Scanlon as natural rights theorist

Eric Mack
Tulane University, USA

abstract This article examines the character of Scanlon’s contractualism as presented in What We Owe to Each Other. I offer a range of reasons for thinking of Scanlon’s contractualism as a species of natural rights theorizing. I argue that to affirm the principle that actions are wrongful if and only if they are disallowed by principles that people could not reasonably reject is equivalent to affirming a natural right (of an admittedly non-standard sort) against being subject to such reasonably disallowed actions. I argue that Scanlon’s invocation of the value of human life can be seen as an attempted grounding for this principle that is akin to standard natural rights attempts to ground fundamental rights. Lastly, I argue that the invocation of the value of human life does not in fact well support the sort of requirement of justifiability to others that characterizes this contractualist variant on natural rights theorizing; if anything, it better supports the sort of ascriptions of rights characteristic of traditional natural rights theorizing.

keywords contractualism, natural rights, justifiability to others, wrongfulness

1. Introduction

This article is motivated by a desire to understand the character of the contractualist stance that T.M. Scanlon develops in What We Owe to Each Other and by the suspicion that this stance shares much more with natural rights theorizing than is recognized either by Scanlon or by his general readership. As a friend of natural rights theorizing, I am interested in showing how readily any moral doctrine that takes seriously the need for one’s actions to be justifiable to others fits into the natural rights category. Indeed, I shall offer both a modest and a more...
bold version of the claim that Scanlon’s contractualism is an instance of natural rights theorizing. The modest version is that Scanlon’s official position (his position as he himself understands it) involves the ascription to individuals of a bedrock of and, hence, natural right. This is the admittedly non-standard natural right (or very rights-like claim) not to be subjected to actions that are disallowed by any set of principles for the governance of their interactions that people could not reasonably reject. The bold version is that, contrary to his own characterization of his position, Scanlon goes still further in the way of natural rights theorizing by offering a justification for his ascription to individuals of the right that, on the official position, is to be taken as bedrock. This justification invokes the value of human (or rational) life.

In consequence, I argue that Scanlon’s position is less contractualist than the ‘contractualist’ label suggests and, indeed, is less ‘contractualist’ than Scanlon himself takes it to be, despite his recognition that there are certain disadvantages to his adopting this label. For one thing, I emphasize the absence of any sort of contractualist basis for the pivotal and higher-order principle that actions are wrongful if and only if they are disallowed by whatever first-order principles people could not reasonably reject. For another thing, I point to the intimations within Scanlon’s overall doctrine of a grounding for this higher-order principle of the sort that traditional natural rights theorists offer for their affirmation of fundamental rights. Lastly, I suggest that Scanlon’s appeal to the value of human (or rational) life better supports the sort of ascriptions of wrongfulness characteristic of the natural rights tradition (for example, the ascription of wrongfulness to the soilure of a person’s body parts) than it supports the undeniable ‘contractualist’ element of Scanlon’s doctrine, namely, his linkage of the wrongfulness of an action with its being disallowed by interpersonal principles that people could not reasonably reject.

2. The structure of the interpretive argument

It will be helpful to begin with a more extensive statement of the arrangement of my interpretive claims about Scanlon’s contractualism. In the next section of this article, I concentrate on the presence within Scanlon’s overall doctrine of what we owe to each other of a higher-order principle according to which an action is wrongful if and only if it is disallowed by principles that people could not reasonably reject:

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.3

I refer to this higher-order principle as ‘the contractualist postulate’ and stress that within Scanlon’s doctrine the conclusion that a given action A is wrong requires two independent premises. The first and major premise is the contractualist postulate. The second and minor premise is that people have reason to disvalue action A and, hence, cannot reasonably reject principles that disallow A. Since the conclusion of an argument with these premises is that people have rights (or very rights-like claims) against being subjected to action A, the major premise of the argument (the contractualist postulate) is equivalent to the proposition that people have rights (or very rights-like claims) against being subject to actions that are disallowed by principles that people could not reasonably reject. This is the natural right that I claim dwells within Scanlon’s doctrine. Putting aside the reformulation of the major premise and the conclusion in terms of rights, I maintain that the basic structure of Scanlon’s account of the wrongfulness of action A is as follows:

Major premise: An action is wrong if and only if it is disallowed by any principles that people could not reasonably reject.
Minor premise: Action A is disallowed by any principles that people could not reasonably reject.
Conclusion: Action A is wrong.

The possibly contentious element in my reading of Scanlon here is my insistence on the separate presence and independent role of the first premise.

In the fourth section of this article, I concentrate on Scanlon’s account of the wrongfulness of failing to fulfill promises, especially his rejection of what I shall call ‘social practice’ accounts of this wrongfulness. I point out that Scanlon’s stance here is that the fact that an individual has promised to perform action A (even when it is recognized that promising occurs within a social practice that makes promising possible) does not by itself account for the wrongfulness of his subsequently failing to perform. The account of the wrongfulness of failing to perform as promised must also invoke a separate principle according to which failing to perform promised actions is wrongful. The structure for the explanation for the wrongfulness of promise breaking is as follows:

Major premise: Any individual’s failing to perform an action that he has promised is wrongful.
Minor premise: This individual promised to perform action A.
Conclusion: This individual’s failing to perform action A is wrongful.

Since Scanlon insists on this structure for explaining the wrongfulness of promise breaking, we should expect him to subscribe to a parallel structure for explaining wrongfulness in general—in particular, a parallel structure in which the separate (and major) premise is the contractualist postulate.

Beyond this, I stress in Section 4 that Scanlon seeks to identify some further features of acts of promise breaking that makes them wrongful, for example, especially in the case of lying promises, the feature of being manipulative of the party who is subjected to the promise breaking. Apparently, then, it is not enough
to assert the major and separate premise that promise breaking is wrongful. Rather, one must delve deeper to identify the manner of treatment that is inflicted through promise breaking and in virtue of which promise breaking is wrongful. I maintain that the same philosophical rationale that moves Scanlon to seek to identify some further feature of promise breaking in virtue of which promise breakings are wrongful moves or should move Scanlon mutatis mutandis to seek to identify some further feature of acting contrary to principles that people could not reasonably reject in virtue of which such actions are wrongful.

In Section 5, I argue that, even though it conflicts with his official position that (what I call) the contractualist postulate is bedrock, Scanlon does seek to identify some further feature of acting contrary to principles that people could not reasonably reject in virtue of which such actions are wrongful. That further feature turns out to be failing to be responsive or being in conflict with the valuableness of human (or rational) life. The valuableness of human (or rational) life provides reason for us to be circumspect in how we conduct ourselves toward beings whose lives possess this value; and I ascribe to Scanlon the view that the appropriate form of circumspection is to eschew that conduct toward others that is disallowed by any principles people could not reasonably reject. It would be wrong to perform an action that is disallowed by principles that people could not reasonably reject because such an action would have the deeper, wrong-making feature of being in conflict with or failing to be responsive to the valuableness of human (or rational) life. As Scanlon states, to recognize human life as valuable is, first and foremost, to see the reasons we have for treating others in ways that accord with principles that they could not reasonably reject.

Recall that the modest version of the contention that Scanlon’s overall doctrine is an instance of natural rights theorizing is that the contractualist postulate is equivalent to the ascription to each person of a natural right (or very right-like claim) against being subjected to actions that are disallowed by principles that people could not reasonably reject. The bolder version of that contention combines the weaker version and the further assertion that, like most self-conscious natural rights theorists, Scanlon seeks to identify some morally fertile feature of human (or rational) life that provides us with reason to ascribe that right (or very rights-like claim) to persons.

In the introduction to What We Owe to Each Other, Scanlon notes that he previously identified the motivational basis of “what we owe to each other” as a desire to act in a way that can be justified to others. But questions about, for example, whether a person who lacked this desire would have reason to avoid acting wrongly have led him to the view that the notion of a desire, in order to play the explanatory and justificatory roles commonly assigned to it, needs to be understood in terms of the idea of taking something to be a reason. So, rather than speaking of a pivotal desire to act in ways that are justifiable to others, we find Scanlon continually speaking of “the reason we have to live with others on terms that they could not reasonably reject” and “this reason we have in virtue of which we have reason to attend to the question of which actions are right and which wrong,” and “the reason which contractualism emphasizes, the reason we have to want to be able to justify our actions to others.”

So, what is this reason? We know that it cannot simply be a desire to live with others on terms that they could not reasonably reject, and so on. Presumably, it cannot merely be a taking of ourselves to have reason to live with others on terms that they could not reasonably reject. Such a reason sounds like it has to be some identifiable feature of certain of our actions toward others other than (deeper than) the actions being disallowed by principles people could not reasonably reject; it has to be some such feature that explains why actions that are disallowed by such principles are wrongful. Scanlon’s abandonment of the view that the motivational basis of what we owe to each other is a desire to act in ways that are not reasonably disallowed is a basis for expecting him to point to some further (deeper) feature of actions that are reasonably disallowed that accounts for their wrongfulness. Hence, I maintain, we ought not to be surprised when we find passages in which Scanlon does seem to be engaged in the project of identifying a deeper feature of disallowed actions that explains their wrongfulness.

Finally, toward the close of the fifth section, I shall express some doubts about the crucial premise that supplies Scanlon’s natural rights theorizing with its contractualist shape. This is the premise that the circumspection in our conduct toward others that is reasonable in light of the valuableness of human (or rational) life takes the contractualist form of avoidance of actions that are contrary to principles that reasonable deliberators would agree upon.

3. Contractualism and the contractualist postulate

For Scanlon, the domain of what we owe to each other is the domain of right and wrong; and his account of this domain centers especially on wrongful actions. Scanlon tells us:

an act is wrong if and only if any principle that permitted it would be one that could reasonably be rejected by people with the motivation just described [namely, the motivation of finding principles for the general regulation of behavior that others similarly motivated could not reasonably reject] or, equivalently, if and only if it would be disallowed by any principle that such people could not reasonably reject.

In fact, I maintain, this central claim resolves into two distinct components. One component of the case for the wrongfulness of an action is the contention that people will reasonably disfavor that action and, hence, will reasonably reject principles that would permit that action. Within this component the focus is on what reasons individuals have to favor or disfavor the action; viable principles are to be identified by determining what principles all would reasonably accept.
or could not reasonably reject. But, as I understand Scanlon’s contractualism, strictly speaking it does not follow just from an action being contrary to principles that people could not reasonably reject that the action is wrong. Rather, the conclusion that the action is wrong requires in addition the separate principle that if an action is disallowed by principles that people could not reasonably reject, it is wrong. This separate, higher-order principle is the contractualist postulate. Reliance upon this postulate is the second and distinctive component of Scanlon’s contractualism. Actions are wrongful if they are not justifiable to others (in particular, not justifiable to those who are subject to them) and they will fail to be justifiable if they are contrary to principles of interaction that people have reason to accept.

A common objection to Scanlon’s stance is that concern for the fact that an action is disallowed by any principles for interaction that people could not reasonably reject is an unnecessary epicycle within the case for that action’s wrongfulness. For, the objection goes, if it is reasonable for people to accept principles that would disallow an action, what makes that reasonable is that people have decisive reasons to disfavor that action. But, then, the decisive reasons that people have to disfavor the action explain its wrongfulness; the explanation does not have to run through the reasonableness of people accepting principles that disallow that action. This epicycle adds nothing to the account of the action’s wrongfulness:

What is primary, it might be said, is the value of people’s lives, or the moral legitimacy of their claims. It is these that determine whether an action is justifiable. To say that a moral person cares about the justifiability of his or her actions to others is at best a roundabout way of saying that such a person is concerned to act in a way that is responsive to the value of others’ lives and to their valid moral claims. However, my highlighting the two separate components within Scanlon’s account of an action’s wrongfulness makes clear that this objection is, at best, question-begging. Indeed, I submit that the best way to read Scanlon’s account is that, while it is in virtue of being reasonably disfavored by people that an action is disallowed by principles that they cannot reasonably reject, that action is wrongful in virtue of the higher-order principle that any action that is reasonably disallowed is wrongful. On this reading, the wrongfulness is, so to speak, delivered by the higher-order principle, not by the bare fact that the action is disallowed by first-order principles that people could not reasonably reject. I have said that the fact that people could not reasonably reject certain principles makes those principles viable; but ‘viable’ here means susceptible to enrollment. On the reading of Scanlon that I offer, what imparts life into those viable principles, what gives them directive force, is the separate contractualist postulate that it is wrongful to act contrary to principles that people cannot reasonably reject.

Once again, the common objection is that appeal to the contractualist postulate that it is wrongful to act contrary to principles that people would reasonably accept is unnecessary to account for the wrongfulness of actions disallowed by those principles; it is unnecessary because the reasonableness of people disfavoring those actions is enough to establish their wrongfulness. This objection presupposes that it follows from people having decisive reason to disfavor their being subjected to a certain action that people as prospective performers of that action have decisive reason (indeed, decisive moral reason) to eschew that action. On certain normative views, for example conventional consequentialist views, this does follow. If others have decisive reason to disfavor my subjecting them to action A, it must be because all things considered the world is worse if I subject them to A than if I eschew A; but if all things considered the world is worse if I subject them to A than if I eschew A, then I have decisive reason to eschew A. However, this inference will be rejected by anyone who, like Scanlon, seriously questions conventional consequentialism. Moreover, it seems correct to reject this inference. For others may very well have decisive reason to disvalue an agent acting in a certain way toward them without it following from this fact that this agent has decisive reason to disvalue his acting in that way. This, I think, is the basic explanation for why the account of the wrongfulness of an agent’s action cannot be reduced without remainder to the reasons that the prospective subjects of that action have to disfavor it and to reject principles that do not disallow it.

At the core of the stance that one’s actions have to be justifiable to others is the thought that with regard to each other person his or her reasons themselves have leverage in determining whether one’s own action toward him or her is permissible or impermissible. But the leverage comes from each of those individuals being a possessor of reasons, not from those reasons being shared by or being replicated in oneself. One’s actions must be justifiable to those individuals as possessors of reasons of their own, not justifiable as a matter of service to some omnibus reason or to the cause of making the world better along some impersonal measure specified by omnibus reason. It is ‘the aim of finding principles that others . . . could not reasonably reject’ that gives us a direct reason to be concerned with other people’s point of view; not because we might, for all we know, actually be them, or because we might occupy their position in some other possible world, but in order to find principles that they, as well as we, have reason to accept. That people have reason to disvalue my subjecting them to action A occasions my having moral reason to eschew A only because of the separate component, the contractualist postulate, according to which it is wrongful for me to perform actions that are disallowed by principles that people could not reasonably reject. Others having reasons of their own to value or disvalue various principles has moral leverage in determining how I may or may not act. But leverage requires a fulcrum against which to work, and that ineliminable fulcrum is the contractualist postulate. So the very idea that one’s actions have to be justifiable to others presupposes that one’s own reason for eschewing certain actions toward others...
Scanlon’s response is:

The contractualist formula that Thomson quotes is intended as an account of what it is for an act to be wrong. What makes an act wrong are the properties that would make any principle that allow it one that it would be reasonable to reject (in this case, the needless suffering and death of the baby). 15

If we employ the language of the wrong-making feature, it sounds here as though Scanlon is saying that the wrong-making feature of the torturing of babies is the needless suffering and death involved in such action rather than the feature of being disallowed by any principles that people could not reasonably reject.

Yet Scanlon cannot mean that the wrong-making feature of the torturing is the feature of the torturing that gives people reason to disvalue it. For this would be akin to holding, as the utilitarian does, that ‘what makes an action right is having the best consequences’. Such a view of the right-making feature of a right action puts the feature of the action that gives the prospective subjects of the action reason to value it in the driver’s seat, so that the justifiability of the action is merely a consequence of this [that is, of the feature that provides reason for people to favor being subject to the action].16 This would eliminate the requirement of justifiability to others as something with any independent significance. It would thereby eliminate ‘What is distinctive about [Scanlon’s] version of contractualism [namely] that it makes the idea of justifiability basic’.17 I can only conclude that when Scanlon says that the needless suffering makes the torturing wrong, what he means is not that the needless suffering is the wrong-making feature, but rather that the needless suffering explains why the torturing has the wrong-making feature of being disallowed by any principle that people could not reasonably reject. That is the sense in which the explanation does go, as Thomson thinks it must, from the needless suffering to reasonable rejection.18 However, the explanation can in this sense go from the needless suffering to reasonable rejection without the needless suffering being the wrong-making feature of the torturing.

I have labeled the crucial higher-order principle that an action is wrong if it is disallowed by any principles that people could not reasonably reject as ‘the contractualist postulate’ for two connected reasons. First, it is the core distinctive claim within the overall doctrine that Scanlon himself labels as ‘contractualist’ and, second, the first-order principles to which it supplies directive force are the principles to which people would reasonably agree. However, the label should not suggest that the postulate derives its directive force from its being the object of reasonable agreement. For one thing, this would build into the labeling of the postulate the denial of Scanlon’s official stance that the postulate is bedrock, that there is (and need be) no deeper justification for it. For another thing, to seek to derive the force of the postulate from its being a principle to which people would reasonably agree would be question-begging. It is worth pausing to see why this is the case.

My point about the eliminable role of the contractualist postulate can be put in another way that will be of use as we move along. We can ask: what is the wrong-making feature of wrongful action A? The answer proposed by those who press the common objection is that the wrong-making feature is the feature of A (including A’s consequences) that gives people reason to disvalue people being subject to it. Since this is the wrong-making feature, 13 there is no need in the explanation of the wrongfulness of A to invoke the principle that actions are wrong if they are disallowed by principles that people could not reasonably reject. In contrast, to hold that the contractualist postulate is an eliminable component in the account of the wrongfulness of action A is to hold, as Scanlon does, that the wrong-making feature of A is A being disallowed by principles that people could not reasonably reject. Since this is the wrong-making feature, the contractualist postulate must be invoked as part of the explanation for A’s wrongfulness. To hold that the contractualist postulate is bedrock, as Scanlon also does, is to hold that there is no deeper feature of wrongful acts that accounts for their wrongfulness. To attempt to provide a justification for the contractualist postulate is to attempt to identify such a deeper feature of wrongful acts that explains why actions that are disallowed by principles that people could not reasonably reject are wrongful. So, in claiming (in Section 5 below) that, contrary to his official position, Scanlon offers a justification for this postulate, I am claiming that he seeks to identify such a deeper wrong-making feature.

Here, however, I must take note of a passage in What We Owe to Each Other that seems to conflict with the reading I have just offered. In a lengthy footnote, Scanlon cites an objection to contractualism offered by Judith Thompson in The Realm of Rights:

For my part, I cannot bring myself to believe that what makes it wrong to torture babies to death for fun (for example) is that doing this would be disallowed by any system of rules for the general regulation of behavior which no one could reasonably reject as a basis for informed, unforced general agreement. My impression is that the explanation goes in the opposite direction—that it is the patent wrongfulness of the action that explains why there would be general agreement to disallow it.14

...
We have seen that the requirement that one eschew reasonably disallowed actions is a separate component within the account of the wrongfulness of any wrongful action \( A \) and, therefore, people's reasonable agreement upon first-order principles that disallow action \( A \) does not by itself account for the wrongfulness of \( A \). Instead, the wrongfulness of \( A \) requires both that \( A \) be contrary to reasonably accepted principles and the principle that it is wrongful to act contrary to reasonably accepted principles. If this is the case, however, then it seems that whatever principle might be put forward as an object of reasonable agreement, the wrongfulness of acting contrary to that principle requires both that this principle would be the object of reasonable agreement and that it is wrongful to act contrary to principles that would be the objects of reasonable agreement. So any account of the wrongfulness of acting contrary to the contractualist postulate that appeals to the reasonableness of people agreeing to that postulate needs to be supplemented with appeal to the contractualist postulate itself! Thus, any such account must be question-begging.

The same point can be made in terms of the requirement of justifiability to others. If the requirement of justifiability to others is needed to get from some principle being the object of reasonable agreement to the wrongfulness of acting contrary to that principle, then it will be needed to get from the requirement of justifiability to others itself being the object of reasonable agreement to its being wrongful to act contrary to that requirement. So, any attempt to account for the requirement of justifiability by way of an appeal to the claim that people would reasonably agree to this requirement will need to appeal to this very requirement. The norm that requires one to eschew actions that violate first-order principles that people have reason to accept can no more be accounted for by its being a norm that people have reason to accept than the principle that promises are to be kept can be accounted for by the contention (even if true) that people have promised to abide by the principle that promises are to be kept.

This means that the requirement that one's actions be justifiable to others either must be bedrock within Scanlon's overall stance or it must have an underpinning that is not a matter of its being the object of reasonable agreement.

Certainly, Scanlon's official stance is that it is bedrock. There is nothing more basic within his overall account of what we owe to each other than the contractualist postulate. Scanlon writes that 'thinking about right and wrong is, at the most basic level, thinking about what could be justified to others on grounds that they, if appropriately motivated, could not reasonably reject'. Moreover, he explicitly disavows the project of providing a 'justification' for the morality of right and wrong. Still, Scanlon's disavowal of the project of justification does not mean that he thinks there are no considerations that support the claim that the postulate is the bedrock for the morality of right and wrong. Most saliently, Scanlon appeals to the phenomenology of wrongness:

When I reflect on the reason that the wrongness of an action seems to supply not to do it, the best description on this reason I can come up with has to do with the relation to others that such acts would put me in: the sense that others could reasonably object to what I do (whether or not they would actually do so).

He also maintains that if one takes the rightness and wrongness of actions to be, respectively, a matter of their being permitted and of their being disallowed by principles that people could not reasonably reject, one can give a non-trivial account of the reason-giving force of the rightness or wrongness of an action. (The trivial account would be that the reason one has not to perform a wrong action is that it is wrong.) For, as Scanlon sees it, an action being permitted by principles that could not reasonably be rejected is a reason to treat it as an acceptable option and an action being disallowed by such principles is a reason to eschew it. Moreover, according to Scanlon, this disclosure of the reason-giving force of right and wrong does not involve reducing the reasons given to 'non-moral' reasons.

Here, however, I shall begin to marshal considerations that should push Scanlon toward the disavowed task of going beneath the purported bedrock of justifying the pivotal contractualist postulate. I think the common objection to Scanlon's doctrine that I discussed above arises from the intuition that the contractualist postulate is too insubstantial to account for the wrongfulness of wrongful actions. The common thought is that it must surely be some actual, more meaty, first-order feature of a wrongful action, such as its being an infliction of needless suffering, that accounts for the action's wrongfulness. Against the common objection, I have argued that even if there are actual, meaty, first-order features on the basis of which it is reasonable for people as prospective subjects of action \( A \) to accept principles that disallow \( A \), it would not follow that as prospective agents all people would have moral reason to eschew action \( A \). Hence, the need for the separate and independent principle that it is wrongful for anyone to perform a reasonably disallowed action. (This, again, is why the requirement of justifiability is not otiose.) Nevertheless, I think the intuition that gives rise to this common objection is correct. The contractualist postulate is unsatisfactorily insubstantial. I was protesting against this insubstantiality in Section 2 when I expressed dissatisfaction with phrases such as 'the reason we have to live with others on terms that they could not reasonably reject' and 'this reason . . . to attend to the question of which actions are right and which wrong', and 'The reason which contractualism emphasizes, the reason we have to want to be able to justify our actions to others' by posing the question: what is this reason?

That question calls for the identification of some further (deeper, more substantial, and more meaty) feature of actions that are disallowed by reasonably accepted principles that explains the wrongfulness of those actions. If one takes up this question, one is in search of a substantial reason we have as agents to
eschew the actions that people as prospective subjects of those actions have reason to disfavor. Substance is added to the explanation of the wrongfulness of performing reasonably disallowed actions; but that substance does not come from pointing to the substantial reasons that people have to disfavor their being subject to certain actions. Rather, that substance comes from an identification of a feature of actions toward others that constitutes a reason for agents as agents to eschew such action.

To engage in such a search for a deeper feature that explains the wrongfulness of engaging in reasonably disallowed action is to abandon the view that the contractual postulate is bedrock; it is, instead, to seek a deeper justification of that postulate. It is to take the further step characteristic of natural rights theorizing. In the latter part of Section 4, I argue that the rationale behind Scanlon’s own rejection of the social practice account of the wrongfulness of promise breaking should push Scanlon into this search for a deeper feature of reasonably disallowed actions that explains their wrongfulness. Additionally, in the earlier parts of Section 5, I will try to document this search within *What We Owe to Each Other*.

### The wrongfulness of promise breaking

In Chapter 7 of *What We Owe to Each Other*, Scanlon offers his account of the wrongfulness of promise breaking. In this section, I focus on Scanlon’s explanation of the wrongfulness of promise breaking in order to provide further support for my reading of Scanlon’s core stance concerning the wrongfulness of actions, including my claims about the natural-rights-theorizing character of that stance. The key organizing idea of this section is that the core stance concerning the wrongfulness of actions that I have ascribed to Scanlon is strongly analogous to the more specific and local account that Scanlon offers of the wrongfulness of promise breaking. The philosophical intuitions and modes of argument that shape Scanlon’s analysis of the wrongfulness of promise breaking also shape the core account of wrongfulness that I have ascribed to Scanlon. Thus, it would be highly incongruous for Scanlon to subscribe to the account of the wrongfulness of promise breaking that he does offer and not also subscribe to the core account of the wrongfulness of actions as I have represented it. On the presumption that Scanlon’s view of the wrongfulness of promise breaking and his general stance on the wrongfulness of actions are not highly incongruous, given the former, he must subscribe to the core account of wrongfulness that I have ascribed to him.

Scanlon’s stance on the wrongfulness of promise breaking turns on his rejection of the social practice account of the directive force of promises. So we need to take a quick view of this account and then move on to the sort of rejection of it that Scanlon offers. To put a simple case before us, let us suppose that Bekah has promised to meet Josh at the corner of Park and Main at 5:00 pm today. There are no complications. None of the conditions obtain that we might think would nullify Bekah’s promise or the obligation it involves. Nor do any of the conditions obtain that we might think would override Bekah’s obligation or excuse her failing to fulfill the promise. So nothing interferes with our straightforward judgment that, when Bekah fails to meet Josh at Park and Main, she wrongs Josh. What we want to know, though, is whence comes this wrongfulness.

On the social practice account, the wrongfulness of Bekah’s failure to show up at Park and Main is entirely the product of her having entered into the rule-constituted practice of promising and, thereby, having become subject to the rules of that practice—most especially, the rule that says that promises are to be kept. Bekah becoming subject to this rule is precisely like Sluggers becoming subject to the rule ‘three strikes and you’re out’, upon entering the rule-constituted practice of baseball. The fact that the promising practice exists and that Bekah has entered into the practice entails that she acts wrongly when she fails to perform as promised, in the same way that the fact that the baseball practice exists and that Sluggers has entered into the practice entails that he is out when the third strike whizzes past him. On a social practice account, there is nothing independently wrong-making about the manner of treatment of Josh involved in Bekah inducing in him an expectation that she will show up at Park and Main and then failing to do so any more than there is anything independently out-making about three balls thrown through the strike zone whizzing past Sluggers. The wrongfulness of Bekah not showing up is as much an artifact of the promising practice (which itself is a social artifact) as the out-ness of Sluggers is an artifact of the baseball practice (which itself is a social artifact).

Scanlon’s basic objection to this is that the promiser’s participation in the promising institution explains his having made a promise, but it does not explain the wrongfulness of his failing to perform as he has promised. Participation in the practice of promising puts one in position to engage in a certain manner of treatment of the party to whom one has made the promise; but that the treatment one is thereby in position to inflict wrongs that party depends upon an independent principle (a principle of fidelity) that requires that one eschew that manner of treatment. A principle of fidelity that stands outside of the practice of promising, thus supplies the directive force that attaches to the promised action. It is crucial here to retain the distinction between: (1) Bekah’s entrance into the promising practice providing her with an opportunity to inflict a certain manner of treatment upon Josh, for example, getting him to organize his attention and energy in ways that turn out not to serve the purposes he has in so organizing his attention and energy, and (2) Bekah’s entrance into the practice making that manner of treatment of Josh wrongful. Suppose we know that in failing to show up at Park and Main, Bekah completes the final stage in a series of sub-actions that add up to her getting Josh to organize his attention and energy in ways that turn out not to serve the purposes he has in so organizing his attention and energy. If this description (or some more philosophically acute description) of Bekah’s treatment of Josh is enough for us to conclude that Bekah has wronged Josh, then the fact (when it is
a fact) that Bekah has been able to inflict this treatment on Josh through the deployment of the promising practice is not needed to explain the wrongfulness of Bekah’s conduct. On the other hand, if knowing that Bekah has inflicted this manner of treatment upon Josh is not enough for us to conclude that Bekah has wronged Josh, it is difficult to see how bringing in the fact (when it is a fact) that Bekah employed the promising practice adds to our understanding of the wrongfulness of Bekah’s conduct. How could the linguistic ritual convert an otherwise perfectly permissible act (omission) into a rights-violating act (omission)? After all, it must be what Bekah does to Josh in first promising and then failing to abide by her promise that wrongs Josh, not her having made this mode of treatment possible by her use of the promising practice.

That the wrongfulness attaches to the manner of treatment that is inflicted and is not itself a creature of the promising practice is most clearly indicated by cases in which the opportunity to inflict a certain treatment is not generated through an agent’s participation in a rule-constituted practice and yet the agent’s infliction of that treatment on another is wrongful. A nice example is provided by Neil McCormick. Jones is about to be trapped on a beach by the rapidly rising tide. He still has a chance to dash along the narrow beach to a path that climbs up the cliff that borders the beach. But MacDonald, who is passing by, begins to lower a climbing rope to Jones with the intention of Jones perceiving this as a better method of escape. Relying upon MacDonald’s apparent intention, Jones moves away from the path and toward the rope so that now Jones will surely have no chance of escape if MacDonald fails to continue to lower the rope. By this point at least, MacDonald has acquired an obligation to continue to lower the rope, but not in virtue of his participation in an obligation-generating social practice. According to McCormick:

Why do we say that MacDonald has this obligation? Need we suppose that he belongs to a society which recognizes some practice or institution according to which persons have a power, by throwing ropes over cliffs, and such like acts, to incur obligations? ... I venture to think not.

Rather, according to McCormick, in these circumstances MacDonald is obligated to continue to lower the rope in virtue of his background and convention-independent obligation ‘not to cause preventable harm to others’. It is this independent requirement not to cause preventable harm to others that renders wrongful the compound action that MacDonald would complete by failing to lower the rope fully. Assuming that this is the correct specification of the relevant independent principle, it is this principle (not participation in the practice of promising) that also explains the wrongfulness of MacDonald’s conduct when he promises to lower the rope and then fails to do so.

Similarly, speaking of the independent principle M, which is formulated to articulate the wrongfulness of lying promises (promises the speaker has no intention of keeping), Scanlon says:

Principle M clearly does not depend on the existence of a social practice of agreement-making. When such a practice exists, it provides one way of committing the wrong of unjustified manipulation because it provides one kind of underpinning for one person’s expectation that another person will respond to his action in a certain way, but... these expectations can have other bases, and manipulating others by creating such an expectation is open to the same moral objection whatever the basis of the expectations may be.

While the lying promise sets the stage for the liar’s manipulative conduct, the wrongfulness of that conduct is a matter of its being contrary to a principle that stands outside of the promising practice. The practice functions as a device for so situating oneself in relationship to others that one’s mere failure to perform some specified action amounts to wronging them. Such a device enables a moral agent readily to provide others with assurances about how he will conduct himself toward them.

Presumably, the same conclusions apply to bilateral promises, for example, agreements and contracts. Individuals contract to act in specified ways through certain rule-constituted practices; but that they are morally bound to act as they have contracted, that it would be wrongful for them to fail to perform the contracted actions, depends upon an independent principle that requires that individuals agree to act in certain ways and then fail so to act. Promises and contracts have directive force only because it is wrongful for one to treat another person in the manner in which one promises or contracts to perform in some specified way and then fails to deliver that performance; and the wrongfulness of treating another in this manner is not itself the creature of the practice of promising or contracting. Having linked promises to agreements and contracts, I will permit myself to speak of the rejection of the social practice account of the wrongness of violating actual promises or agreements or contracts. So I will speak of parallels between Scanlon’s account of the wrongfulness of failing to perform actually agreed upon actions and Scanlon’s account of the wrongfulness of failing to abide by principles to which people would reasonably agree.

It is clear how analogous Scanlon’s overall contractualist stance, as I have represented it in Sections 2 and 3, is to Scanlon’s view about the wrongfulness of promise breaking and contract violation. On that representation, that reasonable people would disvalue being subject to certain actions explains why they would reasonably agree to principles that disallow those actions. But that action contrary to the principles to which they would reasonably agree is wrongful depends upon the separate contractualist postulate that it is wrongful to act contrary to such first-order principles. The separate contractualist postulate supplies directive force to hypothetically agreed upon principles in a way that is parallel to a principle of fidelity supplying directive force to actually agreed to actions. Moreover, the analogy between Scanlon’s view about the wrongfulness of breaking promises or violating actual agreements and his view of the wrongfulness of...
acting contrary to reasonably accepted principles reinforces the argument that I made in Section 3 that the contractualist postulate itself should not be thought to be grounded in agreement to it. For, as we have previously noted, if one were to attempt to account for the principle that actual promises or contracts are to be kept by appealing to an actual promise or contract by people to abide by that principle, one would be relying upon precisely the principle one was seeking to establish, namely, that actual promises or contracts must be kept. Analogously, if one were to attempt to account for the contractualist postulate that one must abide by first-order principles that people would reasonably agree to by appealing to the claim that people would reasonably agree to that postulate, one would be relying upon precisely the principle one was seeking to establish, namely, that hypothetical reasonable agreements must be kept. It would make no more sense to appeal to hypothetical reasonable agreement to explain the contractualist postulate than it would make sense to appeal to actual agreement to explain a principle of fidelity. Just as a principle of fidelity stands outside of the practice of actual promise making and supplies directive force to the actual promises that exist, the contractualist postulate stands outside of what we may think of as the practice of hypothetical agreement upon principles and supplies directive force to the principles that emerge within that practice.

So pleasing is the analogy between the account of the wrongfulness of violating actual promises and agreements and the core account of the wrongfulness of acting contrary to principles that people would reasonably accept that I shall restate it in one further way:

Actual promises or agreements do not work on their own; they do not supply directive force to the promised or agreed to actions. Instead, they require a separate principle that confers wrongfulness upon those actions that are contrary to actual promises or agreements. This separate principle (the principle that actual promises and agreements are to be kept) cannot itself be validated by an actual promise or agreement to abide by it. For, to think that an actual promise or agreement to abide by actual promises or agreements would validate the principle of fidelity is to think that actual promises or agreements do work on their own, that is, that they do supply directive force to the promised or agreed to actions. Yet, if they did, one would not need a separate principle to convey wrongfulness to actions that are contrary to actual promises or agreements. If one does need a principle separate from actual promises and agreements, one cannot get that principle through any appeal to an actual promise or agreement.

Hypothetical reasonable agreement on first-order principles does not work on its own; it does not supply directive force to the principles that would be the objects of reasonable agreement. Instead, hypothetical agreement upon first-order principles requires a separate principle that confers wrongfulness upon actions that are contrary to principles that would be the objects of reasonable agreement. This separate principle (the contractualist postulate) cannot itself be validated by hypothetical reasonable agreement upon it. For, to think that hypothetical reasonable agreement upon the contractualist postulate would validate it is to think that hypothetical reasonable agreement does work on its own, that is, that it does supply directive force to the hypothetically agreed-upon principles. Yet, if it did, one would not need a separate principle (the contractualist postulate) to deliver wrongfulness to acts that are contrary to first-order principles that would be the objects of reasonable agreement. If one does need a principle separate from hypothetical agreement upon principles, one cannot get that principle through any appeal to hypothetical agreement.

That the contractualist postulate stands outside of what we may think of as the practice of hypothetical agreement upon principles and supplies directive force to the principles that emerge within that practice is the modest version of my characterization of Scanlon as a natural rights theorist. Each individual is taken to have a right (or a very rights-like claim) against being subjected to actions that are disallowed by principles that people could not reasonably reject.

I now want to point out that if we look further into Scanlon’s reasoning about the wrongfulness of promise breaking, we find reasoning that should push Scanlon to seek to identify some further feature of actions that are reasonably disallowed – a deep feature in virtue of which such actions are wrongful. We need to ask, what sort of feature of promise breaking (or agreement violating) actions is their wrong-making feature? Is it, according to Scanlon, the insubstantial surface feature of being contrary to the agent’s promise (or agreement) or is it some substantial, deeper feature in virtue of which such actions are wrongful? The key move in the argument against the social practice account is the claim that we can see that the wrongfulness of promise breaking does not derive from the promising practice because we can see that very wrongfulness occurring in conduct that is not promise breaking. For instance, the wrong-making feature of lying promises consists in the manipulation to which the promiser subjects the promisee. Furthermore, Scanlon tells us, actions can have this feature and be wrongful in virtue of having this feature without their being made possible through participation in the promising practice. So, the wrong-making feature of these failures to perform as one has promised is not the insubstantial surface feature of their being failures to perform as promised; rather, it is the substantial deeper feature of their being manipulative. Similarly, to return to McCormick’s example, even if, contrary to the specified facts, MacDonald had promised to lower the rope fully, the wrong-making feature of his failure fully to lower the rope would not be the feature of failing to perform as promised. Rather, following McCormick in his judgment about what the relevant relevant separate norm is, the wrong-making feature of MacDonald’s conduct would be the feature of his action that consists in it being harmful to Jones.

I contend that if in the course of accounting for the wrongfulness of promise breaking one thinks that one cannot rest content with the proposition that morally one must perform promised actions, then in the course of accounting for the wrongfulness of acting contrary to principles that people would reasonably accept, one should not rest content with the proposition that morally one must eschew actions that are disallowed by principles that people would reasonably accept. If, in the first case, one thinks one needs to cite a more substantial, deeper
feature of failures to fulfill promises that is their wrong-making feature, then, in the second case, one should think that one needs to cite a more substantial, deeper feature of failures to abide by principles that people would reasonably accept. Here, again, I offer a contention about incommensurability. It would be incommensurable to be dissatisfied (in the course of accounting for the wrongfulness of promise breaking) with the proposition that morally one must not fail to perform promised actions and yet rest content (in the course of accounting for the wrongfulness of performing reasonably disallowed actions) with the proposition that morally one must not perform actions that are disallowed by principles that people would reasonably accept. To avoid this incommensurability, Scanlon needs to identify a feature of actions that are reasonably disallowed (a feature beyond their being reasonably disallowed) in virtue of which those actions are wrongful. He needs to identify a feature of actions that are deemed wrongful by the contractualist postulate that accounts for the wrongfulness of those actions. Of course, to do so would be for Scanlon to abandon his official position that the contractualist postulate is the normative bedrock. He would have to engage in the endeavor of standard natural rights theorists of seeking out some substantial feature of wrongful actions in virtue of which they are wrongful. In the next section, I discuss passages from What We Owe to Each Other in which Scanlon does seem to be engaged in this aspect of rights theorizing.

5. The value of human (or rational) life

In his introductory chapter, Scanlon tells us that:

\[ \text{to recognize human life as valuable is, first and foremost, to see the reasons we have for treating others in ways that accord with principles that they could not reasonably reject. This connects the sphere of value, or ‘the good’, with ‘what we owe to each other’ in a way that reduces the apparent conflict between them.} \]

We cannot recognize human life as valuable without seeing that we have reason to act in accord with whatever principles we could not reasonably reject in the contractual situation. There are reasons that can be brought to and assessed within the contract situation; and the invocation, assessment, and selection among those reasons will determine which first-order principles no reasonable individual can reject in that situation. However, there is also the reason we have to abide by those principles – the reason we have ‘for treating others in ways that accord with principles that they could not reasonably reject’. That reason, as I am reading Scanlon, is embedded in our recognition of the valuableness of human life. To recognize this valuableness is to see the force of the contractualist postulate. The appeal to the valuableness of human life ‘connects’ right and wrong with the sphere of value or ‘the good’ by indicating something about the sphere of value that makes it reasonable for us to treat others only in ways that accord with the principles that reasonable individuals would not reject.

Scanlon spells out this position more fully in his third chapter, in a section entitled ‘The Value of Human (or Rational) Life’. ‘We all agree that human life is of great value,’36 Yet we have to identify what this value implies with regard to reasonable choice and action. As I read Scanlon, value attaches to each (separate) human life and that value is not agent neutral; the value of each life does not equally summon everyone to its production and maintenance. If the value of human life were agent neutral, then the reasonable response to the value of human life would be to maximize its existence. That, however, is not what Scanlon takes the reasonable response to be:

\[ \text{while we have strong reasons to protect human life and not destroy it, we do not have the very same reasons to create more human life when we can. Insofar as we have reasons to create new life, these are different from, and weaker than, our reasons not to destroy it. But these reasons would be the same if they all flowed from the fact that the existence of a human life is a good thing.} \]

Instead, ‘appreciating the value of human life is primarily a matter of seeing human lives as something to be respected’,37 in contrast to their being the subject of maximal promotion. At this point, though, Scanlon begins to shift away from human life, its value, and the reasonableness of respecting it to a far more specific focus on one particular human capacity and to a very special understanding of the proper response to that capacity. According to Scanlon, ‘we might say... that recognizing the value of human life is a matter of respecting each human being as a locus of reasons.’38 Still, to say this is not yet to concentrate sufficiently on the fact that ‘we are creatures who have the capacity to assess reasons and justifications’ and that ‘we have the capacity to select among the various ways there is reason to want a life to go’.39

For Scanlon, ‘Appreciating the value of human life must involve recognizing and respecting these distinctive capacities’.40 Moreover, the particular ‘best response’ to these capacities is the adoption of the following understanding of what it means to appreciate the value of human (or rational) life:

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

In one way, respecting the value of human life is like respecting the value of the Grand Canyon; in both cases, the destruction of the valuable object is ‘a reason for sadness and regret’. Nevertheless:

\[ \text{respecting the value of human life is in another way very different from respecting the value of objects and other creatures. Human beings are capable of assessing reasons and justifications, and proper respect for their distinctive value involves treating them only in ways that they could, by proper exercise of this capacity, recognize as justifiable.} \]

Thus, while Scanlon starts with the value of human life, his focus shifts to the
special capacity of human creatures to deliberate about how they shall act and how they shall choose. Although it remains the value of human life that is (somehow) the ultimate reason for there being moral limits on our conduct toward others, the capacity for assessing and selecting among reasons is given a privileged role; the constraint that is (somehow) grounded in respect for human life becomes a requirement to respect that particular capacity. More specifically yet, it becomes a requirement to respect the sub-capacity for assessing and selecting among reasons in deliberation about interpersonal norms. Moreover, the shape of the requirement changes: from a requirement not to destroy the object of the requirement or to protect it against destruction (as respect for human life has been said to require that one not destroy human life for that one protect it against destruction) to a requirement not to act in ways that are disallowed by the principles that people could not reject in the course of exercising the privileged sub-faculty for reasoning about interpersonal principles. (Presumably, there will be a requirement not to destroy this sub-capacity and to protect it from destruction if and only if individuals reasonably accept this requirement in the course of the exercise of this sub-capacity. Presumably, in addition to providing people with reason to affirm the contractualist postulate, the value of human life provides people with reason to accept this first-order requirement.)

It is through the special privileging of the sub-capacity for reasoning about interpersonal principles and the special understanding of what respect for this sub-capacity involves that Scanlon connects the value of human (or rational) life with the endorsement of the contractualist postulate that it is wrongful to act in ways that are disallowed by principles that people could not reasonably reject. On my bolder natural rights reading of Scanlon (a reading that, of course, Scanlon would disavow), it is through this special privileging and this special understanding that Scanlon seeks to identify the deeper feature of wrongful actions in virtue of which reasonably disallowed actions are wrongful. That deeper feature is the feature of failing to be responsive to or being in conflict with the valuableness of human (or rational) life. This bolder reading provides, I think, a satisfying construal of Scanlon’s own claim that ‘what we owe to each other’ is to be seen as an aspect of one central value, the value of human, or rational, life.

Unfortunately for what I describe as Scanlon’s bolder venture into natural rights argumentation, the move from the value of human life and the sense that to appreciate this value is to respect each human life (in contrast to maximally promoting human life) to the contractualist postulate is not persuasive. Even if we allow (as conventional natural rights theorists are eager to allow) that the separate value or significance of each person or each human life makes it reasonable for each individual to be circumference in some way in his conduct toward others, it clearly does not follow that the proper form of circumference is avoidance of actions that would be disallowed by the interpersonal principles that people could not reasonably reject. Even if we allow that the separate value or significance of each person or each human life makes it reasonable to require that each individual’s actions be justifiable to those impacted by those actions, it clearly does not follow that this general justifiability requirement takes a contractualist form. The inference from the reasonableness of circumcision to the reasonableness of compliance with the contractualist postulate would be plausible were both the privileging of the sub-capacity of persons to reason about interpersonal principles and the special contractual understanding of proper respect for this sub-capacity themselves plausible. But this crucial condition is not satisfied.

There is a striking gap between affirming the value of human life and a requirement to respect it and affirming the contractualist postulate. It is hardly enough to say that ‘proper respect for [persons]’ distinctive value involves treating them only in ways that they could, by ‘proper exercise of this capacity’ for reasoning about interpersonal principles, recognize as justifiable’. Why is this the proper mode of respect? Why equate proper respect for persons with respect for the specific sub-capacity of persons for reasoning about interpersonal principles? Even given this equation, why respect only the proper exercise of this sub-capacity even though some improper exercises may be impressive manifestations of our deliberative skills?

Scanlon in fact says very little to connect the broad invocation of the valuableness of human life to the conclusion that the form of the wrong is contractualist. Given how little is actually said in support of the move from the valuableness of human life to the contractualist postulate, I offer the following conjecture about the order of conviction within Scanlon’s doctrine: the order of conviction actually runs backward from his core conviction that our bottom-line moral motivation and reason within the domain of right and wrong has a contractualist structure to the view that if the valuableness of human life vindicates or helpfully articulates anything, it must vindicate or helpfully articulate this contractualist structure. Arguing in this direction is not inherently illicit. However, one cannot argue in this direction and hold that it is respect for the value of human (or rational) life that requires us to treat rational creatures only in ways that would be allowed by principles that they could not reasonably reject.

I especially wish to question the privileging (so salient in contractualist theorizing) of the sub-capacity of persons to reason about interpersonal principles. If we do start with Scanlon’s appeal to the valuableness of human life, there seems to be no good reason for honing in on this one, human sub-capacity. Scanlon’s position seems to be that the prospect of one wrongdoing a person by failing to attain one’s conduct to their sub-capacity for reasoning about social principles is anchored in the value of that person’s life and the consequent value that this sub-capacity has in virtue of its potential for serving their life. If so, then it seems that there is a comparable prospect of wrongdoing a person whenever one fails to attain one’s conduct to any capacity (or sub-capacity) they possess the exercise of which has the potential to serve their life. If this is the way the appeal to the value of human life works, then there is no reason to single out the sub-capacity for
assessing and selecting among reasons in the course of deliberation about interpersonal norms as the capacity the failure to attune our conduct to which wrongs its possessor. It is as plausible to think that one wrongs another person if one (even painlessly) destroys or damages their capacity to assess and select among reasons concerning what sort of house to buy or what sort of career to pursue, or if one destroys or damages their capacity to walk around or count pebbles on a beach or dig a ditch or even to control the disposition of their extrapersonal holdings. Moreover, if all the capacities the exercise of which potentially serve the lives of their possessors similarly call for constraint in one's conduct toward the possessors of those capacities, it will be natural to think that each of those capacities calls for a similar mode of constraint. And the one mode of constraint that can similarly be practiced with respect to each of those capacities is the straightforward substantive mode of constraint—constraint against destroying, damaging, or preventing the exercise of the relevant capacity. Among these similar constraints and on a par with them will be a substantive constraint against destroying, damaging, or preventing the exercise of the sub-capacity for reasoning about social principles. This constraint will not be a higher-level, master constraint to abide by whatever norms that would issue from the exercise of that sub-capacity.

Even though the contractualist stance does not itself call for the actual exercise of the human sub-capacity to reason about interpersonal principles, I conjecture that the salience in recent moral and political theory of attention to what would issue from the exercise of this sub-capacity reflects the conviction that the explicit, self-conscious, and sustained exercise of this sub-capacity is of outstanding intrinsic value. The background thought is that it is a particularly high human calling to engage in reasonable deliberation about principles of right and wrong, and a society in which people's adherence to reasonable interpersonal principles is the product of their engagement in such an explicit deliberative process will be both especially attractive and stable. Against the first part of this background thought, I have already suggested that there are lots of at least comparably valuable human activities, The sine qua non of human life is not necessarily the activity in which moral and political philosophers specialize. Against the second part of this background thought, I draw attention to the contrary idea that interpersonal norms best fulfill their coordination function and yield the highest level of (reasonable) social stability when they are not adhered to as the result of people's engagement in an explicit deliberative process about those norms. As Hayek says:

Principles are often more effective guides for action when they appear as no more than an unreasoned prejudice, a general feeling that certain things simply 'are not done'; while as soon as they are explicitly stated speculation begins about their correctness and their validity.

Scalan holds that people count for something: 'It matters that there are, or will be, people out there with lives that will be affected by what I do.' That there are beings out there with valuable lives of their own makes it reasonable that in some ways I be circumspect in my conduct toward them. My claim is that this root idea (the root idea of the natural rights tradition) does not get one to the contractualist construal of due circumspection or justifiability. In support of my claim, it is interesting to see how readily Scanlan himself moves (at least on one occasion) from the thought that there are people out there to the ascription of rights to those people without employing any reasoning about what actions would be disallowed by principles that people could not reasonably reject.

The occasion is Scanlon's response to Bernard Williams' rejection of the priority of morality in guiding our choice of action. Scanlon specifically wishes to counter the thought that friendship may well call upon one to violate principles of morality, for example, to steal a kidney to save a friend. His response is that friendship (at least, friendship in its favored form) requires us to recognize our friends as having moral standing as persons, independent of our friendship, which also places limits on our behavior. Friendship places limits on our behavior because if we take our friends to have moral standing as persons, we must also take our non-friends as having this standing. Thus, no sacrifice of friendship is involved when I refuse to violate the rights of strangers in order to help my friend. Compatibility with the demands of interpersonal morality is built into the value of friendship itself. Presumably, one would not really be acting in accordance with friendship if one stole a kidney for a friend because the seizure of that kidney would contravene a constitutive element of friendship, namely, the moral standing of persons as persons.

My concern here is not to assess Scanlon's position on friendship, but, rather, to note the directness of the brief against seizing people's kidneys. What is built into friendship is the recognition of the friend (and, hence, of each individual) as a separate person with moral standing— as someone to whom justifiability is owed in his or her own right. The existence of individuals as separate persons with moral standing places limits on our behavior, and an evident manifestation of those limits is 'your right to your own body parts.' There is no talk here of whether people have reason to accept principles that (presumably, very stringently) disallow the seizure of people's body parts. There is no talk here of whether it is reasonable for people to license individuals to think of their body parts as their rightful possessions. Within the brief discussion of friendship, the idea of each individual being a separate person with moral standing gets fleshed out in terms of each individual having certain first-order immunities. To have moral standing is to have those first-order immunities in contrast to having a higher-order meta-immunity against being treated in ways (whatever they turn out to be) that people will reasonably disallow. Indeed, the thought that one's substantive moral immunity against the expropriation of one's kidneys depends upon it being reasonable for others to license one to think of oneself as having such an immunity seems to contravene the underpinning idea that each individual
is a separate person with moral standing. To construe the moral standing that individuals possess as separate persons as a meta-immunity against actions that it is reasonable for people at large to disallow (that is, as supporting the contractualist postulate) seems to dilute the core idea of each individual having moral standing in his or her own right. For this construal makes the substantive immunities that each possesses as a being with moral standing a function of collective licensing.

My main argument against the contractualist construal of a requirement of due circumspection or justifiability to others is that this depends upon an unwarranted privileging of one particular human sub-capacity. But I have just suggested a second argument, namely, that the contractualist construal does not capture the force of the root idea of the separateness of persons and the moral standing that each possesses as a separate person. I want to explore this second argument very briefly by considering the sort of case in which, as we have seen, Scanlon himself seems to go directly from people mistreating people possessing substantive immunities against the seizure of their body parts rather than arguing that it is wrong to subject people to such seizures because (1) it is wrongful to perform reasonably disallowed actions and (2) people could not reasonably reject principles that would disallow such seizures.

Suppose a highly effective, well-designed, and transparent system of organ transfers were available within which individuals with two healthy kidneys would be randomly selected to donate one of those kidneys to suitable recipients with no healthy kidneys. Given the prospect of such a system, it may well be reasonable for people to agree to principles that would disallow nonparticipation in the organ-transfer scheme. (Suppose that all potential donors within the system have some significant chance of having two failing kidneys.) If this prospect is at hand then, if one takes the key implication of individuals being separate persons with moral standing in their own right to be that individuals possess a meta-immunity against being treated in reasonably disallowed ways, one may well have to conclude that it is permissible to 'steal' a suitable kidney from an individual with two healthy kidneys even if that individual has not actually agreed to be part of the organ-transfer scheme. If one adopts the contractualist construal of due circumspection or justifiability to others, then, if such a system of organ transfers is available, it will be very difficult to hold (as Scanlon seems to want to hold) that the seizure of one of an individual's two healthy kidneys is wrong. After all, that seizure would not run counter to the involuntary donor's 'proper exercise' of his or her capacity to reason about, assess, and select among interpersonal norms.59

The contractualist construal of due circumspection or justifiability to others seems to leave behind at least part of the important substantive implications that we expect when we hear invocations of the valuableness of human life or the separateness and moral standing of persons or the fact that people matter. The traditional natural rights approach has attempted to capture this substance by not singling out as the ground for rightful claims one valuable sub-capacity of human beings. That more standard line of natural rights argumentation seeks to identify substantive ways of treating others that we each have reason to disavow in response to others' standing as beings with valuable lives or as separate beings with distinct systems of ends or as beings each of whom is rationally oriented to his or her own ultimate good.

I have maintained that what I have called the 'contractualist postulate' is a distinct and crucial component within Scanlon's account of the wrongfulness of wrong actions. In addition, because this postulate is not itself subject to any sort of contractualist grounding, I have affirmed that it is equivalent to ascribing to all individuals a natural right (or very rights-like claim) not to be subject to actions that are disallowed by principles that people could not reasonably reject. Moreover, I have argued that Scanlon's invocations of the value of human (or rational) life (and also of each individual's existence as a separate person with moral standing in his or her own right) are plausibly seen as an attempt to provide the sort of ground for fundamental natural rights that is characteristic of natural rights theorizing. I have argued that, despite his official disavowal of any such attempt at justification, it would be highly incongruous for Scanlon to offer the account of the wrongfulness of promise breaking that appears in What We Owe to Each Other and not seek to identify a 'deeper' feature of wrongful actions (a feature deeper than their being contrary to reasonably accepted norms) in virtue of which those actions are wrongful. Finally, I have argued that the appeal to the value of human (or rational) life (and also of each individual's existence as a separate person with moral standing in his or her own right) does not connect very well with the central contractualist postulate. One may well take these appeals to provide support for a requirement of justifiability to others in the sense of a requirement of due circumspection in each agent's conduct toward others without taking them to provide support for a contractualist construal of justifiability according to which the justifiability of an action is a matter of it being permitted by principles that people could not reasonably reject. The contractualist construal of a requirement of due circumspection is one particular and, perhaps, not very compelling construal of this requirement within the general framework of natural rights theorizing.

Notes

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1. T.M. Scanlon, What We Owe to Each Other (Cambridge, MA: Harvard University Press, 1998).
2. Ibid., p. 5.
4. See ibid., pp. 103–7. See Section 5 below.
5. Scansen, *What We Owe to Each Other*, p. 8.
6. Ibid., p. 7. Scansen is referring to the contractualism of T.M. Scanlan. 

8. *What We Owe to Each Other*, p. 8.
9. Ibid., p. 4.
10. Ibid., p. 169.
11. Ibid., p. 191.
12. So, strictly speaking, what I will continue to refer to as ‘first-order principles’ are not normative principles. They are simply statements that reasonable agreement would disallow this or that type of action. The moral prohibition of the reasonably disallowed actions is supplied by the contractualist postulate.
13. On the view under consideration, different people have different reasons to disvalue being subjected to A, the wrong-making feature of A with respect to one person will be different from the wrong-making feature of A with respect to another person.
15. *What We Owe to Each Other*, p. 391, note 21.
16. Ibid., p. 189.
17. Compare ibid., p. 390, note 8: “What is basic to contractualism as I understand it is the idea of justifiability to each person (on grounds that he or she could not reasonably reject).”
18. It is not entirely clear whether Thomson thinks that the explanation has to go from the feature of needless suffering to the reasonableness of disallowing it or has to go from the wrongfulness of inflicting needless suffering to the reasonableness of disallowing it.
19. *What We Owe to Each Other*, p. 5.
20. Ibid., p. 148. Since I will be maintaining that Scansen does actually go on to offer a justification of the sort that he disavows, it will not be surprising that I do not find persuasive his support for this disavowal of justification. For example, Scansen argues that to search for a justification suggests the false view that “those of us who already care about right and wrong... should abandon our concern with right and wrong unless some additional ground for it can be provided” (p. 148). But a search for a justification does not suggest this. Rather, it suggests the plausible view that, unless some additional ground can be provided for this concern, those who care about right and wrong are no more reasonable than those who do not. (It does not follow from this that they ‘should abandon’ their concern.)
23. Ibid., p. 154.
26. Compare H.L.A. Hart’s remark, ‘it would indeed be mysterious if we could make actions good or bad by voluntary choice’. See H.L.A. Hart, ‘Are They Any Natural Rights?’ in *Theories of Rights*, edited by Jeremy Waldron (Oxford: Oxford University Press, 1984), p. 84. The present article can be viewed as an elaboration of Hart’s contention in ‘Are They Any Natural Rights?’ that, in order to account for the appearance of promissory or contractual rights, one needs to make reference to a background natural right.
27. Of course, if we want to understand why the wrong Bekah does to Josh is an instance of the wrong of promise breaking, then our understanding is surely enhanced by pointing to Bekah’s entrance into the practice of promising. Wanting to understand why the wrong is an instance of the wrong of promise breaking is parallel to wanting to understand why Slugger is subject to an instance of out-mess.
29. Ibid., p. 68.
30. Ibid, McCormick takes the background norm against harming to be a norm of ‘negative utilitarianism’. See ibid., p. 69. But, by this, McCormick must mean a very special sort of ‘negative utilitarianism’. For, as he constructs it, the norm does not require one to minimize harm or to maximize rescue from harm. According to this norm of ‘negative utilitarianism’, ‘it would be wrong for MacDonald to abandon the enterprise... even if he could do equal good, save another person, even two other persons, by going and rescuing them from some other predicament’. See ibid., p. 68.
31. *What We Owe to Each Other*, pp. 299–300. In Mack, ‘Natural and Contractual Rights’, p. 155, this same contention was formulated as follows:

Entering into and failing to fulfill a promise is, then, a method for inflicting a certain type of wrong upon a person. But what is inflicted is wrong is due to the nature of the treatment and is not due to the fact that the stage for this treatment is set by the making of the promise... Treatment of this type does occur and is a wrong outside of promise-making and contract-forming practices. The wrongdoing is not a form of activity whose existence depends upon promissorial or contractual contexts.
32. In this quick discussion, I omit a nonrelevant complication. That complication is that the social practice account that Scansen actually describes is not the *pure* social practice view (as, for example, was advanced by Searle) that participation within *any* rule-constituted practice is sufficient to explain an agent’s being bound to abide by the rules of that practice. Rather, Scansen envisions a view according to which participation in a rule-constituted practice binds one to act in accordance with its rules only if the practice contributes to general utility or to mutual benefit or to

This raises a question about how Scanlon’s position differs from that offered by what we might call the ‘worthwhile social practice account’. I think the answer has got to be that, for Scanlon, the wrongfulness of promise breaking lies in the character of promise breaking, that is, in the type of treatment the promise breaker inflict on the promisee, rather than in the promise breaking being a departure from a practice that is to be endorsed because of its overall societal consequences. The independent normative claim that is needed to account for the wrongfulness of promise breaking is a principle that condemns actions of the character inflicted through promise breaking, rather than a principle of comprehensive social assessment that endorses the practice of promising.

33. Recall the two parallel arguments presented in Section 2.
34. If Scanlon’s view was that first-order principles, such as the principle that actual promises are to be kept, derive their directive force from their being the object of hypothetically reasonable agreement, I would need here to press the argument that if one needs to appeal to any second-order agreement to establish that first-order agreements must be kept, then one will need to appeal to some third-order agreement that second-order agreements must be kept, and so on. However, as I read Scanlon, he is not threatened with such an infinite regress precisely because the contractualist postulate does not itself rest upon (actual or hypothetical) agreement upon it.
35. Scanlon, What We Owe to Each Other, p. 8, emphasis added.
36. Ibid., p. 103.
37. Ibid., p. 104.
38. Ibid.
39. Ibid., p. 105.
40. Ibid., p. 106.
41. Ibid.
42. Ibid.
43. Ibid., p. 169, emphasis added. Both occurrences of ‘proper’ need to do a great deal of work here.
44. My ascription to Scanlon of deep-level natural rights argumentation will remind readers of Ronald Dworkin’s claim in ‘The Original Position’ that, on the level of ‘deep theory’, Rawls’s A Theory of Justice advances a natural rights doctrine. See Ronald Dworkin, ‘The Original Position’, in Reading Rawls, edited by Norman Daniels (New York: Basic Books, 1975), pp. 16–53. However, the basis that Dworkin cites for his natural rights reading of Rawls differs significantly from the basis that I offer for my natural rights reading of Scanlon (and the basis I would offer for a natural rights reading of Rawls). For Dworkin, the key evidence that an apparent contract theory is really a deep-level rights theory is that its contract situation is ‘well designed to enforce’ that right or that the right is ‘assumed in that situation’s design’. See ibid., pp. 50, 51. For me, the key evidence that an apparent contract theory is a deep-level rights theory is that it must invoke some general noncontractual right (or very rights-like claim) to explain why we are to guide our conduct by whatever first-order principles would be agreed to in that theory’s contract situation and the theorist in question (in my case, Scanlon) does

cite some morally fertile property of persons (for example, the valubleness of their lives or the separateness of their persons) as the ground of that guidance.
45. Scanlon, What We Owe to Each Other, p. 13.
46. Ibid., p. 169, emphasis added.
47. Ibid.
48. See John Rawls’s characterization of a well-ordered society as one that is, ‘designed to advance the good of its members’ and is such that, ‘(1) everyone accepts and knows that the others accept the same principles of justice, and (2) the basic social institutions satisfy and are generally known to satisfy these principles’. See John Rawls, A Theory of Justice (Cambridge, MA: Harvard University Press, 1971), pp. 4–5, emphases added.
49. F.A. Hayek, Law, Legislation and Liberty, Vol. 1 (Chicago, IL: University of Chicago Press, 1973), p. 60. For Hayek, the invisible-hand process of cultural evolution is a more reliable source of favorable principles than is actual or imagined social deliberation. Hayek adds, however, that:

Once the instinctive certainty is lost, perhaps as a result of unsuccessful attempts to put into words principles that had been observed intuitively, there is no way of regaining such guidance other than to search for a correct statement of what before was known implicitly. (p. 60)
50. Scanlon, What We Owe to Each Other, p. 168.
51. Ibid., p. 165.
52. Ibid.
53. Ibid., p. 164.
54. Ibid., p. 165.
55. If the bedrock principle is the contractualist postulate, that is, the right (or rights-like claim) against being treated in any reasonably disallowed way, one cannot argue that the kidney seizure is reasonably disallowed because it violates a right to body parts.