cannot be accounted for contractually. And I have instead appealed to reasons we have to treat persons certain ways on account of actions they or we have performed. But Scanlon might reply as follows: there are all sorts of reasons for treating people in this way or that, but these are not necessarily *moral* reasons. For example, the mere fact that someone is suffering is a reason for others to relieve that suffering. The same goes for a suffering animal, for that matter, though Scanlon (and I) would deny that we have a moral duty *to an animal* to relieve its suffering in the way we may have a duty *to another person* to relieve his suffering (p. 184). And, Scanlon would argue, the reason we do have to relieve another person's suffering is moral only insofar as contractualist reasoning requires us to take it into consideration when we deliberate, only insofar as those who suffer can reject any principle permitting us to ignore their suffering. In parallel fashion, then, even if we do have reasons to treat people certain ways on account of their or our own previous actions, what makes these reasons moral? How could they generate moral duties to other persons paralleling those familiar from contractualism?³¹ A complete answer is impossible here, but the key factor is *agency*. On Scanlon's view, as I explained at the beginning of this section, we have duties to other persons because of their capacity to act according to their own conception of reasons (a capacity that most animals presumably lack). I agree, but add that we also have such duties in virtue of the way we ourselves, and the others, have *exercised* this central capacity. (Contrast these reasons with those flowing from pain, which have nothing essentially to do with agency.)

I will add one final remark. I put forth the duties to compensate and reciprocate as counterexamples to contractualism only if this doctrine is understood the way I have suggested, in terms of the Complaint Model. But I cannot decisively exclude the possibility of evading the difficulty by cashing out contractualism in other terms. If that *is* possible, we would certainly still need some account of what is essential to the doctrine, to make sure that whatever we end up with is indeed a version of contractualism. Now, I take at least this much to be essential to any recognizably contractualist defense of a duty to reciprocate (to use that as an example):

³⁰ Scanlon himself has expressed doubts about views of the type I have defended. See especially his (1988). Rawls' well-known critique of desert is also relevant (1971, pp. 103-4, 310-15).

³¹ Scanlon's attempt to distinguish a separate and unified sphere of moral considerations, in the narrow sense of obligations and duties between persons, is itself quite controversial. See especially Everson (2007) for a critique.

beneficiaries cannot reasonably reject a principle requiring them to match the value of the benefactor's action. I should not deny, then, that I am not comfortable saying that beneficiaries *can* reasonably reject such a principle. However, I would say that that just goes to show how little content there is to contractualism without the Complaint Model (cf. section 1). If I am asked why it is not reasonable of beneficiaries to reject the relevant principle, I would have to say that they are in fact required to reciprocate that much and not less. Of course I could also quite properly be called upon to justify that claim in turn, but I would not do that by appeal to the Complaint Model, or to contractualism at all.³²

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³² I presented an earlier version of this paper in a seminar at the Department of Philosophy, University of Lund, and am grateful for comments from the participants. Work on this paper was supported by a grant from the Swedish Research Council.

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